

October 7, 2011

BY ELECTRONIC MAIL

Dr. Steven Chu  
U.S. Department of Energy  
1000 Independence Ave., SW  
Washington, DC 20585

**Re: Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment (July 22, 2011; 76 Fed. Reg. 43941)<sup>1</sup>**

Dear Dr. Chu,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration submits these comments to the Department of Energy, Office of Energy Efficiency and Renewable Energy (DOE) on the proposed rule entitled Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment. Advocacy believes that DOE has underestimated the costs of the proposed rule and that the Initial Regulatory Flexibility Analysis (IRFA) is therefore insufficient.

**The Office of Advocacy**

Advocacy was established pursuant to 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), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>1</sup> *Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment*, 76 Fed. Reg. 43941, 43948 (July 22, 2011).

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

<sup>5</sup> Id.

## Background

Pursuant to the Energy Policy and Conservation Act of 1975, as amended, (the Act) DOE may establish energy efficiency standards for direct heating equipment.<sup>6</sup> In April 2010, DOE published a final rule defining “vented gas hearth heater”, which is a class of direct heating equipment, and setting efficiency standards for these products.<sup>7</sup> This rule did not include vented gas log sets in the definition of “vented gas hearth heaters.” On July 22, 2011, DOE published the proposed rule seeking to change the definition of “vented hearth heater” to include vented gas log sets and to simultaneously provide an exclusion from that definition for decorative vented gas log sets.

The proposed rule defines vented hearth heaters as “vented appliances which simulate a solid fuel fireplace and is designed to furnish warm air, with or without duct connections, to the space in which it is installed.”<sup>8</sup> The proposed rule provides an exclusion for decorative products and establishes decorative products as those that are (1) sold without a thermostat and with provisions voiding the warranty if the product is used with a thermostat; (2) identified in marketing materials as not for use as a heating appliance; and (3) if sold after July 1, 2014, not equipped with a standing gas pilot light.<sup>9</sup> Vented gas fireplaces must also be certified to the ANSI Standard Z21.50 and vented gas log sets must be certified to the ANSI Standard Z21.60.<sup>10</sup> Gas log sets that do not qualify for the exclusion would be required to meet the energy conservation standards set forth by DOE.

## Decorative Products Are Not Direct Heating Equipment

The Act gives DOE authority to regulate direct heating equipment.<sup>11</sup> Historically, this has included equipment which served the primary purpose of heating a space by warming and circulating air into the space. Such equipment includes wall furnaces, floor furnaces, and room heaters. Gas log sets do not fit into this category. Gas log sets are designed primarily to provide ambiance or decoration. These sets are not intended to heat a space. DOE acknowledged this in the “Frequently Asked Questions: Vented Hearth Heater Definition” published on April 16, 2010 “DOE recognizes that by the nature of gas log set construction, they do not provide the same heating function as gas fireplaces...DOE believes that gas log set products are intended to be installed for decorative purposes.”<sup>12</sup>

In this proposed rule DOE acknowledges the decorative nature of gas log sets while simultaneously regulating them as heaters. DOE is requiring that vented gas log sets be identified as “not for use as a heating appliance” in order to qualify for the exclusion but purports authority to regulate these products because they are heaters. It is unclear to

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<sup>6</sup> 42 U.S.C. §6291 et seq.

<sup>7</sup> 75 Fed. Reg. 20112 (April 16, 2010).

<sup>8</sup> 76 Fed. Reg. at 43945.

<sup>9</sup> Id. at 43953.

<sup>10</sup> Id.

<sup>11</sup> 42 U.S.C. §6291 et seq.

<sup>12</sup> *Frequently Asked Questions: Vented Hearth Heater Definition* at <http://www.hpba.org/government-affairs/major-projects/Frequently-Asked-Questions-Question-on-gas-log.pdf> (hereinafter “Frequently Asked Questions”).

both Advocacy and small business what justification DOE is relying upon to regulate these products. By requiring manufacturers to label these products as “not for use as heating equipment”, DOE is acknowledging that these products are not intended for use as heaters. If these products are not heaters it is unclear why they are being included in the definition of “vented hearth heaters”.

### **This Rulemaking Violates the Statutorily Required Process for Proposing a New Energy Standard for Vented Gas Log Sets**

The Energy Policy Conservation Act sets forth criteria upon which new or amended standards must be based. The Act requires DOE to establish that the standard is both technologically feasible and economically justified.<sup>13</sup> Advocacy and small businesses in the industry are concerned that DOE has failed to follow the requirements for proposing a new standard for vented gas log sets by simply broadening the scope of the definition of “vented hearth heater” to include these products.

DOE asserts that this proposed rulemaking seeks to amend the definition of “vented hearth heater” to clarify the scope of the current exclusion for products that are decorative in nature.<sup>14</sup> In fact, this rule adds vented gas log products to the definition of vented hearth heaters thereby imposing upon manufacturers of these products an efficiency standard with which they were not previously required to comply. It is clear that vented gas log sets had not previously been included in the definition of “vented hearth heater” and therefore not subject to an efficiency standard. DOE stated as much as recently as last year. In the “Frequently Asked Questions: Vented Hearth Heater Definition” in response to the question “Does the definition of vented hearth heater cover vented gas log sets” DOE’s response is “no.”<sup>15</sup>

DOE cannot simply redefine the definition of vented hearth heater to include vented gas log sets and avoid the statutorily required process and procedure to impose a standard on a class of products. Under the proposed rule, manufacturers of vented gas log sets must either (1) comply with the energy standard requirements for vented hearth heaters or (2) comply with the four proposed criteria for establishing themselves as decorative products excluded from the energy standard requirements for vented hearth heaters. In either case, DOE is imposing a standard upon manufacturers of gas log sets. If DOE elects to impose an efficiency standard upon vented gas log sets it must do so in accordance with the statutorily proscribed process and applying the statutorily proscribed criteria.

### **The Rule Is Not Technologically Feasible**

The Act requires DOE to establish that the new standard is technologically feasible and prohibits prescribing a new standard if there is no applicable test for determining

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<sup>13</sup> Id. at §6291(o).

<sup>14</sup> 76 Fed. Reg. at 43941.

<sup>15</sup> *Frequently Asked Questions* at <http://www.hpba.org/government-affairs/major-projects/Frequently-Asked-Questions-Question-on-gas-log.pdf>.

compliance with the standard.<sup>16</sup> The current procedure for testing direct heating equipment includes protocols for measuring convective heat transfer. Gas log sets use radiative, not convective heat transfer. The current test procedure could not be applied to gas log sets. In fact, there is no protocol for testing the heating efficiency of gas log sets precisely because they are not heaters. Thus, a test of gas log sets' heating efficiency is not feasible.

### **The Rule Is Not Economically Justifiable**

DOE has not established that the proposed rule is economically justified.<sup>17</sup> In promulgating this rule, DOE has relied upon incorrect information about the industry and gas log products which has led them to mistakenly conclude that this rule will be economically justifiable and lead to energy savings.

#### **1. DOE Underestimates the Number of Manufacturers in the Industry**

In its IRFA, DOE identified ten small manufactures of vented gas hearth products and seven manufacturers of vented gas log sets. Advocacy has spoken to small businesses that estimate that there are actually between twenty and fifty manufacturers of decorative gas fireplaces and gas log sets with many manufacturers producing both products. Almost all of these manufacturers are small businesses. As a result of significantly underestimating the number of manufacturers that will be subject to the rule, the IRFA has also significantly underestimated the cost to the industry of complying with the rule. These costs are discussed below.

#### **2. Certification of Vented Gas Log Sets Is Impractical**

The proposed rule requires that vented gas log sets be certified to a Z21.60 standard in order to be excluded from the definition of vented hearth heaters. DOE states that certification to this standard would not impose new conversion costs on small businesses because all such products are already certified to this standard.<sup>18</sup> DOE's assertion is incorrect.

There is no universal certification standard for vented gas log sets. Several localities have no certification requirement at all and small businesses have indicated that a majority of log sets are sold without any certification. One small business owner that Advocacy spoke with indicated that none of the log sets he manufactured were certified due to the substantial cost of certification. Several other small businesses have indicated that exclusively manufacturing uncertified sets is not uncommon and that uncertified sets make up a major portion of most of the small manufacturers' products.

Relatively few log sets are certified at the Z21.60 standard and those that are, are predominately sold in Maryland, Virginia and along the eastern seaboard. Small

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<sup>16</sup> Id.

<sup>17</sup> 42 U.S.C. §6295(o).

<sup>18</sup> 76 Fed. Reg. at 43948.

businesses that Advocacy has spoken to estimate that no more than 20% of industry sales are of log sets certified to Z21.60. In fact, many small manufacturers custom design these products to fit into existing fireplaces. Because a custom design could not meet the Z21.60 standard, custom designed products would be completely eliminated if this rule were enacted.

Moreover, small businesses have highlighted the case of match lit log sets which could not be certified under the Z21.60 standard because this standard does not provide for match lit sets. Match lit sets make up a substantial number of log sets sold. One public commenter has indicated that over 70% of its sales were of these sets. These sets would be completely eliminated from the market if the Z21.60 certification standard were to be applied. The proposed rule essentially eliminates the market for match lit log sets and custom log sets and nowhere in the IRFA does DOE enumerate the costs to small businesses of these losses or even mention the fact that these sets would be regulated out of existence under the rule since they cannot be certified to the Z21.60 standard.

Because DOE assumes that all vented gas log sets are already certified to the Z21.60 standard it assumes that manufacturers will incur no costs from complying with the requirement to certify log sets to such a standard. The costs of complying with a Z21.60 standard, however, would be considerable. Each certification standard requires the log set to have certain design features. As stated above, the majority of log sets are not certified to the Z21.60 standard and do not currently meet the specifications of the Z21.60 standard. Thus, the majority of the log sets currently sold would have to be redesigned at considerable costs in order to comply with a Z21.60 certification standard. Small businesses have indicated that a unit designed to the Z21.60 standard can be 40 to 50 percent more expensive to build. This information belies DOE's determination that meeting the proposed certification standard would not impose additional costs on small entities.

Small businesses have also indicated that there is no energy saving benefit to a certification standard. Unlike gas fireplaces, the standard to which the gas log set is certified does not represent whether it is intended to function as decorative or as a heater. This is because no gas log set is ever manufactured to be used as a heater. The certification requirement results in no energy savings and considerable compliance costs. This requirement is in direct violation of DOE's stated statutory mandate against imposing rules that have little energy conservation value<sup>19</sup> as well as Executive Order 13563's mandate that a regulation be based upon a reasoned determination that its benefits justify its costs.<sup>20</sup>

### 3. Elimination of Standing Gas Pilot Lights Will Be Costly

Small businesses are concerned about the requirement that gas log sets and decorative fireplaces be manufactured without standing gas pilot lights in order to qualify for the

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<sup>19</sup> Id. at 43943.

<sup>20</sup> Executive Order 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (January 18, 2011).

exclusion. DOE projects significant energy savings as a result of this requirement. DOE appears to have based this requirement on several erroneous conclusions.

DOE projects annual energy savings of 2.67 million btu per unit for decorative fireplaces and 9.53 million btu per unit for gas log sets based upon individual gas log sets using approximately 1,250 btu/hour. This is based upon an average lifetime of 15 years for a unit.<sup>21</sup> DOE obtained this information solely from information they found on the websites of four manufacturers.<sup>22</sup>

Small businesses have indicated that these measures are overestimated by at least 50%. Small businesses indicate that gas log sets actually use approximately five hundred to six hundred btu/hour. Small businesses have also indicated that the typical lifespan for a gas log set is approximately 5-7 years, not 15 years as DOE assumed in calculating the total energy savings. DOE also assumed that 75% of pilot lights on decorative gas fireplaces and gas log sets were left on year round.<sup>23</sup> In fact, many small businesses have indicated that a minority of pilot lights are left ignited year round and the industry has been actively encouraging customers to extinguish their pilot lights during the off season. Thus, DOE has significantly overestimated the benefits of this rule.

Despite DOE's assertion to the contrary, the costs of eliminating standing gas pilot lights would be considerable.<sup>24</sup> Based on a 1997 study of the industry, DOE assumed that only 20 percent of gas log sets used standing gas pilot lights. Small businesses have indicated that in fact, the majority of gas log sets have standing gas pilot lights. One industry association with which Advocacy has spoken indicates that the majority of gas log sets would have to be redesigned and recertified if manufacturers are required to eliminate standing pilot lights.

Moreover, the alternative to standing gas pilot lights - electronic ignition systems - would add significantly to the cost of log sets. Small businesses have stated that the costs of logs sets would double for most log sets and possibly triple for larger or higher end sets. This price increase has the potential to wipe out the market for log sets, increasing the average price for a set from approximately \$400 to over \$1,000 and reducing sales and profit margins of small businesses. Consumers may simply choose not to purchase sets at all at such high prices.

## **Conclusion**

Small businesses have stated that together the requirements proposed would have a devastating effect on the industry and likely lead to many small business closures. Advocacy encourages DOE to reach out to small businesses in the industry to obtain more accurate information before deciding whether to pursue this regulation.

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<sup>21</sup> Id.

<sup>22</sup> 76 Fed Reg. at 43946. Advocacy's review of these four manufacturers' websites indicates that three of the four are actually retailers not manufacturers and one does not make gas log sets.

<sup>23</sup> Id.

<sup>24</sup> Id. at 43946, 43949.

Please contact me or Assistant Chief Counsel Kia Dennis at 202-205-6936 should you have any questions.

Best regards,

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Cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs