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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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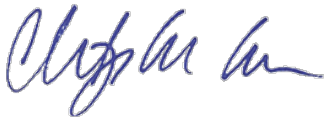

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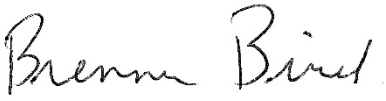

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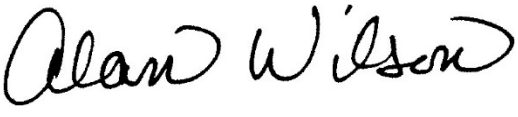

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