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ATTORNEY GENERAL

June 3, 2024

SUBMITTED ELECTRONICALLY VIA REGULATIONS.GOV

Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, DC 20585

RE: ***Energy Conservation Program: Standards for Conventional Cooking Products, No. EERE-2014-BT-STD-0005***

Dear Secretary Granholm:

Nebraska and the States represented by the undersigned attorneys general write to ask the Department of Energy ("DOE") to reconsider its recently released direct final rule that regulates conventional cooking tops and conventional ovens.

I. Introduction

This direct final rule over-regulates American kitchens. Many manufacturers disputed DOE's 2023 Supplemental Notice of Proposed Rulemaking ("SNOPR"). After months of pressure by DOE, appliance manufacturers and advocacy organizations relented and submitted a new proposal. And while the direct final rule is slightly less stringent than the sweeping energy efficiency standards originally proposed, like the SNOPR, it does not weigh heavily enough the appliance cost increases that the rule will cause—price hikes that will ultimately be borne by American consumers. So that more voices may be heard, and to help DOE reevaluate its latest attack on household appliances, the States ask DOE to return to formal rulemaking or, at a minimum, to

proceed with informal notice-and-comment rulemaking before enacting these stringent new standards for ovens and stoves.[1]

II. Background

DOE proposed amended energy conservation standards for conventional stoves and ovens in a SNOPR published in February 2023. Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 88 Fed. Reg. 6818 (Feb. 1, 2023). DOE received numerous comments, including comments opposing the proposed rule. After months of impasse, a group of advocacy organizations and home appliance manufacturers sent a joint statement to DOE (the "joint statement").[2] DOE adopted the joint statement and published a direct final rule. Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 89 Fed. Reg. 11,434 (Feb. 14, 2024).

III. Authority

The Energy Policy and Conservation Act grants DOE the power to prescribe energy conservation regulations for consumer conventional cooking products. *See* 42 U.S.C. § 6295(h)(1), (2). But this grant of authority is not limitless. *See id.* § 6295(o). DOE must consider, among other things, whether the proposed standard is economically justified given the financial burden it will impose on consumers and manufacturers. *Id*. at § 6295(o)(2)(B)(i). Under 42 U.S.C. § 6295(p)(4), DOE may issue a direct final rule if a joint statement (1) is submitted by interested parties who fairly represent the relevant points of view and (2) satisfies the standards of § 6295(o).

IV. Relevant Points of View from the Joint Statement

A. The Appliance Companies

Besides consumers, the Association of Home Appliance Manufacturers ("the Association") is one of the most important parties affected by the direct final rule. The Association, which represents manufacturers of consumer conventional cooking products, lodged complaints against the SNOPR.[3] Whirlpool Corporation and Sub-Zero Group, Inc., both members of the Association, also submitted critical comments.[4]

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[1] While the undersigned Attorneys General submit this comment in response to the direct final rule, the contents of this comment also apply the parallel Notice of Proposed Rulemaking published the same day as the direct final rule. *See* Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 89 Fed. Reg. 11,548 (Feb. 14, 2024).

[2] Joint Statement on Energy Conservation Standards for Consumer Conventional Cooking Products (Sept. 25, 2023), https://perma.cc/6VD3-7T5V.

[3] Ass'n of Home Appliance Mfrs. Comment Letter on Energy Conservation Standards for Consumer Conventional Cooking Products (Apr. 17, 2023), https://perma.cc/R3GM-45CX.

[4] Whirlpool Corp. Comment Letter on Energy Conservation Standards for Consumer Conventional Cooking Products (Apr. 17, 2023), https://perma.cc/65CQ-8WDT; Sub-Zero Group, Inc. Comment

The direct final rule does not respond to many critiques submitted by the Association and its members.

The Association's comment on the SNOPR was based on its own independent testing rather than DOE's. Most importantly, the Association's consumer research showed that "consumers value safety, performance, and cost as purchase drivers more than energy efficiency and cost to use over time."[5] The direct final rule does not account for this consumer preference. The Association's comment further explained that the proposed rule "will likely force consumers who seek to maintain certain features and functionality—for example, the ability to have a range instead of a standalone cooktop, quick cooking times, precise control at lower temperatures, and the ability to safely move pots/pans seamlessly across the cooking surface—to switch from a gas to an electric cooktop."[6] The direct final rule is slightly less burdensome when juxtaposed to the radical proposal in the SNOPR, but without receiving public comments, DOE will remain in the dark about the real-world impact of its updated standards.

Whirlpool, one of the Association's members, identified supply-chain issues with the proposed rule. It wrote separately to criticize DOE for its failure to conduct a supply-chain analysis.[7] Like the SNOPR, the direct final rule includes no North American integrated supply-chain analysis.

Further, the Association's comment letter highlighted DOE's failure to adequately evaluate economic consequences of the proposed rule. The Association relied, in part, on a study it conducted with Bellomy Research that concluded that households at or near the poverty line would be negatively impacted by having to purchase new cooking appliances.[8] The direct final rule responds to this concern in drive-by fashion.[9]

Nevertheless, despite its earlier critical comments, the Association switched from calling DOE's test procedures "arbitrary and capricious" and "an abuse of discretion" to authoring the joint agreement and supporting the direct final rule.[10] Given the direct final rule's failure to adequately respond to the concerns outlined above, it does little to assuage the fear that the new energy efficiency standards will raise prices for conventional stoves and ovens disproportionally harming low-income

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Letter on Energy Conservation Standards for Consumer Conventional Cooking Products (Apr. 13, 2023), https://perma.cc/T5WL-L3S8.

[5] Ass'n of Home Appliance Mfrs. Comment, *supra* note 3, at 16.

[6] *Id.* at 2.

[7] Whirlpool Corp. Comment, *supra* note 4, at 11.

[8] Ass'n of Home Appliance Mfrs. Comment, *supra* note 3, at 48–49.

[9] *See* 89 Fed. Reg. at 11,478.

[10] Ass'n of Home Appliance Mfrs. Comment, *supra* note 3, at 9.

households. Under DOE's direct final rule, consumers will bear the burden of DOE's coercion efforts against manufacturers.

B. The Advocacy Groups

Several advocacy groups also joined the joint statement. This included the Alliance for Water Efficiency, Earthjustice, the Northwest Energy Efficiency Alliance, the Natural Resources Defense Council, and the National Consumer Law Center. These groups' expertise in testing conventional cooking appliances or setting energy efficiency standards is unclear at best.

The Natural Resources Defense Council is an advocacy group that advocates for lower emissions.[11] Earthjustice is a "nonprofit public interest environmental law organization" that seeks "to advance clean energy, and to combat climate change."[12] The National Consumer Law Center is a generalist organization that represents consumers in litigation and lobbying.[13] None of these groups has expertise in setting energy efficiency standards for appliances. The Alliance for Water Efficiency is a water-conservation advocacy group.[14] Nothing in the direct final rule—which regulates stoves and ovens—implicates water conservation efforts. Northwest Energy Efficiency Alliance has conducted independent energy efficiency testing for other household appliances, but its website reveals no testing specific to kitchen appliances.[15] Nor does the Northwest Energy Efficiency Alliance appear to have any expertise in weighing consumer and manufacturer costs.

Nearly all these advocacy groups commented in support of the standards for conventional stoves and ovens in the SNOPR. None of them raised concerns related to consumer pricing, appliance functionality, or economic implications.

As mentioned, many manufacturers originally commented on the burdensome costs of the SNOPR that would be passed onto consumers before compromising. This phenomenon, which the literature calls "administrative arm-twisting," has become increasingly common. *See generally* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873. Informal, ad-hoc bargaining is a serious concern, and federal agencies have continually engaged in such practices. *Id*. at 876. Agency arm-twisting has no judicial oversight, *id.* at 867, and "potentially arrogates undelegated power," *id.* at 930. Bargaining for rules and regulations between a subgroup of regulated entities, advocacy groups, and an agency invites standardless and unaccountable actions by agencies. *Id*. at 936. The Association of Home Appliance Manufacturers and many other groups critically commented on DOE's proposed standards. Those comments even highlighted the standards' effect on low-income individuals. Months after opposing the SNOPR, the

[11] *Climate Change: Overview*, Nat. Res. Def. Couns., https://perma.cc/QN9K-9HUY (May 20, 2024).
[12] *About Earthjustice*, Earthjustice, https://perma.cc/BSY5-YTKA (May 20, 2024).
[13] *Key Issues*, Nat'l Consumer L. Ctr., https://perma.cc/2SY2-FQVA (May 20, 2024).
[14] Alliance for Water Efficiency, https://perma.cc/DXQ8-RECC (May 20, 2024).
[15] *See High Efficiency Clothes Dryers – Test Procedure and Qualified Products List*, Nw. Energy Efficiency All., https://perma.cc/HEY9-JPDH (May 20, 2024).

Association changed its mind and submitted a joint statement with those very same political advocacy groups. Arm-twisting is not always noticeable, *id.* at 941, but when a group of manufacturers raise serious concerns only to suddenly abandon them, it raises questions about the agency's methods of achieving its seemingly political ends.

C. Key Groups Not in the Joint Statement

There were several other groups that commented on the SNOPR but did not appear in the joint statement. While these groups are not manufacturing specialists, they do have a keen focus on the consumers who will bear the brunt of DOE's burdensome rule.

In contrast to the environmental advocacy groups, two groups with a much closer connection to conventional cooking appliances—the National Apartment Association ("NAA") and the National Multifamily Housing Council ("NMHC")—raised concerns about the effects of the SNOPR on mass-appliance purchases, the increased costs of which will fall disproportionately to low-income individuals.[16] Neither group joined the joint statement, but their absence from the group is not surprising considering their findings. NAA and NMHC pointed out that the effects of the proposed energy efficiency standards on consumers could not be overlooked: the price increases and delays in building a home that the regulation will cause "are both directly passed along to consumers and broadly raise consumer housing costs through the impacts of diminished housing supply."[17]

NAA and NMHC represent home builders, renters, and property owners and are acutely aware of the economic implications for consumers and low-income households. The groups purchase large quantities of appliances, including conventional stoves and ovens.[18] Their analysis shows that the increased costs caused by the rule will be passed onto consumers and renters. NAA and NMHCs' comment expressed concern that the "new standards will further stress our construction pipeline and exacerbate the price increases facing the housing industry."[19] NAA and NMHC also explained that modern "cooking products are already highly energy efficient" and that efforts like DOE's "that result in only marginal efficiency gains should be balanced against the costs and burdens of equipment changes and production disruption."[20]

The American Gas Association ("AGA"), the American Public Gas Association ("APGA"), and the National Propane Gas Association ("NPGA") also authored a comment opposing the SNOPR.[21] These groups worried that the proposed standards

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[16] NAA and NMHC Comment Letter on Energy Conservation Standards for Consumer Conventional Cooking Products (Apr. 3, 2023), https://perma.cc/6BMN-C9GK.
[17] *Id.* at 3.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] AGA, APGA, and NPGA Comment Letter on Energy Conservation Standards for Consumer Conventional Products (Mar. 3, 2023), https://perma.cc/V44C-YX4Y.

would "encourage[] fuel switching by creating performance standards designed to promote electric cooking tops and eliminate gas cooking tops."[22] Further, the AGA, APGA, and NPGA take issue with the anticompetitive nature of the rule, noting that it "may compel fuel switching on consumers."[23] These groups explained that not only is fuel switching anticompetitive but that consumers bear its costs.[24]

Finally, while Massachusetts, New York, and California support the changes DOE seeks to implement,[25] 23 States now caution DOE about the direct final rule's effects on consumer welfare.[26] By statute, a joint statement must come from "interested persons that are fairly representative of the relevant points of view" and must include "representatives of . . . States." 42 U.S.C. § 6295(p)(4). Properly construed, the statute requires the concurrence of States across the ideological spectrum for DOE to proceed with a direct final rule. Here, DOE does not come close to meeting that standard. Indeed, it does not come close to approaching majority support. A handful of States favor DOE's proposal, while a much larger group of States opposes it. DOE cannot cherry pick the States with which it is aligned to circumvent the ordinary rulemaking process. Doing so fails the "fairly representative" requirement to issue a direct final rule. 42 U.S.C. § 6295(p)(4).

In addition to highlighting the effects of new energy efficiency standards on consumers, many of the signatory States also previously raised legal concerns with DOE's rule, including its reliance on the social costs of carbon, its disregard for the rule's effects on the States, and the lurking Commerce Clause problem haunting the rule.[27] States have a direct interest in protecting consumers from the increased costs associated with the implementation of this rule. States are also directly affected by the rule because many State entities purchase conventional kitchen appliances and thus will directly bear the burden of their increased costs. *See* 42 U.S.C. § 6297(e) (providing that DOE energy efficiency standards preempt less stringent state-law standards).

V. Direct Final Rulemaking

Nebraska and the undersigned States believe more voices ought to be heard before DOE enforces its new energy efficiency standards for stoves and ovens as a direct final rule. In particular, DOE should allow for publicly submitted comments in light of DOE's acknowledgment that the new standards will lead to "additional financing cost[s]"—costs borne by our States and, more importantly, our States'

[22] *Id.* at 3.
[23] *Id.*
[24] *Id.*
[25] *See* 89 Fed. Reg. at 11,446.
[26] A group of 20 States submitted a comment on the SNOPR that raised this same concern. *See* Joint States Attorneys General Regarding Comment Letter on Energy Standards for Conventional Cooking Products (April 3, 2023), https://perma.cc/ZWA9-U2TT.
[27] *Id.*

citizens. 89 Fed. Reg. at 11,478. Public participation is needed, especially given that States are often forced to grapple with the unprecedented use of "the whole of government" approach to implementing regulatory obligations on American consumers and manufacturers. After all, this single DOE direct final rule is merely one piece of a broad smattering of rules that target nearly every household appliance. States are justifiably concerned about DOE's "ideologically motivated attack on household products that make a difference in the lives of Americans"[28] and merely seek the opportunity to participate in the rulemaking process.

DOE has the power to regulate conventional stoves and ovens for energy conservation, and it can do so using a direct final rule under certain narrow conditions. *See* 42 U.S.C. §§ 6295(h), 6295(p)(4). Those conditions are not met here. As this comment has pointed out, the direct final rule did not respond adequately to concerns raised in response to the SNOPR, nor are the authors of the joint statement upon which the rule is based drawn from a fairly representative pool of interested parties. DOE should instead proceed with formal rulemaking, or at least informal rulemaking, so that all interested parties can comment on the new standards. The additional comment period will help DOE to reevaluate the benefits and burdens of its rules under the factors listed in 42 U.S.C. § 6295(o)(2)(B)(i).

More broadly, this rule shows that the direct final rulemaking procedure should be used sparingly and cautiously. When direct final rulemaking is employed, the Secretary weighs incredibly important economic decisions without public input. Run-of-the-mill informal rulemaking provides "public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). It also "allows all stakeholders in a regulatory decision to be heard before a decision is made and ensures that the agency responds to relevant comments." Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 Alb. L. Rev. 79, 86 (2009). That does not describe DOE's energy efficiency standards for conventional cooking appliances.

Unlike direct final rulemaking, the notice-and-comment process ensures a minimum level of political accountability by giving visibility to internal agency deliberations that would otherwise be hidden. Kolber, 72 Alb. L. Rev. at 86–87. And it produces a record to make sure that the proposed rule and the authoring agency comply with the Administrative Procedure Act. *Id.* Allowing affected parties to participate may also improve the perceived legitimacy of the decision-making process. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Transparency

[28] *Attorney General Hilgers Joins 18-State AG Coalition Against the Biden Administration's Proposal that Would Increase Household Appliance Costs*, Neb. Att'y Gen. (Apr. 28, 2023), https://perma.cc/UHJ8-5WC8.

between the Secretary, DOE, manufacturers, States, and consumers is paramount yet is lacking with the direct final rule.

The problems with direct final rulemaking are not new. Even commentators who support direct final rulemaking concede that the procedure should be used only for rules that are "entirely noncontroversial." Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1, 1 (1995). And the Administrative Conference of the United States itself has recommended that direct final rulemaking be used only "where an agency believes that [a] rule will be noncontroversial and adverse comments will not be received." Admin. Conf. of the U.S., Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,110 (Aug. 18, 1995). Agencies have historically missed the mark with their predictions about whether a rule will be "noncontroversial" and whether "adverse comments" will be submitted. Kolber, 72 Alb. L. Rev. at 104. The Food and Drug Administration, for example, has withdrawn forty percent of its direct final rules since 1997 due to significant adverse comments. *Id.* at 82. And if the adverse comments on the SNOPR are any indication, DOE's rule on conventional cooking appliances is likely to face a similar fate.

Direct final rulemaking faces legal risk as well. For one, the procedure is not mentioned in the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 to 559, 701 to 706. Even looking past that, the hurried nature of direct final rules "does not comport well with the additional demands associated with the continued availability of substantive judicial review." Lars Noah, *Doubts about Direct Final Rulemaking*, 51 Admin. L. Rev. 401, 403 (1999). Ironically, then, direct final rulemaking may even "reduce the efficiency of agency rulemaking," while at the same time "erod[ing] public confidence in the rulemaking process." Kolber, 72 Alb. L. Rev. at 80. The label "direct final rule" also leads to confusion among interested parties, especially when those rules are rescinded due to adverse comments. *See id.* at 108–09.

Here, withdrawing the direct final rule and proceeding with the notice of proposed rulemaking that was published simultaneously with the direct final rule would allow the DOE to consider information it lacked in its adoption of the joint statement. Public participation in the rulemaking process "assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978). NAA and NHMC raised legitimate issues regarding costs to consumers and purchasers, appliance manufacturers represented that the proposed rule would create supply-chain issues that will harm consumers and manufacturers alike, and many of the States submitting this letter raised myriad legal arguments against the SNOPR, arguments that continue to call into question the lawfulness of the direct final rule.

VI. A Return to Formal Rulemaking

The States call on DOE to return to formal rulemaking. The Administrative Conference recommends that formal rulemaking be used when the subject matter is "scientific" and "technical," when "other data relevant to the proposed rule are complex," and when the costs of making an error would be "significant" for "affected industries and consumers." Admin. Conference of the U.S., Miscellaneous Amendments, Recommendation 76-3, 41 Fed. Reg. 29,653, 29,655 (1976). That describes the energy efficiency standards for conventional cooking appliances. Here, however, the DOE not only failed to employ formal rulemaking; it did not even engage in the informal notice-and-comment process.

"Because agencies 'dress up each of their guestimates about the facts . . . in enormous, multi-layered costumes of technocratic rationality' and 'courts cannot . . . be partners to technocrats in a realm in which only technocrats speak the language[,]' mechanisms such as cross-examination" can "help illuminate agency sleights-of-hand" and "should receive careful consideration." John F. Manning & Matthew C. Stephenson, *Legislation and Regulation* 776–77 (2010) (quoting Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* 151–52 (1988); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1507 (1983)). The adversarial process and open debate are cornerstones of democracy, and courts have required agencies to provide rulemaking procedures for safeguarding those inalienable American principles. *E.g.*, *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

Furthermore, without formal rulemaking, evaluating an agency's decision-making procedures, as well as the weight given to certain comments, studies, and notes, is quite difficult. "While an agency in informal [notice-and-comment] rulemaking must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning." Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 Ohio St. L.J. 237, 269 (2014) (quoting Gary S. Lawson, *Reviving Formal Rulemaking: Openness and Accountability for Obamacare* (Heritage Found., Backgrounder No. 2585, 2011)). With formal rulemaking, however, there is a live hearing with the opportunity for cross-examination. Any rule flowing from a live hearing must be "based on evidence presented there," and the agency "must respond" to "party's proposed findings." *Id.* Given the public's intimate involvement and the agency's need to respond directly to the evidence presented at a live hearing, "[f]ormal rulemaking can increase the legitimacy of agency action by enhancing the public's trust in the process." *Id.* at 278. DOE should have—and still can—use formal rulemaking if it wants to prescribe new energy efficiency standards for household ovens and stoves.

While a return to formal rulemaking is the most prudent course, especially when the subject matter is technical, at a minimum DOE should employ the informal notice-and-comment rulemaking process in setting new energy efficiency standards for conventional cooking appliances. DOE did not use informal or formal rulemaking procedures despite proposing a rule that garnered significant opposition and criticism. Because DOE used direct final rulemaking, the signatory States, consumers, and manufacturers were excluded from participating in the rulemaking process in violation of 42 U.S.C.§ 6295(p)(4)(A). DOE should rescind its direct final rule and proceed through the formal or at least informal rulemaking process.

VII. Conclusion

For rules that "touch[] the lives of nearly all Americans," administrative agencies should, at a minimum, "afford the public notice and a chance to comment." *Azar v. Allina Health Servs.*, 587 U.S. 566, 568 (2019). DOE's attempt to implement strict energy efficiency standards for conventional cooking appliances through a direct final rule does not give the people that opportunity. DOE should rescind its direct final rule and proceed through formal or informal rulemaking.

Sincerely,

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Nebraska Attorney General

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Jonathan Skrmetti
Tennessee Attorney General and Reporter

Steve Marshall
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Tim Griffin
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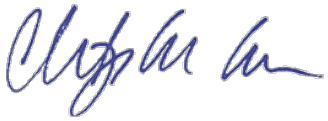

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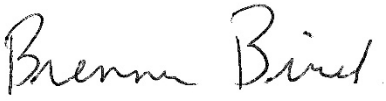

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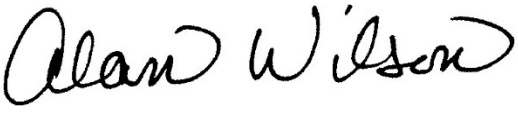

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Via regulations.gov

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Re: ***Energy Conservation Program: Energy Conservation Standards for Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers*, 89 Fed. Reg. 17,338 (Mar. 11, 2024); Docket No. EERE–2024–BT–STD–0002.**

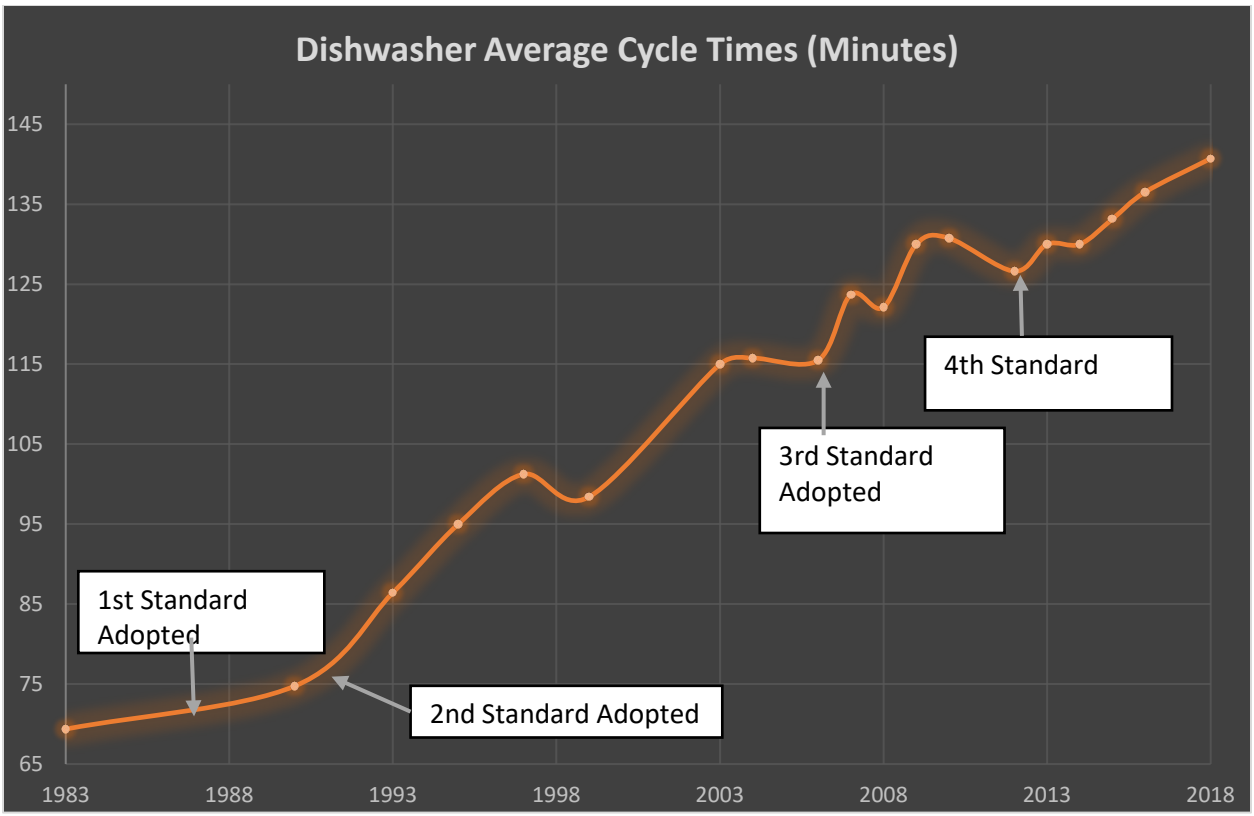
Dr. Shapiro:

I write regarding the Department of Energy's Request for Information, *Energy Conservation Program: Energy Conservation Standards for Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers*, 89 Fed. Reg. 17,338 (Mar. 11, 2024).

I. Background

A. The Rulemakings

In 2018, the non-profit Competitive Enterprise Institute ("CEI") petitioned the Department of Energy to "begin a rulemaking process to define a new product class under 42 U.S.C. § 6295(q) for residential dishwashers" which "would cover dishwashers with a cycle time of less than one hour from washing through drying." Exh. A. CEI explained that "[d]ishwasher cycle times have become dramatically worse under DOE standards, and consumer satisfaction has dropped as a result." *Id.* CEI then explained that this was not what Congress intended. "In enacting the National Appliance Energy Conservation Act of 1987, Congress sought to ensure 'that energy savings are not achieved through the loss of significant consumer features,'" but "[w]e are now in a situation in which dishwashers average cycle times of less than one hour have been eliminated from the marketplace." *Id* (quoting H.R. Rep. No. 100-11, 22 (1987)). CEI supported its petition with extensive data. *See generally id.* An accompanying spreadsheet compiled and graphed cycle time over the years, and it indicated that increased cycle time corresponded to DOE standards.



Exh. B.[1]

DOE granted CEI's petition and proposed to create a new product class for standard residential dishwashers with a cycle time of one hour or less for the normal cycle. *Energy Conservation Program: Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking*, 84 Fed. Reg. 33,869 (July 16, 2019). Following notice and public comment, *see id.*, DOE published a final rule adopting the new product class. *Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers*, 85 Fed. Reg. 68,723 (Oct. 30, 2020) ("*Dishwashers*"). DOE explained:

> DOE has concluded that it has the legal authority to establish a separate short cycle product class for standard residential dishwashers with the manufacturer recommended "Normal" cycle of one hour or less, pursuant to the Department's authority under 42 U.S.C. 6295(q). Dishwashers with a short "Normal" cycle have a performance-related feature that other dishwashers currently on the market lack, which justifies the establishment of a separate product class subject to a higher or lower standard than that currently applicable to dishwashers. Consumers that prioritize energy efficiency will still be able to purchase models characterized by a longer "Normal Cycle" while consumers who place a greater value on cycle time will now have the opportunity to select a model with a shorter "Normal cycle".

[1] This figure and the underlying data are available for download at https://www.regulations.gov/document/EERE-2018-BT-STD-0005-0006.

Id. at 68,726. DOE made clear that it considered human factors in its energy efficiency analysis. *See id.* at 68,728.[2] DOE then adopted similar short-cycle classes for "top-loading consumer (residential) clothes washers and consumer clothes dryers that offer cycle times for a normal cycle of less than 30 minutes, and for front-loading residential clothes washers that offer cycle times for a normal cycle of less than 45 minutes." *Energy Conservation Program: Establishment of New Product Classes for Residential Clothes Washers and Consumer Clothes Dryers*, 85 Fed. Reg. 81,359 (Dec. 16, 2020) ("*Clothes Washers*"). In connection with that rule, multiple commenters recognized cycle time as a performance-related feature with distinct utility, and CEI submitted empirical evidence that consumers were moving toward faster appliances over those that offer higher efficiency ratings. *Id.* at 81,363.

On Jan. 20, 2021, President Biden issued an executive order directing DOE to "consider publishing for notice and comment a proposed rule suspending, revising, or rescinding" the creation of these new product classes. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). On the same day, the White House published a list of agency actions that heads of certain agencies "**will** review in accordance with the Executive Order." Exh. C.[3] Thereafter, DOE proposed revoking the 2020 Final Rules, purportedly because those rules "improperly resulted in new product classes that amended the existing energy conservation standards for these products without determining whether the relevant statutory criteria for amending such standards were met." *Energy Conservation Program: Product Classes for Residential Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers*, 87 Fed. Reg. 2,673, 2,674 (Jan. 19, 2022) ("Repeal Rule"). DOE then revoked the 2020 Final Rules and reinstated the prior product classes and applicable standards for these covered products. *Id.*

B. Litigation

DOE's actions were met with a series of petitions for review. On December 29, 2020, the Natural Resources Defense Counsel and other NGOs filed a petition for review of the October 2020 *Dishwashers* Rule in the Second Circuit. *NRDC v. DOE*, No. 20-4256 (2d Cir.). A group of states did the same. *California v. DOE*, No. 20-4285 (2d Cir.). Those states then filed a petition for review of the December 2020 *Clothewashers* Rule. *California v. DOE*, No. 21-108 (2d Cir.). In February 2021, DOE file unopposed motions to hold at least the *Dishwasher* proceedings in abeyance, explaining that it "is in the process of complying with Executive Order 13,990 to review the challenged regulation." As noted above, DOE did so by revoking the 2020 Final Rules.

Following DOE's revocation of the 2020 Final Rules, a different group of States filed a petition for review in the Fifth Circuit. *Louisiana v. DOE*, No. (5th Cir.). The *NRDC* and *California* petitioners then filed an unopposed motion to continue the abeyance of the Second Circuit proceeding "[g]iven the possibility that the final rule rescinding the dishwasher product class is invalidated through

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[2] Human factors (also referred to as *human factors psychology* and *human factors engineering*) is an applied field of study that examines human abilities, limitations, behaviors, and processes in order to inform human-centered designs (those which include the human perspective throughout the design process). *See* https://www.mtu.edu/cls/undergraduate/human-factors/what/ An important aspect of human factors is the question of how human beings respond to technology or processes *in practice* as distinguished from *in theory*.

[3] https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/

that challenge, resulting in the reinstatement of the … short-cycle product class rule which [the *NRDC* and *California*] petitioners have challenged."

The Fifth Circuit granted Louisiana et al.'s petition for review on January 8, 2024. *Louisiana v. DOE*, 90 F. 4th 461 (5th Cir. 2024). The Court began by expressing doubt "that DOE has statutory authority to regulate water use in dishwashers and clothes washers." *Id.* at 470-72. The Court went on to hold that "even if DOE has water-usage authority over the relevant appliances, [DOE] … failed to adequately consider the negative consequences of the Repeal Rule, including the substitution effects of energy-and-water-wasting rewashing, prewashing, and handwashing," *i.e.*, human factors. *Id.* at 470, 472-73. The Fifth Circuit then concluded that, "in all events, the 2022 DOE … failed to adequately consider the impact of the energy conservation program on 'performance characteristics.'" *Id.* at 470, 473-475. Finally, the Fifth Circuit noted that any defects in the 2020 Rules could not justify the outright revocation of those rules without considering alternatives, and it chastised DOE for attempting *post hac* rationalizations for the Repeal Rule and making borderline "frivolous" claims that the 2020 Rules failed to consider statutory requirements. *Id.* at 475-76. The Fifth Circuit accordingly remanded the Repeal Rule to DOE "for further proceedings consistent with [its] opinion." *Id.* at 476.

After the Fifth Circuit issued its opinion, CEI—which had previously move to intervene in the Second Circuit proceedings—moved to dismiss the Second Circuit *Dishwasher* proceedings as moot. DOE did not dispute that those proceedings were moot, but remarkably "suggest[ed] that the Court should maintain the status quo and continue holding these petitions for review in abeyance while the agency considers its next steps in the wake of the Fifth Circuit's decision in Louisiana." Suffice it to say that a defendant acting to keep a litigation alive is unusual.

II. DOE's post-January 20, 2021 actions appear pretextual, pre-ordained, and collusive.

DOE appears to be blindly following a White House instruction to repeal the well-reasoned 2020 *Dishwashers* and *Clotheswashers* rules. Indeed, the Fifth Circuit chided DOE for its *post hac* rationalizations for the Repeal Rule and borderline frivolous claims about what DOE had considered. After the Fifth Circuit issued its opinion, DOE then remarkably asked the Second Circuit to ignore obvious mootness problems and not dismiss litigation in which DOE is the defendant. The apparent explanation for DOE doing so is collusion with petitioners challenging the 2020 *Dishwashers* and *Clotheswashers* rules. Indeed, the Second Circuit petitioners said that quiet part out loud: "[T]he initial statute-of-limitations period to challenge the Short-Cycle Rule has run, and Petitioners may face uncertainty if these instant cases are dismissed and the Short-Cycle Rule subsequently goes back into effect, either through the outcome of DOE's Remand Rule or judicial review of that rule." Motion (ECF 146) ¶ 9, *NRDC v. DOE*, No. 20-4256 (2d Cir.).

DOE's actions "raise a hot of important questions," including "whether the Government's actions, all told, comport with the principles of administrative law." *Arizona v. City & Cnty. of San Francisco*, 142 S.Ct. 1926, 1928 (2022) (Roberts, C.J., concurring). Indeed, DOE appears to be leveraging the Second Circuit litigation to ensure the *Dishwashers* and *Clotheswashers* rules are undercut. Accordingly, we respectfully insist DOE include all written communications with the Second Circuit litigants in in the administrative record. We further insist DOE memorialize in writing any oral communications and include those memorializations in the administrative record. We note that—to

the extent those communications with Second Circuit litigants are memorialized in communications between DOE and DOJ—such factual statements are not privileged.

III. Short-cycle classes are warranted.

A. Short-cycle classes will increase competition and consumer choice.

In a Petition for Reconsideration of the October 2020 Final Rule, the Association of Home Appliance Manufacturers ("AHAM") gave away the game vis-à-vis the impact of short-cycle standards on competition. AHAM griped that its members "have invested heavily in innovating to meet energy conservation standards for dishwashers" and the October 2020 Final Rule "will result in stranded investments as manufacturers are required to consider abandoning these innovations in efficiency."[4] That's a concession that consumers don't want what DOE and industry historically have on offer. It's also a concession that distinct short-cycle appliance classes will increase competition and consumer choice. And it makes clear that industry is all-too-happy to support regulations that leave consumers with less choice and with appliances that cost more, perform worse, and must be replaced more frequently.

B. Consumers find distinct utility in short-cycle appliances that actually perform the appliance's intended function.

AHAM's Petition for Reconsideration makes clear that consumers prefer appliances with short-cycles that actually perform the appliance's overall intended function. Likewise the survey CEI submitted:

> Over 85% of consumers report handwashing dishes "because the dishwasher takes too long." CEI Comment Attachment B at 3 ("CEI Survey"). Yet DOE recognizes that "hand washing dishes involves 140% the energy use and 350% the water usage of a dishwasher." CEI Comment at 4. And despite long run times, roughly 33% of consumers report that their dishwasher does not clean their dishes well. CEI Survey at 7. A similar 34% report that they run their dishwasher multiple times to get their dishes clean. *Id.* at 8.

Exh. D. Indeed, as Louisiana et al noted in their brief to the Fifth Circuit, the thousands of public comments to the Repeal Rule reflect that consumer preference. *Id.* CEI tabulated that, "among individual commenters, 16 opposed the new class of dishwashers, 41 were neutral, and more than 2,200 supported CEI's petition." Exh. E. Moreover, "[t]hese comments were not form letters with identical language." *Id.* Particularly when viewed with AHAM's concession, *supra*, that's substantial evidence that consumers find distinct utility in appliances that are actually capable of cleaning dishes (or washing clothes) on a short cycle.

IV. DOE must consider the impact of use-phase energy efficiency on lifecycle cost and lifecycle energy use.

A. Life cycle energy use is an important aspect of the problem that DOE must consider.

[4] https://www.regulations.gov/document/EERE-2018-BT-STD-0005-3224

DOE has correctly recognized that "[w]hile conscientious energy use is critical … the issue can be more complicated than just increasing efficiency[.]" Exh. F. Indeed, DOE officials have testified that "a large part of the carbon footprint for many consumer products can be attributed to the supply chain – from raw materials, transport, and packaging to the energy consumed in manufacturing processes – on the order of 40 to 60 percent." Exh. G.[5] Accordingly, "it is relevant to address not only [energy consumption in] the use phase but also other phases of the life cycle, especially the production phase." Exh. H. "In addition, extending the lifetime of a product by fostering durability, reliability, repairability and upgradability contributes to decreasing the environmental impact of a product." *Id.*

B. Increased operational energy efficiency tends to decrease lifespan.

Increased energy efficiency in the use phase tends to increase appliance complexity, decrease component and overall robustness, and decrease engineering margins. As the number of parts, the complexity of those parts, and overall complexity increase, while engineering margins decrease, overall mean time between failures (MTBF, for repairable devices) and mean time to failure (MTTF, for nonrepairable devices) decrease. That's basic reliability engineering. *See, e.g.*, J.D. Andrews and T.R. Moss, RELIABILITY AND RISK ASSESSMENT 164-99 (2002) (Exh. I). It's also common sense.

Moreover, as device complexity increases, the economic viability of repair tends to decrease. In years past, analog controls on traditional boards, for example, could be diagnostically evaluated and cost-effectively repaired at the individual component level. As control systems shifted to surface mount technology, integrated circuits, and digital, repair became limited to isolating the failure to a board, then replacing that entire board. Now, complexity is so high that many consumer appliances are either not repairable in a cost-effective manner, or not repairable at all. The entire appliance is replaced when a component fails. Appliances are yet another disposable.

One traditional method of increasing reliability is to decrease the time of continuous operation of a system: here, decreasing cycle time. Another is lightening the electrical, mechanical, thermal and other conditions of operation of the components by, *e.g.*, operating components well-short of their rated load. *See* A.M. Polovko, FUNDAMENTALS OF RELIABILITY THEORY 387-89 (Exh. J). Doing so tends to be less energy efficient in the use phase: all things being equal, a larger motor operated well under-rating, for example, tends to use more energy in operation even though it tends to be more reliable and last longer. But increased reliability tends to make overall cost less: there is less down-time for repair and a longer time before the device must be replaced. *See* Martin L. Shooman, PROBABILISTIC RELIABILITY: AN ENGINEERING APPROACH 9-12 (1968) (Exh. K). Indeed, downtime and replacement impose economic costs that can dwarf acquisition cost. *See id.* These facts are literally in textbooks, and they are not seriously contestable.

C. A large subset of consumers find distinct utility in appliance quality and lifespan.

One of the few relevant studies of consumer preference vis-à-vis appliances concluded that "products' lifetime is … of higher importance than [use phase] energy consumption" to consumers. Kathleen Jacobs & Jacob Horisch, *The Importance of Product Lifetime Labelling for Purchase Decisions*, 31 BUS. STRAT. ENV. 1275 (2021) (Exh. L). Another concluded that there are three distinct classes of appliance consumers: "price sensitives," "quality seekers," and "energy savers," with "quality seekers"

[5] https://www.energy.senate.gov/services/files/3D26FA56-F102-9E9F-BEA4-52BB0085B19A

finding little utility in energy savings. Mark Olsthoorn et al, *Beyond energy efficiency: Do consumers care about life-cycle properties of household appliances*?, 174 ENERGY POLICY 113430 (2023) (Exh. H). Given the engineering tradeoffs between use phase energy efficiency, on the one hand, and reliability and lifespan on the other, those conclusions indicate a significant subset of consumers have a preference for—and find distinct utility in—more-functional and longer-lasting short-cycle appliances. Moreover the expected increased reliability and increased lifespan of short-cycle appliances likely aligns with lower lifecycle energy use vis-à-vis appliance models in the pre-existing classes.

* * * * *

For the foregoing reasons, DOE should withdraw the Repeal Rule *in toto*.

STATE OF TENNESSEE

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ELECTRONICALLY VIA
REGULATIONS.GOV

Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, DC 20585

RE: ***Energy Conservation Program: Direct Final Rule, Standards for Consumer Clothes Dryers, No. EERE-2014-BT-STD-0058***

Dear Secretary Granholm:

Tennessee and the undersigned States write to request the Department of Energy's ("DOE") to reconsider its recently released direct final rule that regulates consumer clothes dryers.

I. Introduction

DOE's latest direct final rule and additional proposed rule regarding regulations on consumer clothes dryers continues to over-regulate American households. Many manufacturers disputed DOE's initial rules regarding regulations related to freezers, conventional cooking, and other appliances. After months of

pressure by DOE and advocacy groups, manufacturers relented, and appliance manufacturers and advocacy organizations submitted a new proposal encompassing regulations for a myriad of household appliances**.** Most disconcerting is the lack of consideration for the average consumer, who undoubtedly will be most affected by appliance price hikes due to the new regulations. The States ask that DOE abandon its current course, rescind the direct final rule, and proceed to formal rulemaking for regulations that have such sizeable impacts on Americans.

II. Background

DOE proposed new energy conservation standards for numerous household appliances. *See* 88 Fed. Reg. 12,452; *see also* 88 Fed. Reg. 6818; 87 Fed. Reg. 51734. These included regulations for refrigerators, freezers, dryers, dishwashers, conventional cooking appliances, among other items. DOE received scores of comments related to all these regulations, both in favor[1] and against[2].

After months of impasse, advocacy organizations and home appliance manufacturers sent a joint statement to DOE (the "joint statement"). 89 Fed. Reg. 18164, 18165. DOE adopted the joint statement and proceeded directly as a direct final rule. *Id*.

In this latest proposal regarding dryers, DOE released its direct final rule and newest proposed rule at the same time. Essentially, if the direct final rule receives any adverse comments, DOE would proceed with the proposed rule.[3] The States certainly believe going through the normal course of notice and comment for a proposed rule is a good thing- however, the States would caution and suggest that DOE ought to proceed with formal rulemaking. Further, the States continue to warn against direct final rulemaking.

III. Authority

The Energy Policy and Conservation Act grants DOE the power to regulate consumer clothes dryers for energy conservation. *See* 42 U.S.C. 6292(a)(8); 42 U.S.C. 6295(g). However, these regulations are not limitless. *See* 42 U.S.C. 6295(o). DOE must consider the economic burden levied upon consumers and manufacturers. *Id*. at (o)(3)(A)-(B); *see also id*. at (o)(2)(B). Finally, DOE may issue a direct final rule

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[1] *See* Comment from Advocacy Groups Earth Justice, American Lung Association, Utah Clean Energy, Health Care Without Harm, Coastal Conservation League, *et al*., (April 28, 2023) (*Declaring their support for the proposed rule and its necessity due to climate change and climate pollution.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0076

[2] *See* Comment from Sub-Zero regarding Energy Standards for Refrigerators and Freezers (April 28, 2023) (*Expressing grave concerns with impact on consumers and manufacturers*.) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0077; Comment from Several States (April 28, 2023). (*States expressing concerns with reliance on social costs of carbon, federalism and commerce clause implications, as well as impact on low-income households.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0068; Comment from American Gas Association and American Public Gas Association (April 27, 2023) (*Gas Associations' concerns regarding consumer costs and testing procedures*.) Available at https://www.regulations.gov/comment/EERE-2014-BT-STD-0058-0047

[3] This comment letter opposing the direct final rule shall also serve as the undersigned States' opposition to the notice and comment.

regarding regulations if a joint statement is submitted by interested persons that are fairly representative of the relevant points of view and satisfies the standards of 42 U.S.C. 6295(o). *See* 42 U.S.C. 6295(p)(4).

IV. Relevant Points of View & Consumer Costs

A. The Joint Agreement

The Association of Home Appliance Manufacturers ("AHAM") is perhaps one the most important parties to this regulation outside the average consumer. AHAM represents multiple appliance companies including GE Appliances, Alliance Laundry Systems, Whirlpool, Samsung, and LG Electronics, among others. Groups represented by AHAM in the joint statement lodged complaints prior to the release of the joint statement related to numerous appliances.

Other groups that participated in the joint agreement included advocacy organizations. The Natural Resources Defense Council is an advocacy group that advocates for lower emissions.[4] Earthjustice is a "nonprofit public interest environmental law organization" that seeks "to advance clean energy, and to combat climate change.[5] The Alliance for Water Efficiency is a water-conservation advocacy group.[6] The National Consumer Law Center is a generalist organization that represents consumers in litigation and lobbying.[7] However, none of these groups, save Northwest Energy Efficiency Alliance[8], seem to carry any specific knowledge of codes or regulations pertaining to dryers and ultimately fail to take into account the upfront cost of more efficient appliances to low-income households.

While pleasant that AHAM and the advocacy groups could come to an agreement to send DOE their recommendations for Dryers, a key group is largely forgotten- consumers.

B. Consumer Costs

DOE and many of the signatories of the joint agreement largely failed to take into account the costs to folks from lower socioeconomic households. While DOE expects great savings over the life cycle of new, energy-efficient dryers, some commentors, and now the States, expressed lamentation on the calculus and working class individual's preferences for not purchasing new more expensive machines. Again, many of these advocacy groups utterly failed to discuss upfront costs to consumers and the preferences of lower socioeconomic buyers.

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[4] NRDC, Mission Statement, Overview, and Climate Change, (last visited Jun. 24, 2024). Available at https://www.nrdc.org/issues/climate-change#overview

[5] Earth Justice, About Earth Justice, (last visited Jun. 24, 2024). Available at https://earthjustice.org/about

[6] Alliance for Water Efficiency, About the Alliance and Mission Statement, (last visited Jun. 24, 2024. Available at https://www.allianceforwaterefficiency.org/about

[7] National Consumer Law Center, Explore NCLC's Key Issues, (last visited Jun. 24, 2024). Available at https://www.nclc.org/our-work/#TabListing-tabPanel-9

[8] Northwest Energy Efficiency Alliance, Codes and Standards Program, (last visited Jun. 24, 2024). Available at https://neea.org/our-work/codes-standards

However, some manufacturers did initially consider the upfront cost to consumers prior to the joint agreement. Whirlpool and AHAM expressed well-founded concerns about the affordability of dryers for low-income households.[9] "A majority of washer and dryer purchases by low-income consumers over the past five years are $600 or less. For these consumers, and most others, purchase costs is the leading factor in their purchase decision."[10] Many will instead opt to repair old machines rather than purchasing more expensive newer models. The States understand that DOE believes that life cycle savings outweigh the economic burden suffered by those from lower socioeconomic backgrounds. But such obstreperous regulations have incalculable impact when (1) 65% of consumers live paycheck-to-paycheck; and (2) many do not have enough monies in emergency funding to cover an immediate incident, let alone upgrading to a more expensive, energy efficient dryer.[11]

Again, many commenters, including manufacturers and the political advocacy organizations, failed to mention any issues with the upfront costs to consumers. The States are concerned that the price increases from regulation will be passed to consumers and be especially harmful to those living paycheck-to-paycheck.

An analysis of the relevant economic hardship on consumers is also largely lacking.[12] In the context of an appliance study Bellomy Research, in conjunction with AHAM, found that households at or near the poverty line prefer to pay less money upfront and more in energy bills over a ten-year period.[13] Households who cannot afford a new refrigerator or appliance would instead choose to repair their old one.[14]

The joint statement, and most poignantly, the direct final rule, fails to address these concerns further. It does little to assuage any fears of economic impact on low-income households. Consumers face a heavy upfront costly burden.

C. Relevant Viewpoints, Economic Burden, and the States

42 U.S.C. § 6295(p)(4) requires a joint statement from "interested persons that are fairly representative of the relevant points of view," and it must include "representatives of . . . States." Here, DOE does not meet that standard. Very few States supported DOE's Consumer Dryer Regulations- and were not signatories to the joint agreement. The undersigned States oppose such a rule, and believe that interested persons should include more States, who are the direct representatives of consumers.

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[9] *See* Comment from Whirlpool (*noting Low-Income Consumer Impacts and referencing AHAM's concerns regarding the same*) (Oct. 24, 2022). Available at https://www.regulations.gov/comment/EERE-2014-BT-STD-0058-0053

[10] *Id.*

[11] *See id.*

[12] *See* Comment from AHAM regarding Energy Standards, Pg. 10-12 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0069

[13] *Id.*

[14] *Id.*

Moreover, 42 U.S.C. 6295(p)(4)(C) states the Secretary shall withdraw the direct final rule if one or more adverse comments are received and the Secretary determines that the adverse comment provides a reasonable basis for withdrawing the rule. We believe that this letter serves as the basis for such a reasonable determination. Particularly, this letter outlines the burden outweighing the benefit of the rule as is contemplated in 42 U.S.C 6313(a)(6)(B)(ii), and 42 U.S.C 6313(a)(6)(B) is explicitly mentioned as a reason for withdrawing a rule in 42 U.S.C. 6295(p)(4)(C)(ii).

States have a direct interest in protecting consumers, especially low-income consumers, from the increased costs associated with the implementation of this rule. States are also directly affected because many State entities are direct purchasers of these appliances and thus will directly bear the burden of increased costs for appliances. DOE's direct final rule also preempts State procurement standards with less stringent energy-efficiency rules in contradiction of federal law. *See* 42 U.S.C. § 6297(e). States often have a better finger on the pulse of their own citizens than those in Washington. As the States previously noted, the final rule does not address whether households, especially low-income households, will be able to absorb those upfront costs while waiting for future benefits. And, while manufacturers eventually joined the joint statement, there were key comments initially stating DOE's failure to grapple with costs associated with low-income households and upfront costs.

The States believe more voices ought to be heard prior to making this a direct final rule and deeper consideration given to the explicit upfront cost of purchases of consumer dryer appliances. This is especially true given that States are often forced to grapple with the unprecedented use of "the whole of government" approach to implementing regulatory obligations on American consumers and manufacturers. After all, this single DOE direct final rule is merely part of a broad smattering of rulemaking targeting nearly every household appliance. States are justifiably concerned that "the future of American household appliances will include fewer choices, [and] higher prices" for every consumer.[15]

V. Direct Final Rulemaking

DOE has the power to regulate consumer dryers for energy conservation. *See* 42 U.S.C. 6292(a)(8); 42 U.S.C. 6295(g). But, DOE must consider the economic impact of its regulations on consumers and manufacturers. *Id*. at (o)(3)(A)-(B); *see also id*. at (o)(2). DOE may issue a direct final rule regarding regulations if a joint statement is submitted by interested persons, which are fairly representative of the relevant points of view and satisfy the standards of 42 U.S.C. 6295(o). *See* 42 U.S.C. 6295(p)(4).

[15] Jonathan Skrmetti, Here's our plan on household appliances, (Jun. 8, 2023). Available at https://www.foxnews.com/opinion/heres-plan-sink-bidens-household-appliances

DOE ought to reevaluate the benefits and burdens of its rules under the factors listed in 42 U.S.C. 6295(o)(2)(B)(i)(I), (II), and (IV). The Secretary alone weighs incredibly important economic decisions, and without further notice and comment rulemaking, agencies are not accountable to anyone. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating that notice-and-comment rulemaking "reintroduc[es] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978). "Informal notice-and-comment rulemaking provides several interrelated benefits. It allows all stakeholders in a regulatory decision to be heard before a decision is made and ensures that the agency responds to relevant comments." Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 Alb. L. Rev. 79, 86 (2009). The notice and comment process further ensures some level of political accountability by giving visibility to internal agency deliberations that would otherwise be hidden. *Id.* at 86-87. It also provides a record to make sure that the rule and the agency comply with the APA. *Id*. Allowing affected parties to participate may improve the perceived legitimacy of the decision-making process. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Transparency between the Secretary, DOE, manufacturers, and consumers is paramount.

Problems with direct final rulemaking further compound when one evaluates its track record and meaning. "The Administrative Conference recommended. . . direct final rulemaking where an agency *believes* that [a] rule will be noncontroversial and adverse comments will not be received." Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 Alb. L. Rev. 79, 88 (2009). First, it is unclear what an agency considers "noncontroversial and significant adverse comment" to mean. Second, agencies can rarely tell when a rule will be controversial, and blatantly seem not to care. *Id*. 106-07. The FDA, one of the largest agencies in the United States, has an atrocious track record regarding challenges to its promulgation of direct final rules. *Id*. at 82 (finding the FDA used direct final rulemaking for controversial rules and the agency withdrew forty percent of rules for which it attempted to use direct final rulemaking due to opposition). Other problems with direct final rulemaking may be succinctly stated as contrary to the APA, direct final rulemaking is not provided for by the APA, and causes confusion among interested parties. *See Id*. at 108-09; Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)); Direct final rulemaking faces legal risk as well. Again, the procedure is not mentioned in the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 to 559, 701 to 706. Even looking past that, the hurried nature of direct final rules "does not comport well with the additional demands associated with the continued availability of substantive judicial review." Lars Noah, *Doubts about Direct Final Rulemaking*, 51 Admin. L. Rev. 401, 403 (1999); *see also* Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical

Portrait of the Modern Administrative State. 94 Va. L. Rev. 889, 903, n. 37 ("Direct final rulemaking does not comport with the APA's requirements or with meaningful judicial review").

Direct final rulemaking "may reduce the efficiency of agency rulemaking, can cause confusion about the state of the currently effective law, and erodes public confidence in the rulemaking process." Kolber, 72 Alb. L. Rev. at 80 (2009). Pressing again into notice and comment allows DOE to consider information it lacked in its adaptation of the joint statement. *See Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978) ("public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."). Here, the States raise legitimate issues regarding costs to consumers and purchasers, as well as a lack of a variety of representative viewpoints. Moreover, withdrawing the direct final rule and proceeding with the notice of proposed rulemaking that was published simultaneously with the direct final rule would allow the DOE to consider information it lacked in its adoption of the joint statement, and to take further consideration of the initial hefty upfront costs to consumers. Public participation in the rulemaking process "assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978). DOE should reevaluate these issues.

Finally, the circumstances that instigated DOE's direct final rulemaking ability should be taken into consideration. The Energy Policy and Conservation Act was enacted during an international crisis and was instrumental in the regulation of gas, oil, and other energy-pertinent items during the Cold War. *See* 42 U.S.C. § 6201. DOE's direct final rulemaking power arose pursuant to the Energy Independence and Security Act, which was passed after Operation Surge. *See* George W. Bush, The President's Address to the Nation, Office of the Press Secretary (January 10, 2007). The Energy Independence and Security Act's goal was to provide for less reliance on oil from the Middle East, protect consumers, and bring the United States closer to energy independence. Pub. L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007). DOE's powers for direct final rulemaking should be used with caution. Direct final rulemaking ought to be used with caution and care and only when regulations are truly noncontroversial.

VI. A Return to Formal Rulemaking

The States strongly urge DOE to return to formal rulemaking. Formal procedures, and procedures in general, are certainly appropriate when an issue is scientifically complex or when the economic impact is significant. *See* Admin.

Conference of the U.S., Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654 (1976).

"Because agencies 'dress up each of their guestimates about the facts . . . in enormous, multi-layered costumes of technocratic rationality' and 'courts cannot . . . be partners to technocrats in a realm in which only technocrats speak the language' mechanisms such as cross-examination that help illuminate agency sleights-of-hand should receive careful consideration." John F. Manning & Matthew C. Stephenson, Legislation and Regulation 776-77 (2010) (quoting Martin Shapiro, Who Guards the Guardians? Judicial Control of Administration 151-52 (1988); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1507 (1983)). The adversarial process and open debate are cornerstones of democracy and courts have required agencies to provide formal rulemaking procedures for safeguarding those inalienable American principles. *See Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

Furthermore, without formal rulemaking, evaluating an agency's decision-making procedures, as well as the weight given to certain comments, studies, and notes, becomes increasingly difficult. "While an agency in informal rulemaking must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning" Aaron L. Nielson, In Defense of Formal Rulemaking, 75 Ohio St. L.J. 237, 269 (2014) (internal quotation omitted). Merely issuing a comment does little to guarantee an agency takes account of rules that seriously affect certain pertinent parties. *See Id.* On occasion, the "thrust of some rules . . . are preordained . . . especially . . . when an agency institutes a rulemaking proceeding to satisfy demands for a particular outcome from the White House or political appointees at the top of the agency . . . rulemaking does not work well when policy disputes are disguised as issues of scientific judgment." *Id.* (internal quotations omitted). As such, having a transparent process, especially one that provides for formal rulemaking, which includes live hearings, the ability to cross-examine witnesses, and establishing a clear record for decision-making, is paramount in increasing trust in our institutions and agencies.

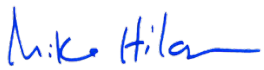
"The American people deserve a regulatory system that works for them, not against them" 58 FR 51735, Preamble. (Executive Order 12,866). Agencies ought to find incentives to promote their desired goals, not twist industry's arm. *Id.* at (3). Perhaps, rather than pursuing a direct final rule pursuant to some arm-twisting, DOE could proceed down formal rulemaking paths scribed in the APA, thereby fomenting transparency and trust in our agencies and faith in our democracy.

VII. Conclusion

The undersigned States request that DOE seriously reevaluate its direct final rule in light of this comment. DOE's regulations will limit consumer choices and heighten costs for everyone.

Sincerely,

Jonathan Skrmetti
Tennessee Attorney General & Reporter



Mike Hilgers
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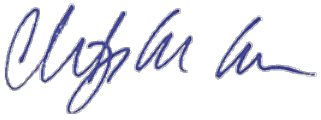

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Georgia Attorney General

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Austin Knudsen
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Todd Rokita
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Russell Coleman
Kentucky Attorney General

Ken Paxton
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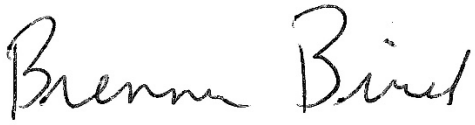
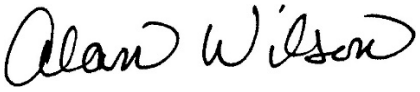


Brenna Bird
Iowa Attorney General



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STATE OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

July 3, 2024

Secretary Granholm
U.S. Department of Energy
1000 Independence Ave. SW
Washington, DC 20585

RE: Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, EERE-2017-BT-STD-0014

Dear Secretary Granholm:

Florida and the States represented by the undersigned attorneys general write regarding the Department of Energy's (DOE) recently released direct final rule regulating residential clothes washers.

I. Introduction

This direct final rule marks the latest regulatory overreach from the Biden Administration, this time into American laundry rooms and residential clothes washers. Many manufacturers resented DOE's initial rule regarding residential clothes washers. After many months of pressure by DOE, however, certain appliance manufacturers and advocacy organizations relented and submitted a regulatory proposal resulting in this direct final rule.

While this direct final rule appears to be less demanding than the initial proposed rule concerning energy efficiency standards, it does not consider the economic impact that will be borne by American consumers who will undoubtedly face appliance price hikes due to the new regulations. Not only that, but these overreaching efficiency standards will also leave consumers struggling with washers that take longer to clean clothes, ultimately leading to greater financial burdens falling on American families.

To help DOE reevaluate its latest attack on household appliances, the undersigned States ask DOE to return to abandon this rule or, at a minimum, to proceed with notice and comment rulemaking before enacting these stringent new standards for residential clothes washers.

II. Background

DOE proposed new energy conservation standards for residential clothes washers in March 2023 (the "proposed rule"). Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 88 Fed. Reg. 13,520 (Mar. 3, 2023). DOE received numerous comments, both supporting[1] and opposing[2] the new regulations. After months of impasse, advocacy organizations and home appliance manufacturers sent a joint statement to DOE (the "joint statement").[3] DOE adopted the joint statement and published a direct final rule (the "direct final rule"). Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 89 Fed. Reg. 19,026 (Mar. 15, 2024).

III. Authority

The Energy Policy and Conservation Act grants DOE the power to regulate residential clothes washers for energy conservation. *See* 42 U.S.C. § 6292(a)(7); 42 U.S.C. § 6295(g). That grant of authority is not limitless. *See* 42 U.S.C. § 6295(o). DOE must also consider the economic burden such regulations will impose on consumers and manufactures, and whether such burden is economically justified. *Id.* at § 6295(o)(2)(B)(i). And DOE may only issue a direct final rule if a joint statement (1) is submitted by interested parties who fairly represent the relevant points of view and (2) satisfies the standards of 42 U.S.C. § 6295(o). *See id.* § 6295(p)(4).

IV. Relevant Points of View

A. The Joint Statement

The Joint Statement represents the consent of the Association of Home Appliance Manufacturers (AHAM), advocacy groups, and a select group of States.[4] But the joint statement was the result of administrative arm-twisting and did not address issues raised by important stakeholders during the period for comments on the proposed rule.

a. *AHAM and Appliance Companies*

The Association of Home Appliance Manufacturers (AHAM) is perhaps one the most important parties to this regulation outside the average consumer. AHAM represents multiple appliance companies including GE Appliances, Alliance Laundry Systems, Whirlpool, Samsung, and LG Electronics, among others. Companies represented by AHAM in the joint statement lodged complaints prior to the release of the joint statement related to numerous appliances. AHAM

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[1] *See* Comment from Appliance Standards Awareness Project, et al. (May 17, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0459; Comment from American Council for an Energy-Efficient Economy, et al. (May 2, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0458.

[2] Comment from Members of Congress (May 17, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0456.

[3] Joint Statement on Energy Conservation Standards for Residential Clothes Washers (Sept. 25, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0505.

[4] *See* Joint Statement, *supra* note 3.

submitted a comment in opposition to the initial rule proposed by DOE.[5] Whirlpool Corporation and GE Appliances, both members of AHAM, also submitted critical comments.[6]

AHAM's comment stressed that the proposed rule would "eliminate consumer features, reduces choice, significantly increases cost, and/or negatively impacts product performance."[7] AHAM members' independent testing confirmed that actual performance by washing machines with the new DOE standards are significantly different from previous performance. Machines using DOE's new standards had significantly decreased load turnover, meaning that it would be harder and take longer to remove soil from laundry load.[8] Not only do the new standards impact actual performance, AHAM's original comment highlights how consumer preference might even be a bigger issue.[9] GE Appliances, one of AHAM's members, wrote separately to criticize DOE for its failure to realize the cost of consumer dissatisfaction.[10]

Further, AHAM's comment letter highlighted DOE's failure to adequately evaluate economic consequences of the proposed rule. Relying, in part, on a study it conducted with Bellomy Research, AHAM determined low-income households would be negatively impacted by having to purchase new residential clothes washers.[11] Their findings showed that over half of these households would not be able to purchase a more energy efficient washer and would have to resort to purchasing used washers or delaying purchasing a washer at all.[12] The result of that would be an ultimate delay in more households obtaining energy efficient washers—a result DOE has not taken into account.[13]

Whirlpool, another one of AHAM's members, wrote separately to further emphasize that the proposed rule was not economically justified.[14] Research conducted by Whirlpool showed a 25% increase cost for consumers and a potential 31% loss in industry net present value, which could result in more than 8,000 American job losses.[15] It also criticized DOE for its failure to conduct a supply-chain analysis because the regulatory burdens of disparate standards in markets sharing a supply chain, like the United States and Canada, could have significant burdens to the industry.[16] The direct final rule, like the proposed rule, does not address a North American integrated supply-chain analysis.

Even though AHAM ultimately endorsed the joint statement, the failure to address AHAM and its members' original comments is glaring. The direct final rule does little to assuage the fear

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[5] Ass'n of Home Appliance Mfrs. Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0464.
[6] Whirlpool Corp. Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0462; GE Appliances Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0457.
[7] Ass'n of Home Appliance Mfrs. Comment, *supra* note 5, at 1.
[8] *Id.* at 6–10.
[9] *Id.* at 10.
[10] GE Appliance Comment, *supra* note 6, at 2.
[11] Ass'n of Home Appliance Mfrs. Comment, *supra* note 5, at 27.
[12] *Id.* at 27–28.
[13] *Id.*
[14] Whirlpool Corp. Comment, *supra* note 6, at 4.
[15] *Id.* at 3, 5.
[16] *Id.* at 15.

of the economic impact such energy efficiency standards for residential clothes washers will have on low-income households. Under DOE's direct final rule, consumers will bear the burden of DOE's coercion efforts against manufacturers.

As mentioned, many manufacturers originally wrote complaints regarding the burdensome costs the proposed rule would have on consumers and manufacturers alike before swiftly changing their position. This phenomenon, known as "administrative arm-twisting," has become increasingly common. *See generally* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873 (1998). Informal ad hoc bargaining is a serious concern, and federal agencies have continually engaged in such practices. *Id.* at 876. Agency arm-twisting has no judicial oversight, *id.* at 875–76, and "potentially arrogates undelegated power," *id.* at 930. Bargaining for rules and regulations between a subgroup of regulated entities, advocacy groups, and an agency invites standardless and unaccountable actions by agencies. *Id.* at 936. AHAM, along with many other appliance groups, wrote comments criticizing DOE's proposed regulations. Such comments highlighted the regulations' impact on low-income individuals. However, after months of AHAM opposing the proposed rule, they changed their minds and submitted a joint statement with the same political advocacy groups that have supported DOE from the beginning. Arm-twisting is not always obvious, *id.* at 941, but when manufacturers raise serious concerns only to suddenly abandon them, it raises questions about the agency's methods of achieving its seemingly political ends.

b. The Advocacy Groups

The joint statement also relies largely on the support of several advocacy groups, including the Alliance for Water Efficiency, the Northwest Energy Efficiency Alliance, the Natural Resource Defense Council, Earthjustice, and the National Consumer Law Center. These niche advocacy groups do not represent the interests of everyday consumers, and their input should not be given significant weight by DOE.

The Natural Resources Defense Counsil (NRDC) is an advocacy group whose stated mission is to "expand support for efficiency measures that improve customer savings."[17] Yet, NRDC does not address the negative economic impact the proposed rule would have on these low-income households.[18] The National Consumer Law Center is an organization that addresses a range of issues from Criminal Justice to Student Loans.[19] In their comment letter, they propose the idea that DOE's new energy efficiency standards will actual provide significant financial benefits to low-income households, which is contrary to the research done by appliance groups.[20] And Earthjustice is a "nonprofit public interest environmental law organization" that seeks "to advance clean energy, and to combat climate change.[21] None of these groups has expertise in setting energy efficiency standards for appliances.

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[17] *Climate Change: Overview*, Nat. Res. Def. Couns., https://www.nrdc.org/issues/climate-change#solutions (2024).
[18] NEEA, ComEd, and NRDC Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0455.
[19] *Key Issues*, Nat'l Consumer L. Ctr., https://www.nclc.org/our-work/#TabListing-tabPanel-9.
[20] Nat'l Consumer Law Center Comment Letter on Energy Conservation Standards for Residential Clothes Washers at 1–2 (May 15, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0448.
[21] *About Earth Justice*, Earth Justice, https://earthjustice.org/about (last visited June 27, 2024).

The Alliance for Water Efficiency is a water-conservation advocacy group.[22] This group might have significant interest in residential clothes washers' water conservation, but it seems to not have expertise in the proposed rule's subject matter in any way.

The organization that comes closest to demonstrating a specialty in energy efficiency relating to residential clothes washers is Northwest Energy Efficiency Alliance. This group has previously conducted independent energy efficiency testing on clothes washers.[23] But, again, it does not appear that this group has any expertise in weighing consumer and manufacturer costs that should lead DOE to rely on their analysis.

B. Key Groups Not in the Joint Statement

Other groups provided comments on the proposed rule regarding residential clothes washers but did not appear in the joint statement. While these groups are not manufacturing specialists, they do have a keen focus on the consumers who will bear the brunt of DOE's burdensome direct final rule.

The National Apartment Association (NAA) and the National Multifamily Housing Council (NHMC), two groups that arguably have a closer connection to residential clothes washers than environmental advocacy groups, raised concerns about the economic impact that low-income households will face from this regulation.[24] The NAA and NHMC represent home builders, renters, and property owners and are acutely aware of the economic implications upon consumers and low-income households.[25] The groups purchase large quantities of appliances, including residential clothes washers. Neither group joined the joint statement, as their comments make clear why they were absent from this statement.

NAA and NHMC expressed in their comment letter that DOE should avoid new efficiency requirements that undermine the efforts of high construction costs and cause delays, creating increased costs that will be passed onto consumers and renters through the impacts of diminished housing supply.[26] These groups are concerned about regulations that impact their ability to deliver new housing units. Already difficult market conditions "are exacerbated by new regulatory burdens and changes to the availability and expense of essential appliances in particular."[27] NAA and NHMC explained that modern "clothes washers are already highly energy and water efficient" and that efforts like DOE's "result in only negligeable [sic] efficiency gains that should be balanced against the costs and burdens of equipment changes, production disruption and performance impacts."[28] NAA and NHMC rightly predict that upfront costs will have significant impacts on consumers, more so than DOE anticipates in its regulation.

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[22] Alliance for Water Efficiency, https://www.allianceforwaterefficiency.org/about (2024).
[23] *See Perfect Pairings? Testing the Energy Efficiency of Matched Washer-Dryer Sets*, Nw. Energy Efficiency All., (Jan. 20, 2022), https://neea.org/resources/perfect-pairings-testing-the-energy-efficiency-of-matched-washer-dryer-sets.
[24] NAA and NHMC Comment Letter on Energy Conservation Standards for Consumer Residential Clothes Washers (May 16, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0451.
[25] *Id.*
[26] *Id.* at 3.
[27] *Id.*
[28] *Id.* at 4.

Finally, while Massachusetts, New York, and California support the changes DOE seeks to implement, 21 States expressed concern about consumer welfare impacted by DOE's proposed rule.[29] By statute, a joint statement must come from "interested persons that are fairly representative of the relevant points of view" and must include "representatives of . . . States." 42 U.S.C. § 6295(p)(4). Properly construed, the statute requires the concurrence of States across the ideological spectrum for DOE to proceed with a direct final rule. Here, DOE does not come close to meeting that standard. Indeed, it come near to approaching the requisite consensus. A handful of States favor DOE's proposal, while a much larger group of States strongly oppose it. DOE cannot cherry pick the States with which it is politically aligned to circumvent the ordinary rulemaking process. Doing so fails the "fairly representative" requirement of § 6295(p)(4).

Along with taking issue with the effects of new energy efficiency standards on consumers, many of the signatory States raised numerous concerns with DOE's proposed rule including its reliance on social costs of carbon, its disregard for federalism, and the Commerce Clause implications.[30] States have a direct interest in protecting consumers from the increased costs associated with the implementation of this rule. States are also directly affected by this rule because many State entities purchase industrial clothes washers and thus will directly bear the burden of their increased costs. *See* 42 U.S.C. § 6297(e) (providing that DOE energy efficiency standards preempt less stringent state-law standards.)

Moreover, 42 U.S.C. § 6295(p)(4)(C) states that the Secretary shall withdraw the direct final rule if one or more adverse comments are received, and the Secretary determines that the adverse comment provides a reasonable basis for withdrawing the rule. We believe that this letter serves as the basis for such a reasonable determination. Specifically, this letter outlines the burden outweighing the benefit of the rule as is contemplated by 42 U.S.C. § 6313(a)(6)(B)(ii), and 42 U.S.C. § 6313(a)(6)(B) is explicitly mentioned as a reason for withdrawing a rule in 42 U.S.C. § 6295(p)(4)(C)(i).

V. Direct Final Rulemaking

Florida and the undersigned States believe more voices ought to be heard before DOE may enforce new energy efficiency standards for residential clothes washers. Such public participation is needed, especially given that States are often forced to grapple with the unprecedented use of "the whole of government" approach to implementing regulatory obligation on American consumer and manufacturers. This single DOE direct final rule is one of many that target nearly every household appliance.

DOE has the power to regulate residential clothes washers for energy conservation. *See* 42 U.S.C. § 6295(g)(2). It can only do so using a direct final rule, however, under narrow conditions. See 42 U.S.C. § 6295(p)(4). Those conditions are not satisfied here. As previously mentioned, the direct final rule did not adequately respond to the concerns raised in response to the proposed rule, nor does the joint statement form a fairly representative pool of interested parties. DOE should at the very least proceed with notice and comment rulemaking, so that all interested parties can

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[29] See Joint States Attorneys General Regarding Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 2, 2023), https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0438.
[30] *Id.*

comment on the new standards. The additional comment period will allow DOE to reevaluate the benefits and burdens of its rules under the factors listed in 42 U.S.C. § 6296(o)(2)(B)(i).

Moreover, this direct final rule shows that such procedure should be used sparingly and cautiously. Direct final rulemaking allows the Secretary alone to weigh incredibly important economic decisions without public input, allowing agencies to not be accountable to anyone. Typical notice and comment rulemaking "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). It also "allows all stakeholders in a regulatory decision to be heard before a decision is made and ensures that the agency responds to relevant comments." Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 Alb. L. Rev. 79, 86 (2009). That does not describe DOE's energy efficiency standards for residential clothes washers.

The notice and comment process—as opposed to direct final rulemaking—is designed to ensure some level of political accountability for internal agency decisions that would otherwise be hidden. *Id.* at 86–87. It also "provides a record" to facilitate judicial review under the Administrative Procedure Act (APA). *Id.* Allowing affected parties to participate may also improve the perceived legitimacy of the decisionmaking process. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980) (describing the benefits to private parties and the government of notice and comment rulemaking). Transparency between the Secretary, DOE, manufacturers, States, and consumers is paramount and sadly lacking with the direct final rule.

These concerns about direct final rulemaking are not a new phenomenon. It is considered that such rulemaking should only be employed "where an agency believe that [a] rule will be noncontroversial and adverse comments will not be received." Kolber, 72 Alb. L. Rev. at 88 (quoting Administrative Conference of the United States, Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,110 (Aug. 18, 1995)). Historically though, agencies have missed the mark with their predictions about whether a rule will be "noncontroversial" and whether "adverse comments" will be submitted. *Id.* at 80, 104. One of the largest agencies in the United States, the Food and Drug Administration (FDA), has an atrocious track record regarding challenges to its promulgation of direct final rules. The FDA has withdrawn forty percent of rules since 1997 for which it attempted to use direct final rulemaking. *Id.* at 82. DOE's direct final rule on residential clothes washers would likely face the same fate as those FDA rules if the adverse comments on the proposed rule are any indication.

Not only do agencies poorly determine when to employ direct final rulemaking, this procedure also faces legal risk. For one, the procedure is not mentioned in the APA. *See* 5 U.S.C. §§ 551–59, 701–06. Not only is in not provided in the APA, the hurried nature of direct final rules "does not comport well with the additional demands associated with the continued availability of substantive judicial review." Lars Noah, *Doubts about Direct Final Rulemaking*, 51 Admin. L. Rev. 401, 403 (1999). Therefore, such rules "may reduce the efficiency of agency rulemaking, can cause confusion about the state of the currently effective law, and erode[] public confidence in the rulemaking process." Kolber, 72 Alb. L. Rev. at 80.

Here, NAA and NHMC raised legitimate concerns regarding costs to consumers and purchasers, appliance manufacturers stressed that the proposed rule would create supply-chain issues that will harm consumers and manufacturers alike, and many of the States undersigned here have raised legal arguments that question the lawfulness of the direct final rule. DOE should

reevaluate these issues, and going forward with the proposed rule instead of the direct final rule would allow the agency to consider information it lacked in its adoption of the joint statement. *See Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978) ("[P]ublic participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions,").

VI. A Return to Formal Rulemaking

The States also call on DOE to return to formal rulemaking. Such formal procedures are appropriate when the subject matter is scientifically complex, or when the economic impact will significantly affect industries and consumers. *See* Admin. Conference of the U.S., Recommendation 76-3, Procedures in Addition to Notice and Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654 (1976). That describes the energy efficiency standards for residential clothes washers. Here, however, DOE not only failed to employ formal rulemaking, it did not even engage in the informal notice and comment process. The adversarial process and open debate are cornerstones of democracy, and courts have required agencies to provide rulemaking procedures for safeguarding those inalienable American principles. *E.g.*, *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

Furthermore, without formal rulemaking, evaluating an agency's decisionmaking procedures, as well as the weight given to certain comments, studies, and notes, becomes rather difficult. "While an agency in informal [notice and comment] rulemaking 'must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning.'" Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 Ohio St. L.J. 237, 269 (2014) (quoting Gary S. Lawson, *Reviving Formal Rulemaking: Openness and Accountability for Obamacare* (Heritage Found, Backgrounder No. 2585, 2011)). Comments used in the informal rulemaking process do little to guarantee that an agency seriously considers rules that impact certain parties. With formal rulemaking, however, there is a live hearing with the opportunity for cross-examination. Any rule flowing from a live hearing must be "based on evidence presented there," and the agency "must respond" to "party's proposed findings." *Id.* Having a transparent process, such as formal rulemaking, is paramount in increasing trust in our institutions and agencies. DOE should have—and still can—use formal rulemaking if it wants to prescribe new energy standards for residential clothes washers.

While a return to formal rulemaking is the most prudent course, at a minimum, DOE should employ the informal notice and comment rulemaking process in setting new energy efficiency standards for residential clothes washers. The direct final rulemaking process used by DOE excluded the signatory States, consumers, and manufacturers from participating in the rulemaking process which violates 42 U.S.C. § 6295(p)(4)(A). To foster transparency and instill trust in our agencies, DOE should rescind its direct final rule. "The American people deserve a regulatory system that works for them, not against them." Executive Order No. 12866: Regulatory Planning and Review 58 Fed. Reg. 51,735 (Sept. 20, 1993).

VII. Conclusion

This direct final rule will impact the lives of nearly all Americans. Given the widespread impact of the rule, DOE should afford the public a chance to comment on a regulation that will reach its way into homes and meaningfully consider that feedback. As of right now, the

implementation of these new energy efficiency standards for residential clothes washers does not give the people that opportunity. Florida and the undersigned States request that DOE seriously reevaluate its direct final rule in light of this comment.

Sincerely,

Ashley Moody
Florida Attorney General

Steve Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General

Chris Carr
Georgia Attorney General

Raúl Labrador
Idaho Attorney General

Todd Rokita
Indiana Attorney General

Brenna Bird
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Kris Kobach
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STATE OF TENNESSEE

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May 6, 2024

SUBMITTED ELECTRONICALLY VIA REGULATIONS.GOV

Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, DC 20585

RE: ***Energy Conservation Program: Standards for Refrigerators, Refrigerator-Freezers, and Freezers, No. EERE-2017-BT-STD-0003***

Dear Secretary Granholm:

Tennessee and the undersigned states write regarding the Department of Energy's ("DOE") recently released direct final rule regulating refrigerators, refrigerator-freezers, and freezers.

I. Introduction

DOE's direct final rule regarding regulations on refrigerators, refrigerator-freezers, and freezers, over-regulates American kitchens. Many manufacturers disputed DOE's initial rule. After months of arm-twisting by DOE and advocacy

groups, manufacturers relented, and appliance manufacturers and advocacy organizations submitted a new proposal**.** Most disconcerting is the lack of consideration for the average consumer, who undoubtedly will be most affected by appliance price hikes due to the new regulations.

II. Background

DOE proposed new energy conservation standards for refrigerators, refrigerator-freezers, and freezers on February 27, 2023. 88 Fed. Reg. 12,452. DOE received dozens of comments, both in favor[1] and against[2] the new regulations.

After months of impasse, advocacy organizations and home appliance manufacturers sent a joint statement to DOE (the "joint statement").[3] DOE adopted the joint statement and proceeded directly as a direct final rule. 10 CFR Part 430, (EERE-2017-BT-STD-0003) RIN 1904-AF56 (Jan. 17, 2024).

III. Authority

The Energy Policy and Conservation Act grants DOE the power to regulate refrigerators and freezers for energy conservation. *See* 42 U.S.C. 6292(a)(1); 42 U.S.C. 6295. However, these regulations are not limitless. *See* 42 U.S.C. 6295(o). DOE must consider the economic burden levied upon consumers and manufacturers. *Id*. at (o)(3)(A)-(B); *see also id*. at (o)(2). Finally, DOE may issue a direct final rule regarding regulations if a joint statement is submitted by interested persons that are fairly representative of the relevant points of view and satisfies the standards of 42 U.S.C. 6295(o). *See* 42 U.S.C. 6295(p)(4).

IV. Relevant Points of View from the Joint Statement

A. The Appliance Companies

The Association of Home Appliance Manufacturers ("AHAM") is perhaps one the most important parties to this regulation outside the average consumer. AHAM represents multiple appliance companies including GE Appliances, Viking Range, Whirlpool, Samsung, and LG Electronics, among others. AHAM represents the vast

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[1] *See* Comment from Advocacy Groups Earth Justice, American Lung Association, Utah Clean Energy, Health Care Without Harm, Coastal Conservation League, *et al*., (April 28, 2023) (*Declaring their support for the proposed rule and its necessity due to climate change and climate pollution.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0076

[2] *See* Comment from Sub-Zero regarding Energy Standards for Refrigerators and Freezers (April 28, 2023) (*Expressing grave concerns with impact on consumers and manufacturers*.) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0077; Comment from Several States (April 28, 2023). (*States expressing concerns with reliance on social costs of carbon, federalism and commerce clause implications, as well as impact on low-income households.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0068; Comment from GE regarding Energy Standards for Refrigerators and Freezers, (April 28, 2023) (*Manufacturer stating Doe's failure to evaluate supply chain demands and production volume*.) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0075; Comment from NAA regarding Consumer Costs (April 27, 2023) (*Homebuilders' stating the significant costs that'll be passed to consumers.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0061

[3] Comment from Joint Stakeholder Proposal on Recommended Energy Conservation Standards for Residential Refrigerator/Freezers (Oct. 9, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0105

majority of refrigerator, refrigerator-freezer, and freezer manufacturers. Many of the groups represented by AHAM in the joint statement lodged complaints prior to the release of the joint statement.

Many of those complaints are not addressed in the joint statement nor by DOE's direct final rule. For example, GE alleged DOE failed to take into consideration a supply chain analysis and the availability of required components at the production volumes necessary for the market, which is significant because nearly 12 million fridges are sold in the United States every year.[4] An analysis of the relevant economic hardship on consumers is also largely lacking.[5] AHAM's comment fervently expresses DOE's failure to evaluate economic impacts, citing a Bellomy Research Study, which, in sum, states households at or near the poverty line prefer to pay less money upfront and more in energy bills over a ten-year period.[6] AHAM also noted that households who cannot afford a new refrigerator would instead choose to repair their old one.[7] Sub-Zero, another manufacturer, had further concerns:

> "Since Federal efficiency regulation began, refrigeration products have undergone four rounds of Efficiency Standards, which has led to the current products on the market using only one-quarter of the energy their predecessors did in 1975. . . however, it now must be emphasized that there are significant limitations to further energy regulation if products are to remain reliable, affordable and designed for enabling consumers to enjoy the same level of performance. . . Every new Standards Rulemaking [*sic*] requires significant effort and cost both by industry and the Government. DOE even recognizes that several recent regulations have increased the net cost of new appliances to a sizeable percentage of users. . . when is enough, enough? It is important to recognize that many products have little or no remaining energy savings possible at reasonable cost and without affecting their utility and reliability. This is particularly true of the Built-In products. . . [which] compromise only 1.3% of total U.S. refrigerator and freezer shipments. . . Further Standards will pose a significant. . . burden on manufacturers."[8]

The joint statement, and most poignantly, the direct final rule, fails to address these concerns further. Moreover, it does little to assuage any fears of economic impact on low-income households. Consumers will bear the burden of the DOE's coercion efforts against manufacturers.

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[4] Comment from GE regarding Energy Standards for Refrigerators and Freezers, Pg. 2 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0075

[5] *See* Comment from AHAM regarding Energy Standards for Refrigerators and Freezers, Pg. 10-12 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0069

[6] *Id.*

[7] *Id.*

[8] Comment from Sub-Zero regarding Energy Standards for Refrigerators and Freezers, Pg. 1-2 April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0077

B. The Advocacy Groups

Several advocacy groups also joined the joint statement, including Alliance for Water Efficiency, Earth Justice, Northwest Energy Efficiency Alliance, Natural Resources Defense Council, and National Consumer Law Center.

The Natural Resources Defense Council ("NRDC") seems particularly tuned in to Climate Change and Equity & Justice. NRDC looks to cooperate with women-led groups in local areas to help make more energy-efficient homes. NRDC's mission is not only a pursuit of greener efficient energy use, but to lower the cost of energy for those from low-income households.[9] Yet, NRDC does not discuss the upfront costs of these programs to those from low-income households.[10] It also seems that NRDC does not run tests of its own to determine the efficiency and economic viability of refrigerators or freezers.

Earth Justice is "the premier nonprofit public interest environmental law organization. We wield the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change."[11] Yet, again, Earth Justice is not comprised of scientists or economists checking DOE's data, has no insight into expenses for consumers, and is not a producer, manufacturer, or seller of household appliances. It advocates for environmental policy divorced from the realities facing consumers.

The Alliance for Water Efficiency, however well-intentioned, does not seem to have expertise in anything dealing with the proposed rules. Perhaps Alliance for Water Efficiency is concerned with freezer and fridge water dispensation. Still, the States have not seen anything to determine the Alliance for Water Efficiency's relevant experience one way or the other.[12]

The National Consumer Law Center seems to specialize in a myriad of issues, from Criminal Justice to Climate Change to Equity & Racial Justice.[13] Yet, once again, it does not seem to have any means of evaluating refrigeration items, nor does it seem to take into account the upfront cost of more efficient appliances to low-income households.

Northwest Energy Efficiency Alliance is perhaps the closest organization to anything demonstrating a specialty in energy efficiency related to refrigeration regulation. It mobilizes experts, reads data, and has experience implementing codes

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[9] NRDC, Mission Statement, Overview, and Climate Change, (last visited May 1, 2024). Available at https://www.nrdc.org/issues/climate-change#overview

[10] NRDC, Climate Change and Renewable Energy Overview, (last visited May 1, 2024). Available at https://www.nrdc.org/issues/renewable-energy#overview

[11] Earth Justice, About Earth Justice, (last visited May 1, 2024). Available at https://earthjustice.org/about

[12] Alliance for Water Efficiency, About the Alliance and Mission Statement, (last visited May 1, 2024. Available at https://www.allianceforwaterefficiency.org/about

[13] National Consumer Law Center, Explore NCLC's Key Issues, (last visited May 1, 2024). Available at https://www.nclc.org/our-work/#TabListing-tabPanel-9

and procedures with communities.[14] Nonetheless, here again, it is unclear what insights it has on initial consumer and manufacturer costs.

Many of these advocacy groups sent in comments prior to the joint statement endorsing the original NOPR standards for fridges and freezers. They did not raise any concerns related to consumer pricing and appliance utility or functionality, discuss market implications, limits of conservation utility or anything akin. Many of these groups not only seem to be irrelevant parties but, even if relevant, appear not to consider any of the concerns raised during the NOPR. These groups are not industry leaders when it comes to household appliances, costs, or consumers.

Again, many of these political advocacy organizations failed to mention any issues with any of the standards for fridges and freezers promulgated by DOE.[15] Noticeably, another group raised concerns regarding low-income households and mass-appliance purchases, the National Apartment Association and National Multifamily Housing Council ("NAA"), which did not join the joint statement. As NAA articulated, "the price increase from regulation will be passed to consumers."[16]

As mentioned, many manufacturers lodged complaints and acknowledge the burdensome costs to consumers and manufacturers alike, yet promptly changed their tune. A phenomenon known as administrative arm-twisting has become increasingly common. *See generally* Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. Rev. 873 (1998). Informal ad-hoc bargaining is a serious concern, and federal agencies have continually engaged in such practices. *Id*. at 876. Agency arm-twisting has no judicial oversight, *id*. at 867, and "potentially arrogates undelegated power". *Id*. at 930. Bargaining for rules and regulations between certain parties and an agency invites standardless and unaccountable actions by agencies. *Id*. at 936. AHAM, and many other groups, released multiple comments critiquing DOE's regulations. Since the start, political advocacy groups like Earth Justice supported DOE's endeavors; months later, AHAM had an about-face and submitted a joint statement with the political advocacy groups. Arm-twisting isn't always noticeable, *id*. at 941, but when many manufacturers raise serious concerns only to suddenly all fall in line, it raises questions about the agency's methods of achieving its politically motivated ends.

C. Key Groups Not in the Joint Statement

Some other groups also provided comments regarding refrigerators and freezers but did not appear in the joint statement. While these groups are not

[14] Northwest Energy Efficiency Alliance, Codes and Standards Program, (last visited May 1, 2024). Available at https://neea.org/our-work/codes-standards

[15] *See* Comment from Advocacy Groups (Earth Justice, American Lung Association, Utah Clean Energy, Health Care Without Harm, Coastal Conservation League, *et al*.) agreeing with DOE's initial rule. Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0076

[16] Comment from NAA regarding Consumer Costs (April 27, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0061

manufacturing specialists, they do have a keen focus on the consumers who will bear the brunt of DOE's burdensome regulations.

The National Apartment Association and National Multifamily Housing Council ("NAA") represent home builders, renters, and property owners and are acutely aware of the economic implications upon consumers and low-income households. NAA purchases large quantities of appliances, including refrigerators and freezers.[17] NAA's analysis clearly shows that much of the increased costs will be passed onto consumers and renters.[18] Again, as stated previously in comment letters, many refrigerator and freezer appliances only have a lifespan of 14 to 15 years, and many consumers and renters do not reside in any abode for more than a few years. As such, acute upfront costs will have a significant impact on consumers, more so than DOE anticipates in its rule.

Finally, while Massachusetts, New York, and California support the changes DOE seeks to implement, numerous States expressed at least some worry about consumer welfare.[19] 42 U.S.C. § 6295(p)(4) requires a joint statement from "interested persons that are fairly representative of the relevant points of view," and it must include "representatives of . . . States." Properly construed, this text would require the concurrence of States across the ideological spectrum in order for DOE to proceed with a direct final rule. Here, DOE does not come close to meeting that standard. Some States strongly favor DOE's proposals, other States strongly oppose them. DOE cannot simply cherry pick the States that it is politically aligned with and thereby circumvent the ordinary rulemaking process. Doing so would fail the "fairly representative" requirement of § 6295(p)(4). Moreover, 42 U.S.C. 6295(p)(4)(C) states the Secretary shall withdraw the direct final rule if one or more adverse comments are received and the Secretary determines that the adverse comment provides a reasonable basis for withdrawing the rule. We believe that this letter serves as the basis for such a reasonable determination. Particularly, this letter outlines the burden outweighing the benefit of the rule as is contemplated in 42 U.S.C 6313(a)(6)(B)(ii), and 42 U.S.C 6313(a)(6)(B) is explicitly mentioned as a reason for withdrawing a rule in 42 U.S.C. 6295(p)(4)(C)(ii).

Many States raised numerous concerns with DOE's proposed rule and now find similar issues here. Those include concerns with reliance on social costs of carbon, federalism, commerce clause implications, and effects on low-income households.[20] States have a direct interest in protecting consumers, especially low-income consumers, from the increased costs associated with the implementation of this rule. States are also directly affected because many state entities are direct purchasers of these appliances and thus will directly bear the burden of increased

[17] *Id.*
[18] *Id.*
[19] Comment from Several States (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0068
[20] *Id.*

costs for appliances. DOE's direct final rule also preempts state procurement standards with less stringent energy-efficiency rules in contradiction of federal law. See 42 U.S.C. § 6297(e). States often have a better finger on the pulse of their own citizens than those in Washington. As the States previously noted, the final rule does not address whether households, especially low-income households, will be able to absorb those upfront costs while waiting for future benefits.[21] And, while manufacturers eventually joined the joint statement, there were key comments initially stating DOE's failure to grapple with costs associated with low-income households and upfronts.[22]

The States believe more voices ought to be heard prior to making this a direct final rule and deeper consideration given to the explicit upfront cost of purchases of fridge/freezer appliances. This is especially true given that States are often forced to grapple with the unprecedented use of "the whole of government" approach to implementing regulatory obligations on American consumers and manufacturers. After all, this single DOE direct final rule is merely part of a broad smattering of rulemaking targeting nearly every household appliance. States are justifiably concerned that "the future of American household appliances will include fewer choices, [and] higher prices" for every consumer.[23]

V. Direct Final Rulemaking

DOE has the power to regulate refrigerators and freezers for energy conservation. *See* 42 U.S.C. 6292(a)(1); 42 U.S.C. 6295. But, DOE must consider the economic impact of its regulations on consumers and manufacturers. *Id*. at (o)(3)(A)-(B); *see also id*. at (o)(2). DOE may issue a direct final rule regarding regulations if a joint statement is submitted by interested persons, which are fairly representative of the relevant points of view and satisfy the standards of 42 U.S.C. 6295(o). *See* 42 U.S.C. 6295(p)(4).

DOE ought to reevaluate the benefits and burdens of its rules under the factors listed in 42 U.S.C. 6295(o)(2)(B)(i)(I), (II), and (IV). The Secretary alone weighs incredibly important economic decisions, and without further notice and comment rulemaking, agencies are not accountable to anyone. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating that notice-and-comment rulemaking "reintroduc[es] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978). "Informal notice-and-comment rulemaking provides several interrelated benefits. It allows all stakeholders in a regulatory decision to be heard before a decision is made and

[21] *Id*. at 5-6.
[22] *See* Comment from AHAM regarding Energy Standards for Refrigerators and Freezers, Pg. 10-12 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0069
[23] Jonathan Skrmetti, Here's our plan on household appliances, (Jun. 8, 2023). Available at https://www.foxnews.com/opinion/heres-plan-sink-bidens-household-appliances

ensures that the agency responds to relevant comments." Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 Alb. L. Rev. 79, 86 (2009). The notice and comment process further ensures some level of political accountability by giving visibility to internal agency deliberations that would otherwise be hidden. *Id.* at 86-87. It also provides a record to make sure that the rule and the agency comply with the APA. *Id*. Allowing affected parties to participate may improve the perceived legitimacy of the decision-making process. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Transparency between the Secretary, DOE, manufacturers, and consumers is paramount.

Problems with direct final rulemaking further compound when one evaluates its track record and meaning. "The Administrative Conference recommended. . . direct final rulemaking where an agency *believes* that [a] rule will be noncontroversial and adverse comments will not be received." Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 Alb. L. Rev. 79, 88 (2009). First, it is unclear what an agency considers "noncontroversial and significant adverse comment" to mean. Second, agencies can rarely tell when a rule will be controversial, and blatantly seem not to care. *Id*. 106-07. The FDA, one of the largest agencies in the United States, has an atrocious track record regarding challenges to its promulgation of direct final rules. *Id*. at 82 (finding the FDA used direct final rulemaking for controversial rules and the agency withdrew forty percent of rules for which it attempted to use direct final rulemaking due to opposition). Other problems with direct final rulemaking may be succinctly stated as contrary to the APA, direct final rulemaking is not provided for by the APA, and causes confusion among interested parties. *See Id*. at 108-09; Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)); *see also* Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State. 94 Va. L. Rev. 889, 903, n. 37 ("Direct final rulemaking does not comport with the APA's requirements or with meaningful judicial review").

Direct final rulemaking "may reduce the efficiency of agency rulemaking, can cause confusion about the state of the currently effective law, and erodes public confidence in the rulemaking process." Kolber, 72 Alb. L. Rev. at 80 (2009). Pressing again into NOPR allows DOE to consider information it lacked in its adaptation of the joint statement. *See Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978) ("public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."). Here, NAA raised legitimate issues regarding costs to consumers and purchasers. Additionally, several manufacturers represented efficiency may be limited and further attempts in pursuit of efficiency may impede appliance utility. Likewise, manufacturers stated there could be supply chain issues, as well as further costs to consumers. DOE should reevaluate these issues.

Finally, the circumstances that instigated DOE's direct final rulemaking ability should be taken into consideration. The Energy Policy and Conservation Act was enacted during an international crisis and was instrumental in the regulation of gas, oil, and other energy-pertinent items during the Cold War. *See* 42 U.S.C. § 6201. DOE's direct final rulemaking power arose pursuant to the Energy Independence and Security Act, which was passed after Operation Surge. *See* George W. Bush, The President's Address to the Nation, Office of the Press Secretary (January 10, 2007). The Energy Independence and Security Act's goal was to provide for less reliance on oil from the Middle East, protect consumers, and bring the United States closer to energy independence. Pub. L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007). DOE's powers for direct final rulemaking should be used with caution. Direct final rulemaking ought to be used with caution and care and only when regulations are truly noncontroversial.

VI. A Return to Formal Rulemaking

Lastly, DOE should return to formal rulemaking. Formal procedures, and procedures in general, are certainly appropriate when an issue is scientifically complex or when the economic impact is significant. *See* Admin. Conference of the U.S., Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654 (1976).

"Because agencies 'dress up each of their guestimates about the facts . . . in enormous, multi-layered costumes of technocratic rationality' and 'courts cannot . . . be partners to technocrats in a realm in which only technocrats speak the language' mechanisms such as cross-examination that help illuminate agency sleights-of-hand should receive careful consideration." John F. Manning & Matthew C. Stephenson, Legislation and Regulation 776-77 (2010) (quoting Martin Shapiro, Who Guards the Guardians? Judicial Control of Administration 151-52 (1988); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1507 (1983)). The adversarial process and open debate are cornerstones of democracy and courts have required agencies to provide formal rulemaking procedures for safeguarding those inalienable American principles. *See Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

Furthermore, without formal rulemaking, evaluating an agency's decision-making procedures, as well as the weight given to certain comments, studies, and notes, becomes increasingly difficult. "While an agency in informal rulemaking must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning" Aaron L. Nielson, In Defense of Formal Rulemaking, 75 Ohio St. L.J. 237, 269 (2014) (internal quotation omitted). Merely issuing a comment does little to guarantee an agency takes account of rules that

seriously affect certain pertinent parties. *See Id.* On occasion, the "thrust of some rules . . . are preordained . . . especially . . . when an agency institutes a rulemaking proceeding to satisfy demands for a particular outcome from the White House or political appointees at the top of the agency . . . rulemaking does not work well when policy disputes are disguised as issues of scientific judgment." *Id.* (internal quotations omitted). As such, having a transparent process, especially one that provides for formal rulemaking, which includes live hearings, the ability to cross-examine witnesses, and establishing a clear record for decision-making, is paramount in increasing trust in our institutions and agencies.

"The American people deserve a regulatory system that works for them, not against them" 58 FR 51735, Preamble. (Executive Order 12,866). Agencies ought to find incentives to promote their desired goals, not twist industry's arm. *Id*. at (3). Perhaps, rather than pursuing a direct final rule pursuant to some arm-twisting, DOE could proceed down formal rulemaking paths scribed in the APA, thereby fomenting transparency and trust in our agencies and faith in our democracy.

VII. Conclusion

DOE has a hard job balancing the interests of so many Americans. No one contests otherwise. But the undersigned States request that DOE seriously reevaluate its direct final rule in light of this comment. DOE's regulations will cause Americans distaste toward government agencies, leaving many with increased expenses in their kitchens.

Sincerely,

Jonathan Skrmetti
Tennessee Attorney General & Reporter

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Nebraska Attorney General

Ashley Moody
Florida Attorney General

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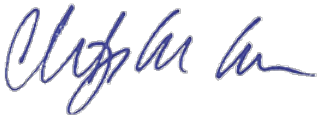

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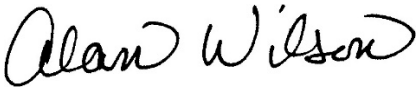

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