



November 13, 2014

Via Electronic Mail

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

Re: Energy Conservation Program; Proposed Energy Efficiency Standards for Automatic Commercial Ice Makers; 79 Fed. Reg. 14846 (March 17, 2014).

Dear Secretary Moniz,

On behalf of the Office of Advocacy, I am writing to bring to your attention the concerns of small manufacturers regarding the Department of Energy’s (DOE) Appliance and Equipment Standards program. Advocacy supports the Department’s efforts to fulfill the mandate of the Energy Policy Conservation Act (EPCA) to reduce national energy consumption through the development of energy efficiency standards; however, Advocacy has concerns about the cumulative and disproportionate impact that DOE’s standards may be having on small manufacturers. DOE has recently proposed and adopted several energy efficiency regulations that will have significant economic impacts on small business manufacturers, according to DOE’s own analyses.¹ Most recently, small manufacturers have expressed concerns regarding DOE’s proposed efficiency standards for automatic commercial ice makers.² Advocacy recommends that DOE use its discretion to adopt an alternative to the proposed standard that is achievable for small manufacturers. Additionally, Advocacy recommends that DOE give similar consideration to small manufacturers in all future energy efficiency rulemakings.

¹ See Energy Conservation Program: Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment, 79 Fed. Reg. 58947 (September 30, 2014); Energy Conservation Program: Energy Conservation Standards for General Service Fluorescent Lamps and Incandescent Reflector Lamps, 79 Fed. Reg. 24067 (April 29, 2014); Energy Efficiency Standards for Certain Commercial and Industrial Electric Motors, 78 Fed. Reg. 73589 (December 6, 2013); Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment, 78 Fed. Reg. 55889 (September 11, 2013) (all containing RFA analyses showing disproportionate and significant costs for small manufacturers).

² See e.g. comments of Hoshizaki America and Ice-O-Matic, www.regulations.gov, RIN 1904-AC39.

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

Small Manufacturers Play an Important Role in Energy Efficiency Policy

Given the steadily rising cost of energy, manufacturers should have ample incentive to create innovative products to meet growing consumer demand for energy efficient products. Indeed, in many cases, large manufacturers are already meeting or exceeding DOE's proposed energy efficiency standards under EPCA. Small manufacturers can provide efficient and affordable choices to consumers that would not otherwise be in the market for high-end replacement products. They also often manufacture niche products that serve consumers with unique needs. It is important that DOE's energy efficiency policy recognizes the value that small manufacturers bring to the table. 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.

Current DOE Policy May Significantly Disadvantage Small Manufacturers

EPCA requires DOE to adopt efficiency standards that achieve significant energy savings to the extent they are economically justified. DOE's current interpretation of this mandate often greatly disadvantages small manufacturers, as evidenced by DOE's own RFA analyses. EPCA provides DOE with a rebuttable presumption that standards are economically justified when the consumer payback period is less than or equal to three years³; however, in making this calculation, DOE averages costs across small and large firms. When DOE simply sets its standards at the level where average costs meet EPCA's rebuttable presumption, DOE often imposes extremely disproportionate costs on small entities. This is especially problematic when small manufacturers only represent a small portion of the overall market for a given product, and their compliance with a burdensome standard contributes relatively insignificant energy savings.

³ EPCA provides for a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of equipment that meets the standard level is less than three times the value of the first-year energy savings resulting from the standard, as calculated under the applicable DOE test procedure, *see* 42 U.S.C. 6295(o)(2)(B)(iii).

The Proposed Standard for Commercial Ice Makers Will Harm Small Manufacturers

DOE's proposed energy efficiency standards for automatic commercial ice makers will have a disproportionately negative impact on small business manufacturers. Small manufacturers have commented that the proposed standards for automatic commercial ice-makers are not technologically achievable or economically feasible within the three year period prescribed by DOE.⁴ Yet, their compliance with the rule will not result in significant energy savings. The majority of firms manufacturing automatic commercial ice makers are small businesses, but they only represent 5 percent of the total market, and thus will contribute only 5 percent of the overall energy savings achieved.⁵ According to DOE's own data, the adopting proposed trial standard level (TSL3) will reduce the industry net present value (INPV) of these small businesses manufacturing by \$4.0 million, which represents a 78.6 percent reduction in INPV for small business manufacturing in the industry overall.⁶ In contrast, the proposal will result in only a 23.8 percent reduction in INPV for large manufacturers.⁷

DOE Should Adopt an Alternative Standard to Reduce Small Manufacturing Impacts

DOE should exercise its discretion to adopt a standard for commercial automatic ice-makers that still achieves significant energy savings without imposing costs that will cause small businesses to exit the market. While DOE can achieve the highest level of energy savings without exceeding a three year consumer payback period by adopting the proposed standard, DOE has clearly demonstrated that the costs of achieving those gains will be disproportionately felt by small manufacturers.⁸ DOE is expressly permitted to balance energy savings with costs to manufacturers under EPCA, and may adopt a less burdensome standard as long it achieves significant energy savings. For example, adopting TSL1 instead of TSL3 would reduce costs for small businesses by 41 percent and will still result in a 4 percent increase in national energy savings over the current baseline.⁹ Advocacy believes that DOE has ample basis in the record to make the determination that adopting TSL1 will achieves significant energy savings and is economically justified.

DOE Must to Explain Its Rationale for Rejecting Significant Alternatives

The RFA requires that agencies analyze significant alternatives to proposed rules that will reduce disproportionate impacts of their rules on small entities. In its Initial Regulatory Flexibility Act Analysis (IRFA), DOE cites to TSL1 and TSL2 as significant alternatives.¹⁰ If DOE declines to adopt either of these less burdensome standards, the RFA requires DOE to explain its legal and policy reasons that decision in its Final Regulatory Flexibility Act Analysis (FRFA).¹¹ However, if DOE believes it lacks the legal authority to adopt TSL1 or TSL2, it cannot also claim to have analyzed any significant alternatives under the RFA. Significant alternatives under the RFA

⁴ See *supra* note 2.

⁵ Proposed Energy Efficiency Standards for Automatic Commercial Ice Makers, 79 *Fed. Reg.* 14846 at 14942 (March 17, 2014).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* 14927, 14943.

¹⁰ *Id.* 14944.

¹¹ 5 U.S.C § 604(a)(5).

must be alternatives that both “accomplish the stated objectives of applicable statutes and which minimize significant economic impacts on small entities”.¹² If DOE lacks statutory authority to adopt TSL1 or TSL2, then DOE must publish a supplemental IRFA which analyzes significant alternatives. Significant alternatives might include a delayed compliance date for small manufacturers, or other flexibilities DOE believes are permitted under EPCA. If DOE believes is unable to adopt any small business flexibilities under EPCA, it should state the basis for that conclusion clearly in its FRFA.

Conclusion

Small business compliance with DOE’s proposed energy efficiency standard for automatic commercial ice makers will yield very little in the way of energy savings, but will cause significant economic harm. DOE should adopt a standard that is feasible not only for large manufacturers, but also for small manufacturers. EPCA gives DOE ample latitude to adopt standards that will achieve significant energy savings without inflicting serious harm on small business manufacturing. In setting its EPCA policy going forward, DOE should consider the cumulative costs and benefits of imposing burdensome standards that reduce small business participation in the manufacturing sector. Please do not hesitate to contact me or my staff at 202-205-6533 should you have any questions.

Sincerely,



Winslow L. Sargeant, Ph.D.
Chief Counsel



Jamie Belcore Saloom
Assistant Chief Counsel

cc: The Honorable Dr. Howard Shelanski
Administrator, Office of Information and Regulatory Affairs

¹² 5 U.S.C. § 603(c).