



November 23, 2015

Via regulations.gov

The Honorable Ernest Moniz, Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: Comments on Proposed Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines; 80 Fed. Reg. 50461 (August 19, 2015).

Dear Secretary Moniz,

The U.S. Small Business Administration’s Office of Advocacy (Advocacy) submits the following comments in response to the Department of Energy’s (DOE) August 19, 2015, notice of proposed rulemaking on “Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines.” Small manufacturers are concerned that DOE’s proposal for beverage vending machines (BVM) are neither technologically nor economically feasible within the three year period prescribed by DOE. Advocacy recommends that DOE either adopt a lower Trial Standard Level (TSL) or use its discretion to adopt a regulatory alternative to the proposed standard that is achievable for small manufacturers.

About the Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule’s publication in the Federal Register, the agency’s response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Advocacy's Comments

There are four types of BVM equipment classes covered by this rulemaking. DOE proposes raising the energy efficiency standards for Class A and Class B product classes, and establishing new standards for Combination A and Combination B product classes. In its Initial Regulatory Flexibility Act Analysis (IRFA), DOE identifies 8 BVM manufacturers. Out of those eight, five manufacturers qualify as small, with four being directly affected by the proposal as small domestic manufacturers.¹ These manufacturers account for approximately 15-20 percent of all BVM equipment shipments. Small manufacturers generally focus on Combination A and Combination B product classes, and account for nearly 74 percent Combination A and Combination B sales.² Combination A and Combination B product classes account for approximately 18 percent of the BVM market.³

DOE Should Reassess their Economic Impact Analyses

The RFA requires agencies to provide an IRFA so that the agency can know with certainty how the regulation will affect small businesses. Advocacy is concerned that DOE's estimation of small business impacts is understated and could be improved by additional data on small entities. In its RFA analysis, DOE estimated that the average conversion cost to a small manufacturer would be \$217,000.⁴ This would mean that the average small manufacturer would have to reinvest approximately 40 percent of its operating profit per year over the conversion period to comply with the proposed rule.⁵ Advocacy's conversations with small businesses on their projected compliance costs yielded estimates exceeding \$1,000,000.⁶ This means a small business would have to reinvest approximately 184 percent of its operating profit per year over the conversion period to comply with the proposed rule. Further, despite the massive cost, it is doubtful that small manufacturers will be able to reach the efficiency levels specified in the rule.

Advocacy is further concerned with how DOE calculated the economic impact of the proposed rule on Combination A and Combination B product classes. These classes are of particular interest because a sizeable majority of these products are manufactured by small entities. Since these products were not included in the pre-existing BVM rules, DOE notes that it initially did not have sufficient market data to construct a baseline. Rather, DOE set the baseline for these product classes as the least efficient combination of technologies analyzed in the engineering analysis.⁷ As a result, DOE could possibly be overstating benefits at higher TSLs because the baseline represents products that are less efficient than actual products on the market and may not represent a reasonable combination of technologies. Moreover, these analytical choices could affect the robustness of DOE's cost estimates. For example, small manufacturers have told Advocacy that products on the market are already very close to the maximum achievable level of efficiency. If market products are that efficient, DOE may be understating the increase in costs to

¹ Proposed Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines; 80 *Fed. Reg.* 54062 at 50530 (August 19, 2015).

² *Id.*

³ *Id.*

⁴ *Id.* at 50531.

⁵ *Id.*

⁶ *E.g.*, some of the compliance costs mentioned by small businesses include upgrades to the production equipment, engineering costs to redesign, and putting alternative refrigerants into production.

⁷ *Supra*, note 1 at 54082.

manufacturers as the incremental costs to meeting the proposed efficiency levels could be prohibitively high due to the standard being so difficult to meet technologically. However, if products on the market are much less efficient than the maximum achievable efficiency level, costs could be understated, as manufacturers employ less costly technological solutions. In other words, DOE may be skewing the baseline for these products to be lower than they might actually be by virtue of constructing the baseline based on the most inefficient technology choices available. Advocacy recommends that DOE consider analyzing and discussing an alternative baseline more directly based on actual combination vending machine data to verify the robustness of its potential benefit and cost estimates.

DOE Should Adopt a Standard that is Achievable for Small Manufacturers

Advocacy has spoken with several small manufacturers about the proposed standards, and they believe the proposed standards are neither technologically nor economically feasible within the three year period prescribed by DOE. In addition to the proposed rule at issue, the Environmental Protection Agency's Significant New Alternatives Policy (SNAP) will require that manufacturers use new refrigerants like carbon dioxide or propane to achieve the proposed BVM efficiency levels.⁸ To ensure that the cost implications of complying with the SNAP rule are considered in DOE's analysis, Advocacy recommends that sensitivity be done. If DOE does not have representative data in the baseline to support doing a sensitivity, DOE should make that clear.

Small manufacturers maintain that carbon dioxide is about 15 percent less energy efficient than current refrigerants and therefore not a technologically feasible alternative.⁹ Small manufacturers believe that they could achieve *current* energy efficiency levels with propane, but do not believe they can meet the proposed new standard even with utilizing additional design options. Manufacturers are already implementing many of the design options that DOE references in the proposed rule.¹⁰ By setting an energy efficiency standard at a level that's beyond the technological reach of small manufacturers in the industry, small manufacturers believe the proposed rule will result in them having to exit the market entirely, or become export-only producers.

Under the Energy Policy and Conservation Act (EPCA), the Secretary may not prescribe an amended or new standard if the standard is likely to result in the unavailability in the United States of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities and volumes that are substantially the same as those generally available in the United States.¹¹ The inability of some product types or classes to meet the new criteria does not factor into the Secretary's determination of whether to prescribe a new standard.¹² Advocacy believes that no manufacturer, large or small, could meet the proposed standard with existing technology.

Adopting energy efficiency standards that impede the ability of small manufacturers to remain in the market is harmful from both an economic and energy efficiency standpoint. Small businesses

⁸ 80 *Fed. Reg.* 42870 (July 20, 2015)(codified at 40 C.F.R. Part 82).

⁹ Advocacy has verified this assumption through a contact at the only known manufacturer of carbon dioxide compressors.

¹⁰ *Supra*, note 1 at 50485.

¹¹ 42 U.S.C. § 6295(o)(4).

¹² *Id.*

make up 99.7 percent of U.S. employers, and 63 percent of net new private-sector jobs. Maintaining a small business presence in any industry is important not only for the economy, but also promotes competition which leads to development, innovation and growth.


DOE Must Explain Its Rationale for Rejecting Significant Alternatives

The RFA requires that agencies analyze significant alternatives to proposed rules that will reduce the disproportionate impacts of their rules on small entities. Significant alternatives under the RFA must be alternatives that both “accomplish the stated objectives of applicable statutes and which minimize significant economic impacts on small entities.”¹³ In its IRFA, DOE cites to its Regulatory Impact Assessment (RIA) for a discussion of policy alternatives, but the policy alternatives are not specific to minimizing impacts on small businesses.¹⁴ DOE also points to other TSLs considered for product classes in the proposed rule as significant alternatives, then maintains that EPCA does not allow it to choose any of the less burdensome standards.¹⁵ A less burdensome standard that would be consistent with the statutory mandate is a significant alternative within the meaning of that term in the RFA. Advocacy believes that DOE can and should consider less burdensome alternatives that meet the requirements of the RFA and would still accomplish the energy goals of this regulation.

Conclusion

Small manufacturers of BVMs will not be able to comply with DOE’s proposed energy efficiency standard for BVMs, and finalizing this rule as proposed will cause them significant economic harm. DOE should consider standards that are technologically and economically feasible and will achieve significant energy savings without imposing serious harm on small business manufacturing. Please do not hesitate to contact me or my staff at 202-205-7013 should you have any questions.

Sincerely,



Claudia Rayford Rodgers
Acting Chief Counsel



Rosalyn C. Steward
Assistant Chief Counsel

cc: The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs,
Office of Management & Budget

¹³ 5 U.S.C. § 603(c).

¹⁴ *Supra*, note 1.

¹⁵ *Id.* at 50532.