June 20, 2016

Mr. John Cymbalsky
U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy, Building Technologies Program
Mailstop EE–5B
1000 Independence Avenue SW
Washington, DC 20585–0121

AHRI/AHAM JOINT COMMENTS ON PETITIONS TO AMEND THE ERROR CORRECTION RULE

Re: Petitions to Amend the Rule Establishing Procedures for Requests for Correction of Errors in Rules submitted by: 1) Hussman; 2) Lennox International Inc.; and 3) the Appliance Standards Awareness Project, Earthjustice, and National Resources Defense Council. Docket No. EERE-2016-BT-PET-0016

Dear Mr. Cymbalsky:

AHRI and AHAM[1] appreciate the opportunity to comment upon the Petitions to Amend the Rule Establishing Procedures for Requests for Correction of Errors in Rules submitted

[1] The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) is the trade association representing manufacturers of heating, cooling, water heating, and commercial refrigeration equipment. More than 300 members strong, AHRI is an internationally recognized advocate for the industry and develops standards for and certifies the performance of many of the products manufactured by our members. In North America, the annual output of the HVACR industry is worth more than $20 billion. In the United States alone, our members employ approximately 130,000 people and support some 800,000 dealers, contractors, and technicians.

The Association of Home Appliance Manufacturers (AHAM) represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's more than 150 members employ tens of thousands of people in the U.S. and produce more than 95% of the household appliances shipped for sale within the U.S. The factory shipment value of these products is more than $30 billion annually. The

by: 1) Hussman; 2) Lennox International Inc. (Lennox); and 3) the Appliance Standards Awareness Project, Earthjustice, and National Resources Defense Council (Advocates). These petitions and associated comments were submitted in response to the Department of Energy (DOE) final rule regarding the Establishment of Procedures for Requests for Correction of Errors in Rules (Final Rule or Error Correction Rule) and companion Notice of Opportunity to Submit a Petition to Amend the Rule Establishing Procedures for Requests for Correction of Errors in Rules, both appearing in the *Federal Register* on May 5, 2016.

Hussman and Lennox Petitions

AHRI and AHAM agree with the concerns identified in the Hussman petition and believe that they would be addressed by DOE's adoption of the amendments set forth in AHRI's Petition to Amend the Error Correction Rule submitted to the Department on June 6, 2016. Similarly, AHRI's Petition would address the issues raised in the Lennox Petition, which also supports the key goals of correct final rules and regulatory transparency.

On two particular issues, we wish to provide further clarification. First, we agree with Lennox that the simple, effective and transparent process of a 60 day pre-publication period in which Petitions for Reconsiderations are allowed, both for energy efficiency standards and test procedures is the best method to meet all stakeholder goals. However, should DOE determine not to adopt such a process, DOE should make the amendments to the error correction process set forth in AHRI's Petition to Amend the Final Rule. AHRI and AHAM also support the concerns of both Hussman and Lennox regarding DOE's current definition of a "party" able to bring an error correction request. We believe that the key factor is whether an actual error occurred. The source of its identification should be irrelevant. The Lennox petition sets forth in greater detail the strong reasons in support of the elimination of the requirement for, and evaluation of, a party's "substantive" comment. As such AHRI and AHAM support Lennox's amendment to eliminate the definition of "party" and petition DOE to make such an amendment to the error correction rule.

Advocates Petition

AHRI and AHAM disagree with, and do not support, the request in the Advocates' Petition that the error correction process be prohibited if it would result in DOE's failure to meet an EPCA deadline, or "prolong such a failure where a deadline has already passed."[2] First, this request is directly contradictory to DOE's stated purpose in establishing the error correction process:

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home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

[2] Advocates' Petition page 2.

> If the Department made an error in the regulatory text of a rule, and that error had the effect of increasing a standard beyond what the Department had concluded—after reasoned deliberations—was appropriate, the error-correction process set forth in this document would permit the Department to correct it. For section 325(o) to prohibit that result would undermine the multiple goals of EPCA. Were an erroneous standard to remain in place, its economic costs might be higher than what DOE had concluded could be justified, at that time, by the resulting energy savings or the standard might be technologically infeasible.

81 Fed. Reg. 26,998, 27,003 (May 5, 2016).

The Advocates' request would mean that it is better for a rule to be timely and outside of DOE's statutory authority than correct and appropriately justified by a) the explanations given for the rulemaking and by b) the relevant rulemaking record. At a minimum it sets up a conflict between two Congressional requirements – that rules be economically justified and technologically feasible, on the one hand, versus the need for certain specified rules to meet statutory set timeframes, on the other hand. Given the anti-backsliding provision at 42 U.S.C. 6295(o)(1), manufacturers, consumers and DOE must live with a flawed rule if to correct it would result in a lower efficiency requirement. The Advocates' position is simply that it is preferable to be timely rather than correct, even though the rule would likely be no more than 60 days "late" in any case.[3]

Since DOE would be balancing two statutory objectives here (and because DOE is right to indicate that the preference should be to produce a rule that accurately analyzes all of the substantive factors for setting energy efficiency standards and accompanying test procedures), DOE would be well within its authority to weight accuracy over rule timing. Missing timing deadlines is remediable only by court orders to expeditiously issue delayed rulemakings. By contrast, rulemaking errors by DOE can result in substantive judicial relief that is far more capable of having adverse impacts on DOE's program of regulation. Clearly, DOE's goal should be to produce legally defensible efficiency and test procedure standards consistent with EPCA on as timely as a basis as is possible. But it would be backwards for DOE to rush to put out incorrect standards or standards based on flawed rationales or deficient records, by prioritizing meeting rulemaking deadlines over the goal

[3] To support its petition, the Advocates cite district court authority for the proposition that OMB review should be regarded as superfluous (and thus, seemingly by analogy, some error-correction action by DOE should similarly be regarded as unnecessary). DOE should not adopt this position of legal policy. DOE is part of the Executive Branch and review by components of the Executive Office of the President such as OMB should be regarded as part of the constitutional design of the federal government. Courts wrongly concluding that OMB review should be disregarded or viewed as having less importance are not acting consistent with law. For instance, the *American Long Ass'n v. Browner* decision asserted that "[r]eview by the Office of Budget Management (OMB) serves no congressional purpose and is wholly discretionary." 884 F. Supp. 345, 349 (D. Ariz. 1994). This ignores the Constitution and that Congress should be taken to be acting consistent with the Constitution in all of the laws that it passes (consistent with basic constitutional avoidance canons of construction). And consistent with the Constitution, a delegation by Congress to the Department of Energy is not a delegation to DOE alone but a delegation to a Department that is subject to presidential control.

of accuracy and clear and well-grounded explication — aspects of good rulemaking practice that give both regulators and regulated parties alike the certainty they need.

Indeed, the Advocates themselves implicitly recognize this in their citation of *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1974). The Advocates' own parenthetical for this case notes that statutory deadlines can give way when the problem before the agency has "need for further study." Advocates' Pet. at 2. Correcting errors is obviously subsumed within the larger category of "further study." Additionally, *Train* notes that giving "meaningful consideration to the technical intricacies of promising control mechanisms may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date." *Id.* at 712. ECPA is an energy savings and not pollution control statute but *Train*'s point that overweighting the timing factor of rules can lead to outcomes that are counterproductive to the relevant agency's statutory mission or, in common-sense terms, that haste can make waste is a sound one.

In addition, the situation where DOE is pressing to complete a rulemaking prior to a deadline is precisely the type of circumstance that leads to error in the rulemaking. This is a failing common to all. If things are rushed to satisfy a deadline, errors are made. The Advocates' request would illogically exclude one of the situations that has the higher likelihood of an error occurring in the final rule.[4]

From a practical perspective, the Advocates' petition to amend is also flawed because stakeholders negatively impacted by an error in a final rule would not simply acquiesce, but instead would engage in a legal challenge to the rule that the error correction process is intended to avoid. If such an error exists, it would result in a court invalidation of the rule years after the original "issuance" date, and result in a much longer delay than allowing DOE the opportunity to fix the rule through the error correction process, raising the prospect that even if the Advocates' aims are taken as a given, what they are asking for could well turn counterproductive to their own stated goals. For example, in the Walk-In Cooler and Freezer litigation that was the subject of AHRI's Petition for Reconsideration, the legal challenge and resulting settlement means that the revised standards that were remanded will not be effective until years after the originally proposed standards. Surely an error correction process that avoided the time and expense of litigation for all parties and that would have been resolved in a much shorter timeframe for resolution is vastly preferable *and saves more energy* than a legal challenge of last resort.

Furthermore, given that the statutory requirements in EPCA have multiple year lead-times, DOE would be well aware, given the protections of the error correction rule, of the time required to meet those deadlines, and we have every confidence that DOE could manage those requirements accordingly. The Advocates' request would also create a perverse incentive for DOE – it could avoid having to address any errors by simply

[4] The Advocates' suggestion to post the rule as transmitted to OMB does nothing to remedy this, as there would be no certainty as to what the final rule would be until OMB completes its review, and if an error was identified, DOE's "correct the error or meet the statutory deadline" dilemma would remain unresolved.

delaying the rulemaking to a point where the error correction timeframe is unworkable, and thus deny stakeholders the benefits of the rule.

The Advocates' second request that the error correction process be "time limited" is subject to the same fatal flaws. DOE cannot foresee the nature of every possible error, and given the past complexity of DOE's analysis on many rules it is entirely feasible that it could take more than 30 days to resolve an error correction request. Again, the Advocates elevate to highest priority a relatively miniscule amount of time, compared to how long a standard may be in effect, preferring such an outcome over ensuring that the standard is actually correct as well as legally defensible on its stated rationale and based appropriately on the evidence of record. A permanently flawed standard is not preferable to a correct standard that takes some additional amount of time to enact.

Regarding the Advocates' discussion of the term "issue" as it is set forth in the Final Rule, AHRI and AHAM agree that the issuance of the Final Rule occurs upon publication in the *Federal Register*, and not upon posting of the pre-publication version. However, the analysis set forth by the Advocates supports AHRI's Petition to Amend the Final Rule to clarify that the record of the rulemaking does not close upon the posting of the pre-publication version for precisely the same reason – the rule has not yet been issued – and the record of the rulemaking cannot be "closed" until that point in time.

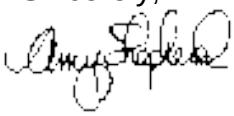
Conclusion

AHRI and AHAM believe that many of the main purposes articulated in the Final Rule are best met by allowing for a 60-day pre-publication period in which Petitions for Reconsideration, as provided for under the Administrative Procedure Act (APA), will be considered and publicly addressed by DOE. This would offer a simple mechanism that both a) avoids triggering the anti-backsliding provision as DOE now reads it (*i.e.*, that this provision is not triggered by changes made to energy efficiency standards that predate *Federal Register* publication); and b) allows for the full range of reconsideration petitions that the APA contemplates, without artificially restricting that range to allow the correction only of errors defined extremely narrowly as typographical errors, mathematical errors, cross-reference errors or even as DOE putting something in a final rule that it did not intend to include. AHRI's proposal for how DOE should proceed here would also treat DOE rulemakings consistently across test procedures and other agency rulemakings, and allow DOE to better act in harmony with the existing body of law addressing reconsideration petitions under the APA.

Alternatively, if DOE does not accept AHRI's Petition to Amend the Rule as described above, AHRI and AHAM state their support for the amendments set out in the Hussman and Lennox Petitions to Amend and as a concomitant of that petitions DOE to make the amendments to the Final Rule as stated in AHRI's, Hussman, and Lennox's Petitions to Amend.

AHRI and AHAM appreciate the opportunity to provide these comments. If you have any questions regarding this submission, please do not hesitate to contact us.

Sincerely,



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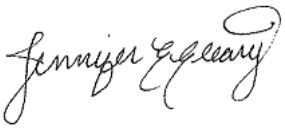

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