

Nos. 14-2147, 14-2159 & 14-2334 (consol.)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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ZERO ZONE, INC., et al.,

Petitioners,

v.

U.S. DEPARTMENT OF ENERGY et al.,

Respondents.  
\_\_\_\_\_

On Petition for Review of  
Final Rules of the Department of Energy  
\_\_\_\_\_

**BRIEF FOR RESPONDENTS**  
\_\_\_\_\_

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## INTRODUCTION

Petitioners in these consolidated cases, Zero Zone, Inc., the Air-Conditioning, Heating, and Refrigeration Institute (AHRI), and the North American Association of Food Equipment Manufacturers (NAFEM), challenge two final rules promulgated by the U.S. Department of Energy (DOE)—one establishing revised energy conservation standards for commercial refrigeration equipment, and the other clarifying certain aspects of the test procedure used for measuring compliance with those standards.

Through the Energy Policy and Conservation Act (EPCA), Congress charged DOE with prescribing energy conservation standards and test procedures for various equipment and appliances, including commercial refrigeration equipment, in the interest of energy conservation. 42 U.S.C. § 6295(a)(2). By statute, such standards must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. *Id.* § 6295(o)(2)(A). A standard is economically justified if its benefits exceed its burdens, taking into account, to the extent practicable, such considerations as the standard's economic impact on consumers and manufacturers of the covered equipment, its effect on equipment utility, and the energy savings likely to be achieved through the standard. *Id.* § 6295(o)(2)(B)(i).

Petitioners' characterization of the energy conservation standards rulemaking as a cursory process in which DOE ignored important considerations is entirely unfounded. DOE engaged extensively with industry and other stakeholders throughout this complex and highly technical rulemaking, holding two public meetings and comment periods before even publishing a notice of proposed rulemaking (NPR). *See* 79 Fed. Reg. 17,726, 17,733 (Mar. 28, 2014). DOE then held a third public meeting and received further comments before issuing the final rule. *See id.* Based in large part on stakeholder comments, DOE ultimately selected less stringent standards than those it initially proposed.

The record amply supports DOE's conclusion that the selected standards are designed to achieve the maximum improvement in energy efficiency that DOE determined is technologically feasible and economically justified, as EPCA requires. Petitioners nevertheless seek to dissect the minutia of DOE's analysis, endeavoring to cast doubt on the agency's expert judgments without suggesting what alternative judgments would, in petitioners' view, have been reasonable. These arguments disregard the deferential review prescribed by the Administrative Procedure Act (APA) and improperly ask the Court to "substitute [petitioners'] technical judgment for that of the Agency." *New York v. EPA*, 716 F.2d 440, 444 (7th Cir. 1983). There is likewise no merit to petitioners' attack on the test procedure rule,

which DOE promulgated with careful attention to the rule's technical requirements and stakeholder concerns.

### **STATEMENT OF JURISDICTION**

Petitioners' jurisdictional statements are complete and correct.

### **STATEMENT OF THE ISSUES**

Whether the final rules adopting energy conservation standards for commercial refrigeration equipment and clarifying the test procedure for measuring energy use in such equipment are arbitrary, capricious, or otherwise contrary to law.

### **STATEMENT OF THE CASE**

#### **A. Statutory and Regulatory Background**

1. The Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, §§ 321-339, 89 Stat. 871, 917-932 (1975) (codified as amended at 42 U.S.C. §§ 6201-6422), was enacted to promote national energy conservation, including by improving the energy efficiency of certain types of equipment and appliances. Congress initially enacted a voluntary, market-based program for achieving that goal, *see id.* § 325, 89 Stat. 923-24, but it soon amended EPCA to require mandatory energy conservation standards, *see* National Energy Conservation Policy Act, Pub. L. No. 95-619, § 422, 92 Stat. 3206, 3259 (1978). Congress has continued to amend EPCA over time to revise those standards in order to advance the goal of energy conservation.

As amended, EPCA prescribes energy conservation standards for commercial refrigeration equipment, 42 U.S.C. § 6313(c)(2)-(4), and it directs DOE periodically to review and revise those standards and to implement new standards as appropriate, *id.* §§ 6295(m), 6313(c)(4)-(6), 6316(e)(1). Any standard established by DOE must be designed to achieve the maximum improvement in energy efficiency that DOE determines is both technologically feasible and economically justified, *id.* §§ 6295(o)(2)(A), 6316(e)(1), and it must result in significant energy savings, *id.* § 6295(o)(3)(B). A proposed standard is economically justified if the benefits of the standard exceed its burdens. *Id.* § 6295(o)(2)(B)(i). In determining whether a standard is economically justified, DOE is directed to consider, to the extent practicable, such factors as the standard's economic impact on manufacturers and consumers of the equipment; the total projected energy savings likely to result directly from the standard; any expected decrease in equipment utility or performance; and the impact of any lessening of competition that is likely to result; as well as any other factors the Secretary considers relevant. *See id.* § 6295(o)(2)(B)(i)(I)-(VII).

**2.** EPCA also charges DOE with establishing test procedures for measuring the energy use of covered equipment. 42 U.S.C. § 6314. Equipment manufacturers must use these test procedures as the basis for certifying to DOE that their equipment complies with applicable energy

conservation standards. *Id.* §§ 6295(s), 6316(e)(1). For certain equipment, DOE may adopt industry standards for measuring equipment performance as long as those standards meet statutory requirements. *See id.*

§ 6314(a)(6)(A)(i), (E). DOE is directed to amend the test procedures from time to time to ensure that they produce representative results, and, as appropriate, to clarify their meaning and operation. *Id.* § 6314(c)(1).

## **B. The Challenged Rules**

### **1. The energy conservation standards rule**

a. EPCA required DOE to conduct a rulemaking to determine whether to amend the existing energy conservation standards for commercial refrigeration equipment, and, if appropriate, to publish a final rule establishing such standards by January 1, 2013. 42 U.S.C. § 6313(c)(6). The existing, baseline standards for the equipment classes covered by this rulemaking were established by three separate sources: the Energy Policy Act of 2005, Pub. L. No. 109-58, § 136, 119 Stat. 594, 638 (codified at 42 U.S.C. § 6313(c)(2)-(3)); DOE's 2009 final rule establishing energy conservation standards for commercial refrigeration equipment, 74 Fed. Reg. 1092 (Jan. 9, 2009); and the American Energy Manufacturing Technical Corrections Act, Pub. L. No. 112-210, § 4, 126 Stat. 1514, 1516 (2012) (codified as amended at 42 U.S.C. § 6313(c)(4)).

DOE initiated the rulemaking here at issue in 2010 by publishing online and noticing in the Federal Register a sixty-page framework document identifying the relevant issues, analyses, and processes that DOE anticipated using to determine whether and how to amend the baseline energy conservation standards. *See* Framework Doc., No. 2,<sup>1</sup> 75 Fed. Reg. 24,824, 24,825 (May 6, 2010). In that document, DOE explained that it proposed to use the same design-option approach that it used in the previous energy conservation standards rulemaking. *See* Framework Doc., No. 2, at 5.2. Under that approach, DOE identifies a representative model in each equipment class at the baseline level of performance and then incrementally implements more efficient components to measure their effect on equipment cost and efficiency. *See id.*

After holding a public meeting and soliciting comments on the framework document, DOE published its preliminary analysis assessing the technologies available for improving equipment efficiency and the costs and benefits associated with their use. *See* Prelim. Technical Support Document (TSD), No. 30. DOE again noticed a public meeting and invited comment on its analysis. Notice, No. 35; 76 Fed. Reg. 17,573 (Mar. 30, 2011).

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<sup>1</sup> Materials in the administrative record for the energy conservation standards rulemaking are identified by the docket number assigned to each entry, as reflected in the certified index to the administrative record filed with the Court.



DOE published a notice of proposed rulemaking in September 2013, together with a technical support document providing further detail regarding the agency's assumptions and analyses. 78 Fed. Reg. 55,890 (Sept. 11, 2013); NOPR TSD, No. 51. These documents addressed the comments that DOE received at earlier stages of the rulemaking and explained the agency's proposal to adopt the second most stringent of the five trial standard levels under consideration (referred to as TSL 4).<sup>2</sup> After holding another public meeting and receiving further comment, DOE issued a final rule, together with a 700-page technical support document detailing the agency's final assumptions and analyses. 79 Fed. Reg. 17,726 (Mar. 28, 2014); Final TSD, No. 102. Based on comments received during the rulemaking and the agency's own further analysis, the final rule ultimately adopted a less stringent trial standard level (TSL 3) than the one proposed in the notice of proposed rulemaking. 79 Fed. Reg. at 17,814.

**b.** The final rule establishes energy conservation standards for forty-nine classes of commercial refrigeration equipment. 79 Fed. Reg. at 17,727.

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<sup>2</sup> Trial standard levels are groupings of potential energy conservation standards across equipment classes. Each trial standard level includes efficiency levels for each equipment class that correspond to specific packages of technologies and design features that could be developed and built by manufacturers. *See* 79 Fed. Reg. at 17,738. Once these packages are identified, DOE analyzes the benefits and burdens associated with each trial standard level to determine which one meets the statutory criteria.

These classes are defined by performance-related features including geometry (vertical, semivertical, or horizontal), door type (solid, transparent, or open), operating temperature (medium, low, or ice-cream), and condensing-unit configuration (self-contained or remote-condensing). *Id.* at 17,743. The equipment classes used in this rulemaking include the thirty-eight equipment classes identified in the 2009 rulemaking, as well as equipment covered by the Energy Policy Act of 2005. *See* Final TSD, No. 102, at 5-3.

For eight of the equipment classes in the rulemaking here at issue, DOE ultimately determined that no efficiency level above the baseline established by the 2009 rule was economically justified, and it therefore made no changes to the existing standards for those classes. 79 Fed. Reg. at 17,728. For the remaining equipment classes, DOE identified the third-most-stringent of the trial standard levels (TSL 3) as the standard that would achieve the maximum improvement in energy efficiency that the agency determined is both technologically feasible and economically justified. *Id.* at 17,728-30, 17,814. DOE estimated that the revised standards are likely to result in a savings of 2.89 quadrillion British thermal units of energy, or an annualized savings equivalent to 0.5% of total domestic commercial primary energy consumption. *Id.* at 17,728, 17,736-37.

Many of the assumptions and analytical methods underlying the engineering analysis in this rulemaking borrowed heavily from those

reflected in the 2009 final standards rule, although DOE also used new data and revised assumptions as appropriate. Notwithstanding that the 2009 rule required compliance beginning in January 2012—more than a year before the notice of proposed rulemaking for the revised standards now at issue, *see* 74 Fed. Reg. 1092, 1092 (Jan. 9, 2009)—parties commenting on the revised standards proposed by DOE did not identify any significant issues based on their experience with the 2009 rule.

As it had previously, DOE used a design-option engineering analysis in the rulemaking here at issue to evaluate the cost and energy consumption of incrementally more efficient equipment. 79 Fed. Reg. at 17,745; Final TSD, No. 102, at 5-41 to 5-68. Under this approach, DOE calculated the cost to manufacturers of implementing more efficient components, as well as the energy savings that those components would achieve. *See* Final TSD No. 102, at ch. 5; NOPR TSD, No. 51, at ch. 5; Prelim. TSD, No. 30, at ch. 5. DOE's consideration of various design options is a means of gauging the improvement in energy efficiency that is technologically feasible. The resulting energy conservation standards do not compel manufacturers to use any particular components to achieve improved efficiency. This stands in contrast to other contexts in which the use of particular design requirements is specified. *See, e.g.*, 42 U.S.C. § 6295(f)(3) (requirements for boilers); 42 U.S.C. § 6313(f)(1)-(3) (requirements for walk-in coolers and freezers).

In the 2014 rule, DOE used the results of the engineering analysis to assess how the different standards evaluated in the rulemaking would affect consumer and manufacturer economics. For consumers of commercial refrigeration equipment (*i.e.*, businesses that purchase the equipment for use in their stores or restaurants), DOE principally considered the incremental increase in the initial cost of purchasing and installing more efficient equipment, and the expected energy savings over the life of the equipment. 79 Fed. Reg. at 17,764-65. DOE determined that the revised standards will produce a net benefit for consumers of all affected equipment classes, *id.* at 17,728, 17,784, and it concluded that those benefits are likely to be even greater for certain small businesses as a result of their higher average electricity costs, *id.* at 17,790. Taking into account the costs and benefits associated with equipment purchased during the thirty-year analysis period beginning in 2017 (when compliance with the amended standards is required), DOE determined that the standards will produce a net benefit to consumers between \$4.93 and \$11.74 billion, depending on the discount rate used. *See id.* at 17,728, 17,729 tbl. I.3.

For manufacturers of commercial refrigeration equipment, DOE calculated the conversion costs necessary to bring equipment into compliance with the new standards. While DOE determined that manufacturers will be able to make up most of those costs through increased prices (DOE projected

a 4% price increase), the increase likely will not be enough for manufacturers to fully recoup all the profits they would have expected if they continued operating at the baseline standard. *See* 79 Fed. Reg. at 17,795. Based on these calculations, DOE predicted that the industry net present value likely will decrease by \$93.9 to \$165 million (or 3.53 to 6.20%) as a result of the revised standards. *Id.* at 17,795-96 & tbl. V.36. As a percentage of industry net present value, this figure is considerably lower than the one projected for the 2009 rule. *See* 74 Fed. Reg. at 1094 (predicting a 7.29-to-27.35% reduction in industry net present value at the chosen standard level).

After considering the projected energy savings achieved by the rule, together with its economic effect on consumers and manufacturers, DOE concluded that the chosen standard level, TSL 3, would achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. Although the foregoing findings were sufficient to support the agency's conclusion that the revised standards are economically justified, DOE additionally noted the monetary benefits of the reductions in greenhouse gas emissions (specifically, CO<sub>2</sub> and NO<sub>x</sub>) that are projected to result from the use of more efficient equipment purchased during the thirty-year period after the rule takes effect. *See* 79 Fed. Reg. at 17,777-79, 17,804. DOE ultimately rejected the proposed trial standard level (TSL 4) in favor of

the lower TSL 3 after concluding, based in large part on stakeholder comments, that TSL 4 was not economically justified. *Id.* at 17,809.

## **2. The test procedure rule**

On April 21, 2014, DOE issued a final rule revising the test procedure for commercial refrigeration equipment “to clarify certain terms, procedures, and compliance dates” in order “to improve . . . repeatability and remove ambiguity.” 79 Fed. Reg. 22,278 (Apr. 21, 2014). DOE had previously revised the test procedure in 2012. 77 Fed. Reg. 10,292 (Feb. 21, 2012). The 2012 test procedure rulemaking was initiated in tandem with the energy conservation standards rulemaking here at issue, and the revised test procedure became effective on March 22, 2012—well in advance of DOE’s publication of the notice of proposed rulemaking for the energy conservation standards rule. *Id.* at 10,292.

Following the issuance of the 2012 test procedure rule, DOE received a number of questions and comments from interested parties about the test procedure’s application. Some of the comments highlighted conflicting interpretations of the industry standard, incorporated by reference into the 2012 test procedure, for calculating total display area—a measure of equipment size used for certain equipment classes. In October 2013, DOE issued a notice of proposed rulemaking suggesting clarifying amendments to the existing test procedure in order to address these issues. 78 Fed. Reg.

64,296, 64,309-12 (Oct. 28, 2013). With respect to the measurement of total display area, DOE proposed an approach that would have provided a more precise measurement of a unit's visible area but would arguably have marked a departure from current industry practice. *See id.* at 64,310-12.

After commenters raised concerns that the proposed approach would meaningfully change calculations under the revised energy conservation standards, effectively making the standards 10% more stringent, DOE adopted a different approach in the final test procedure rule, published in April 2014, that is “consistent with and clarifies current industry practice and the existing provisions of the DOE test procedure.” 79 Fed. Reg. at 22,301. Based on comments and its own analysis, DOE concluded that the revised approach “should not change the measured energy consumption of covered equipment.” *Id.*

### **SUMMARY OF ARGUMENT**

Petitioners attempt to pick apart myriad aspects of the challenged rulemakings, focusing in particular on the assumptions and analyses underlying DOE's selection of revised energy conservation standards for commercial refrigeration equipment. Petitioners urge that the rulemaking proceeded without the required test procedure in place; that DOE did not properly account for future rulemakings by other agencies that could affect compliance with the amended energy conservation standards; that DOE

made erroneous assumptions in both its economic and engineering analyses; and that DOE failed to comply with requirements to consider less burdensome alternatives for small businesses and to obtain the views of the Department of Justice with respect to the rule's effect on competition. Each of these arguments misses the mark: There *was* a test procedure in place at the time of the standards rulemaking; DOE properly does not premise its rulemakings on speculative future events; the agency's assumptions and analyses were reasonable, adequately explained, and supported by the administrative record; and DOE properly considered the rule's effect on small businesses and competition.

Petitioners' arguments fail to acknowledge the extensive process that DOE undertook in these rulemakings or the agency's extraordinary engagement with stakeholders. DOE provided multiple opportunities for discussion and comment, and, based in large part on stakeholder feedback, it ultimately adopted energy conservation standards less stringent than the ones it initially proposed. The arguments petitioners advance in challenging those standards are conclusory and not supported by the record. Petitioners repeatedly fail to suggest what data the agency should have used, or what a reasonable analysis or result would have looked like. When petitioners themselves cannot identify what action by the agency would have satisfied their notions of reasonableness, their complaints that the rulemaking fell



short of that standard ring particularly hollow. Petitioners in any event fail to show that the alleged defects in the agency's analysis were prejudicial. This Court should reject petitioners' efforts to second-guess the considered judgment of the regulatory agency charged under EPCA with developing these highly technical standards.

### STANDARD OF REVIEW

Judicial review of energy conservation standards promulgated under EPCA proceeds under the familiar, deferential standards established by the APA. 5 U.S.C. § 706(2); *see NRDC v. Herrington*, 768 F.2d 1355, 1369 & n.14 (D.C. Cir. 1985). The APA directs reviewing courts to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under that standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

### ARGUMENT

#### **I. The Timing and Substance of DOE's Clarification of the Test Procedure Were Reasonable and Did Not Affect Compliance with the Energy Conservation Standards.**

Petitioners AHRI and Zero Zone (together AHRI) first contend that DOE ran afoul of the requirement that "[a]ny new or amended energy conservation standard . . . shall include . . . test procedures," 42 U.S.C.

§ 6295(r); *see* AHRI Br. 17, by promulgating clarifications to the test procedure for commercial refrigeration equipment after issuing the 2014 standards rule. There is no merit to the contention that DOE failed to comply with that procedural requirement. DOE initiated a test procedure rulemaking in tandem with the energy conservation standards rulemaking here at issue, and it promulgated a final test procedure rule in 2012—well in advance of the notice of proposed rulemaking for the standards rule. DOE made clear that the 2012 test procedure rule is “to be used in conjunction with the amended standards promulgated in th[e] energy conservation standards final rule.” 79 Fed. Reg. 17,726, 17,735 (Mar. 28, 2014).

DOE reasonably determined that clarifying amendments to the 2012 rule did not establish a new test procedure and would not affect compliance with the energy conservation standards. As relevant to this case, the 2014 test procedure rule clarified the previously required measurement of “total display area,” which is used in calculating the applicable performance standard for certain types of equipment. *See* 79 Fed. Reg. 22,278, 22,299 (Apr. 21, 2014). In that rulemaking, DOE sought to clarify how the industry definition, which defines total display area as “the sum of the projected

area(s) for *visible* products,” applies to the breadth of equipment available on the market. *Id.* (emphasis added).<sup>3</sup>

Total display area is calculated by summing the surface area of each display face of the refrigerated case. Two of the relevant dimensions are plainly defined in industry materials to include only those areas through which displayed product is visible. 79 Fed. Reg. at 22,299. Thus, “areas of the product zone that cannot be viewed as part of a direct projection through a transparent area are not to be included in any measurement” of those dimensions. *Id.* The proper measurement of a third dimension used in calculating total display area (referred to as *L*) is not similarly demonstrated in the literature, *see id.*, and DOE sought to resolve conflicting interpretations, *see* 78 Fed. Reg. 64,296, 64,309-12 (Oct. 28, 2013).

In its notice of proposed rulemaking, DOE proposed to clarify that *L* should be measured as the total length of the transparent area through which product can be seen, excluding any opaque portions, including those that overhang the product zone. 78 Fed. Reg. at 64,310-12. Commenters expressed concern that DOE’s proposed approach would decrease total display area as compared to the internal wall-to-wall measurements being

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<sup>3</sup> As AHRI notes, Congress defined total display area for these purposes by reference to the AHRI Standard 1200 definition. 42 U.S.C. § 6313(c)(1)(D); *see* 10 C.F.R. § 431.63(c)(2).

used by many manufacturers and would effectively increase the required energy efficiency of equipment by about 10%. *See* 79 Fed. Reg. at 22,300.

In response to these concerns, DOE adopted a different approach to measuring  $L$  in the final test procedure rule. The clarification in the final rule ensures consistency with the prevailing industry approach and does not affect outcomes in measuring total display area. Under that approach,  $L$  is the continuous length of the transparent area (measured from door edge to door edge), including non-transparent mullions and door frames that overhang the product zone, but excluding any additional case wall present on the front face of the unit. 79 Fed. Reg. at 22,300.

DOE explained that this measurement “is representative of the dimension through which product can be viewed,” in keeping with the industry definition of total display area as consisting of the visible area. 79 Fed. Reg. at 22,300. But the approach also “accommodates small non-transparent areas that are part of the doors themselves and are typically included in [manufacturers’] calculation[s].” *Id.* To prevent anomalous results in cases where the non-transparent area is unusually large, DOE additionally provided that no more than 10% of the area included in calculating  $L$  may be non-transparent. *See id.* at 22,300-01 (explaining why this approach is preferable to, and more generous than, the one suggested by some commenters, including AHRI, that would allow up to five inches of non-

transparent length to be counted). The “compromise” that DOE reached in the final rule thus reconciled the industry definition of *L* with current industry practice in order to ensure consistency.

DOE determined that this approach to calculating total display area is “consistent with and clarifies” the industry definition and will produce measurements in line with current industry practice and the existing provisions of the DOE test procedure. 79 Fed. Reg. at 22,301. The clarification does not have any practical effect on measurement outcomes for total display area. *See id.* at 22,300-01. DOE reached this conclusion after examining the effect of the test procedure, as clarified, on the engineering analysis performed in the 2014 energy conservation standards rule. *Id.* at 22,301. Based on the results of that examination, DOE reasonably concluded that the amendment would not change the measured energy consumption of covered equipment. *Id.* at 22,300-301. Several commenters, including petitioner Zero Zone, expressed the same conclusion in comments supportive of this approach. *See id.* at 22,300. There is accordingly no merit to AHRI’s contention that DOE did not adequately consider the effect of this clarification on the operation of the energy conservation standards.<sup>4</sup>

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<sup>4</sup> Were the Court to conclude otherwise, the remedy would not be (as AHRI suggests) to invalidate both the test procedure and standards rules,

**II. DOE Adequately Responded to Comments Regarding the Cumulative Regulatory Burden Imposed by Other Programs and Potential Rulemakings.**

**A. DOE reasonably declined to consider the potential effects of possible future rulemakings as unduly speculative.**

Petitioners contend that DOE erred in failing to consider potential regulatory actions that could also affect commercial refrigeration equipment. In particular, NAFEM urges that DOE should have engaged in speculation to anticipate regulations later promulgated by the Environmental Protection Agency (EPA) concerning refrigerants commonly used in commercial refrigeration equipment. NAFEM Br. 14-23. At the time of the energy conservation standards rulemaking, however, EPA had not even issued a notice of proposed rulemaking, *see* 79 Fed. Reg. 46,126 (Aug. 6, 2014) (EPA NOPR), so there was no regulatory action for DOE to consider.

An agency is not required to predict and consider the effect of a potential regulatory action not yet initiated by another agency, and DOE reasonably concluded that it was “not in a position to predict future trends of the refrigerants market” based on the information available. 78 Fed. Reg. at 55,919; *see* 79 Fed. Reg. at 17,754. DOE explained that the agency “does not include the impacts of pending legislation or unfinalized regulations in its

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but rather to invalidate only the offending portion of the test procedure rule clarifying the measurement of  $L$  as it relates to total display area.

analyses, as any impact would be speculative.” 79 Fed. Reg. at 17,775.

Moreover, because EPCA established a timeline for completing the energy conservation standards rule, *see* 42 U.S.C. § 6313(c)(6), DOE could not simply wait to see what EPA might do in this respect.

DOE might reasonably have considered alternative refrigerants in its rulemaking for reasons other than those that NAFEM suggests—*e.g.*, as a means of improving energy efficiency. But despite the agency’s repeated requests to manufacturers for relevant information, *see* 78 Fed. Reg. at 55,919; NOPR Pub. Mtg. Tr., No. 62, at 124, DOE was not able to obtain the data needed to model the effects of such alternatives, *see* 79 Fed. Reg. at 17,754. NAFEM now contends that the necessary information was readily available. But the record belies that contention, and NAFEM itself conspicuously fails to identify any such information except in the most sweeping generalities. *See* NAFEM Br. 18-23.

Contrary to NAFEM’s suggestion, NAFEM Br. 22, the use of alternative refrigerants in Europe does not provide sufficient information to support further analysis because a number of factors driving the basic design of the equipment and its constituent components—including those specifically designed to function at different voltages and frequencies—can vary across international markets. And with respect to the purported availability of certain domestic units using alternative refrigerants, *see id.*,

stakeholders (including petitioners) provided no information on those units despite DOE's repeated requests. Having failed to "develop evidence in the record to support their objections to [the] rule," *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), petitioners cannot now fault DOE for failing to consider evidence that did not exist. See *USA Group Loan Servs. v. Riley*, 82 F.3d 708, 713-14 (7th Cir. 1996).

DOE "continues to welcome comments on experience within the industry with the use of . . . alternative refrigerants" and will revisit the issue as appropriate. 79 Fed. Reg. at 17,754. There is currently no information supporting petitioners' suggestion of any conflict between the energy conservation standards rule and the final rule promulgated by EPA on July 2, 2015. To the contrary, EPA recently confirmed, based on information obtained in the course of its own rulemaking, that the energy efficiency of equipment using alternative refrigerants not affected by EPA's new rule "can be at least as good as, and often better than, the energy efficiency of equipment using refrigerants whose status will change to unacceptable" under that rule. See 80 Fed. Reg. 42,870, 42,921 (July 20, 2015) (EPA Final Rule). Moreover, if a manufacturer could show that the revised energy conservation standards cause hardship, inequity, or an unfair distribution of burdens, it could petition DOE's Office of Hearing and Appeals for an



exemption. *See* 42 U.S.C. § 7194; 10 C.F.R. pt. 1003, subpt. B; 79 Fed. Reg. at 17,754 (noting the availability of this process).

**B. DOE reasonably determined that the issues in this rulemaking are distinct from the ENERGY STAR program.**

There is likewise no merit to NAFEM's contention that DOE unreasonably "failed to evaluate the impacts" of the ENERGY STAR program in the context of this rulemaking. NAFEM Br. 23. Indeed, NAFEM itself nowhere identifies the nature of these alleged impacts or what, specifically, DOE should have considered. DOE acknowledged comments relating to the ENERGY STAR program, and it reasonably determined that the program had no bearing on the agency's analysis in identifying the energy conservation standards designed to achieve the maximum energy savings that the agency determined is both technologically feasible and economically justified. *See* 79 Fed. Reg. at 17,740.

The ENERGY STAR program is a separate, voluntary program designed to identify and promote energy-efficient products that meet a high level of energy performance, and the specifications established by that program do not implicate the cost-benefit inquiry that Congress directed under EPCA, 42 U.S.C. § 6295(o)(2)(A). *See* 79 Fed. Reg. at 17,740. NAFEM asserts that "[a] comparison must be made between the two programs to understand, at the very least, the continued utility of ENERGY STAR

incentives.” NAFEM Br. 24. But NAFEM fails to suggest what role that inquiry conceivably plays in DOE’s analysis regarding which energy conservation standards satisfy the statutory criteria.

### **III. Petitioners’ Criticisms of DOE’s Economic Assumptions Are Unfounded.**

#### **A. DOE reasonably calculated the cost of capital for different consumers using established methods.**

In challenging DOE’s economic analysis, AHRI first urges that DOE did not adequately consider the effect that the higher initial cost of more efficient equipment would have on consumers. In particular, AHRI cites comments submitted by the Mercatus Center suggesting that, although the cost of capital for investments assumed by DOE accounted for specific risks according to business type and size, the assumptions are flawed because DOE did not account for the specific risks associated with commercial refrigeration equipment—namely, the allegedly high depreciation rate and low salvage value of such equipment. *See* AHRI Br. 31; Mercatus Center Cmt., No. 72-A1, at 2. As DOE explained, the cost of equity financing typically is not determined at that level of analysis. Instead, it “tends to be high when a company faces a large degree of systematic risk, and it tends to be low when the company faces a small degree of systematic risk.” 79 Fed. Reg. at 17,767. By accounting for the risk of failure associated with different types of businesses that purchase commercial refrigeration equipment, DOE

reasonably accounted for such considerations as the higher rate of failure of certain businesses. *See* Final TSD, No. 102, at 8-27 to 8-28.

The Mercatus critique is in any event premised on an apples-to-oranges comparison. Mercatus first urges that commercial refrigeration equipment has limited resale value because *grocery and convenience stores* are unlikely to purchase used equipment “due to both cosmetic concerns” and the difficulty of achieving “the same ‘look’ for planned display case line-ups in retail stores.” Mercatus Ctr. Cmt., No. 72-A1, at 3. It then states that the low salvage value of the equipment is relevant because a high percentage of *restaurants* fail after one-to-three years—before the expected life of the unit has expired. *Id.* But restaurants do not have the same cosmetic concerns with respect to equipment as grocery and retail stores due to the equipment’s very different use in the two settings. And the record indicates that there is a robust market for used equipment in certain sectors. *See* Danfoss Cmt., No. 61-A1, at 3 (“There is a very active market for used, repaired and/or refurbished commercial refrigeration equipment in the United States.”). Mercatus has offered no basis for concluding that there is a limited market for used equipment among small restaurants—*i.e.*, the businesses it identifies as likely to fail. Nor has it suggested that there is a high rate of failure among the businesses that it identifies as reluctant to purchase used equipment. *See* Mercatus Ctr. Cmt., No. 72-A1, at 3. Because low salvage

value “is not problematic if most firms/sites continue to operate throughout most of the expected life of the unit,” *id.*, the lack of evidence of a high rate of failure among those consumers that are reluctant to purchase used equipment wholly undermines Mercatus’s concern.

In addition, both Mercatus and AHRI fail to acknowledge that the risk associated with investment in commercial refrigeration equipment is mitigated by the predictable return on the investment provided in the form of increased energy savings. DOE determined that those benefits would be substantial in relation to initial equipment-cost increases, 79 Fed. Reg. at 17,784, and that they would accrue disproportionately to precisely those businesses that AHRI suggests are exposed to the greatest risk, *see id.* at 17,790. Based on the foregoing, DOE reasonably concluded that the risk associated with investment in commercial refrigeration equipment does not reach the level that AHRI suggests. That determination is entitled to deference. *See Newspaper Ass’n of Am. v. Postal Regulatory Comm’n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013); *Western Fuels-Illinois, Inc. v. ICC*, 878 F.2d 1025, 1030 (7th Cir. 1989).

**B. DOE’s predictions regarding the response of the regulated industry are reasonable and entitled to deference.**

**1. Equipment refurbishment.** NAFEM similarly ignores the amended standards’ substantial cost savings for consumers in urging that

DOE did not adequately consider whether the increase in initial equipment costs would cause consumers to purchase different types of equipment or refurbish existing units. NAFEM urges that, as a result of such substitution effects, the rule might not achieve the full measure of energy savings that DOE projects. *See* NAFEM Br. 26.

DOE acknowledged that the revised standards will likely produce a modest price increase (roughly 4%, *see* 79 Fed. Reg. at 17,795), but it determined that, for most consumers, the higher initial cost of equipment will be more than offset by the cost savings expected over the life of the equipment. *Id.* at 17,728, 17,784. The expected cost savings are particularly significant for certain types of small businesses. *Id.* at 17,790. In response to comments, to account for the possibility that some small businesses might nevertheless delay new purchases, DOE did increase in its analyses the expected lifetime of equipment used by such businesses. *See id.* at 17,766.

For these reasons, DOE concluded that it is unlikely that the rule will discourage investment in new equipment. Such “predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.” *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004); *see Western Fuels-Illinois*, 878 F.2d at 1030. NAFEM has nowhere suggested, nor could it plausibly, that a less stringent efficiency standard would actually result in

greater overall energy savings as a result of the substitution effects it describes. Thus, there is no reason to conclude that DOE should have adopted a different standard on that basis.

Although it is incumbent upon parties to provide data to support the comments they offer on a proposed rule, *see USA Group Loan Servs.*, 82 F.3d at 713-14, commenters urging that DOE did not adequately consider substitution effects offered no quantitative or credible data to substantiate their concerns. *See* 79 Fed. Reg. at 17,770. DOE thus had insufficient information to incorporate any alleged substitution effects in its model. *Id.*; *see* NOPR Pub. Mtg. Tr., No. 62, at 228-29 (identifying the need for additional data). Although DOE could not rule out the possibility that some consumers might delay replacing equipment as a result of the revised standards, DOE concluded based on the information available that the extent of any increase in refurbishment “would not be so significant as to change the ranking of the [standards] considered for [the] rule” and cause DOE to reach a different conclusion under the analysis prescribed by EPCA. 79 Fed. Reg. at 17,770.

The consumer economics of refurbishment corroborates the conclusion that a significant shift toward that option is unlikely. For refrigeration systems, unit failure is generally associated with compressor failure; the cost of compressor replacement is high; the additional equipment life obtained as a result of compressor replacement is significantly lower than the expected

life of a new unit; and, unlike unit replacement, compressor replacement produces no operating-cost savings.

As the foregoing shows, DOE adequately explained why, based on the available information, it determined that significant changes in purchasing behavior are unlikely, *see* Final TSD, No. 102, at 9-8 to 9-9.<sup>5</sup> There is no merit to AHRI's argument to the contrary. *See* AHRI Br. 52-56. At the outset, the comments on which AHRI relies are premised on very different assumptions than those made in the final rule. Whereas commenters assumed a price increase of 15-20% based on the analysis in the notice of proposed rulemaking, *see id.* at 55 (citing Danfoss Cmt., No. 61-A1, at 3), DOE determined that the standard level chosen in the final rule was likely to produce only a 4% price increase, *see* 79 Fed. Reg. at 17,795.

Commenters in any event failed to suggest with specificity how DOE should account for alleged shipment reductions, notwithstanding DOE's request for information that it could use to model purchase price elasticities. *See, e.g.*, NOPR Pub. Mtg. Tr., No. 62, at 220-21, 244-45. This Court has

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<sup>5</sup> AHRI misstates the record where it asserts that DOE's consultant "assured participants . . . that it would take price-elasticity effects into account." AHRI Br. 56 (citing NOPR Pub. Mtg. Tr., No. 62, at 276:12-13). The consultant stated only that he would take the comment "under consideration"—precisely the same language used by DOE throughout its public meetings to acknowledge that a comment has been received. There is no basis for AHRI's allegation of a "bait-and-switch" in these circumstances.

repeatedly warned that “when an industry opposes a regulation on a ground that requires data for the ground to be convincing, they had better obtain and submit the data.” *USA Group Loan Servs.*, 82 F.3d at 714 (citing *Morales v. Yeutter*, 952 F.2d 954, 960 (7th Cir. 1991)). Tellingly, in urging that “[i]t is not hard to find, even with rudimentary Internet searches, price-elasticity benchmarks for other products to use as potential analogues,” AHRI does not suggest a potential analog but rather notes the availability of benchmarks “for products ranging from salt to Chevy automobiles”—examples that bear no relationship to the covered equipment. AHRI Br. 53. Given the dearth of data submitted by commenters, coupled with DOE’s own determination that equipment refurbishment will likely be limited, it was reasonable for DOE not to model this alleged effect. *See* 79 Fed. Reg. at 17,770.

**2. Equipment substitution.** NAFEM also contends that DOE did not adequately consider the likelihood of product substitution. Most of the comments concerning this possibility predicted shifts resulting from changes in the utility of equipment in a given class, rather than changes to the equipment’s price or efficiency. *See* 79 Fed. Reg. at 17,770. In particular, commenters raised concerns about the diminished utility of certain transparent-door units if required to use triple-paned glass, and they cautioned that a change in utility could reverse the existing trend away from open units and toward comparatively efficient transparent-door units. *See*,



*e.g., id.*; NOPR Pub. Mtg. Tr., No. 62, at 98, 101-02. DOE responded to these concerns by not including triple-paned glass in its final analysis as an option for improving the efficiency of the specified equipment, thereby obviating the possibility of the type of utility-based substitution effects raised by commenters. *See* 79 Fed. Reg. at 17,751, 17,770.

The fact that equipment utility is the primary driver of consumer decisions regarding equipment type serves to limit the likelihood of product substitution. As DOE observed, equipment with display areas is used to showcase merchandise, and equipment with solid doors is used for storage. *See* 79 Fed. Reg. at 17,741. A store owner cannot readily substitute a solid-door model for a transparent-door model because the two do not serve the same function. Based on such considerations, together with the unavailability of more specific information that would have enabled the agency to model the substitution effects that NAFEM now suggests, DOE reasonably determined that it would not further account for these unsubstantiated effects in its analysis. *See id.* at 17,770; *USA Group Loan Servs.*, 82 F.3d at 714.

There is no substance to NAFEM's suggestion that the revised standards will discourage the use of more-energy-efficient equipment. For each equipment class, DOE identified the maximum improvement in energy efficiency that it determined was both technologically feasible and

economically justified, as EPCA requires. 79 Fed. Reg. at 17,740; *see* 42 U.S.C. § 6295(o)(2)(A). Applying the same methodology to each class ensures uniform regulation and compliance with statutory requirements.

NAFEM is wrong in asserting that the standards irrationally “allow greater energy use for those [units] with solid doors versus those with transparent doors.” NAFEM Br. 27. NAFEM arrives at that conclusion by inserting into the energy-conservation-standards formulas for the selected equipment classes a volume (7 cubic feet) that is not representative of commercial units on the market. *Id.* At the representative volume of 49 cubic feet used in DOE’s analysis, *see* Final TSD, No. 102, at 5A-6 to 5A-7 (tbl. 5A.2.2), the transparent-door unit in NAFEM’s example is allowed 5.76 kWh/day, or 51% more than the 3.81 kWh/day allowed for the solid-door unit, *see* 79 Fed. Reg. at 17,727 (providing formulas for calculating energy conservation standards for the relevant equipment classes).<sup>6</sup>

NAFEM is on no firmer ground in urging that “the new standard[] for using transparent doors [on horizontal freezers] is so greatly reduced that

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<sup>6</sup> Under the revised standard levels, the allowed energy use of the solid-door unit in NAFEM’s example does not exceed that of the transparent-door unit until the volume of the units is reduced to 10 cubic feet, *see* 79 Fed. Reg. at 17,727 tbl. I.1 (providing the relevant formulas)—a volume that is not representative of commercial refrigeration equipment actually on the market. NAFEM’s effort to skew the standards by substituting unrepresentative volumes in no way casts doubt on the reasonableness of the standards selected by DOE.

they will become increasingly expensive,” leading consumers to choose open units instead. NAFEM Br. 28. In focusing on the percentage change in allowed energy use over the baseline standard for each unit, *see id.*, NAFEM fails to acknowledge that the baseline for these classes were established at different times and through different processes, making it unsurprising that they would bear a different relationship to the revised standard level, 79 Fed. Reg. at 17,740. DOE adequately addressed these concerns about the “relative perceived stringencies of proposed standards for different classes.” *Id.*

**C. DOE did not commit error by acknowledging the benefits of reduced greenhouse gas emissions, and any error would be harmless because the rule’s other benefits outweigh its costs.**

AHRI argues that DOE erred in acknowledging the monetary benefits of the reductions in CO<sub>2</sub> and NO<sub>x</sub> emissions that are projected to result from the revised energy conservation standards. AHRI Br. 23-3-, 36-43. There is no merit to that argument, but, even if there were, such error would be harmless because the record makes clear that DOE would have adopted the same standards even in the absence of those additional benefits. *See* 5 U.S.C. § 706 (noting that, in reviewing agency action, “due account shall be taken of the rule of prejudicial error”); *Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010) (holding that remand is inappropriate where it is clear that an agency’s

mistake did not affect the outcome of the rule); *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (same).

In concluding that the chosen trial standard level was economically justified, DOE observed that it would achieve a significant estimated energy savings and produce a positive net present value for consumers between \$4.93 billion and \$11.74 billion, depending on the discount rate used. 79 Fed. Reg. at 17,728, 17,810. On the costs side of the ledger, DOE projected a decrease in industry net present value for manufacturers between \$93.9 million and \$165.0 million. *Id.* at 17,810. Although DOE estimated that the monetized benefits of reduced emissions from equipment purchased during the thirty-year analysis period would provide an additional \$1 billion to \$14 billion in benefits, those benefits were not necessary to support a finding that the revised standards were economically justified. *See id.* The benefits to consumers, and the significant energy savings achieved by the revised standards, easily outweighed the rule's costs for manufacturers without taking into account the monetized value of reduced emissions. *See id.*; ASAP et al. Cmt., No. 91-A1, at 7.

AHRI's criticisms of the Social Cost of Carbon analysis in any event lack merit. DOE acknowledged AHRI's concerns regarding the uncertainties inherent in predicting the costs of emissions, as well as the alleged mismatch between the global dimension of emissions benefits and the domestic nature

of other factors considered by the agency. *See* 79 Fed. Reg. 17,729-30, 17,779. And the agency reasonably explained why its recognition of these benefits was nevertheless appropriate. *See id.*; *cf. Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (“[W]hen an agency’s decision is primarily predictive, . . . [the court] require[s] only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive.”). The fact that AHRI can identify competing approaches to monetizing these benefits does not undermine the reasonableness of the values derived by DOE, which find ample support in the record. *See, e.g., NRDC et al. Cmt., No. 83-A1; ASAP et al. Cmt., No. 91-A1, at 7.* “When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts . . . .” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013).

AHRI additionally errs in asserting that DOE’s emissions analysis “flunks the [Information Quality Act’s] decisionmaking standards.” AHRI Br. 25 (capitalization omitted). That contention fundamentally misapprehends the nature and operation of the Information Quality Act, which does not impose “decisionmaking standards.” “The purpose of the Information Quality Act is to ‘ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by

Federal agencies' and does not constitute a statutory mechanism by which [an agency's] conclusions . . . can be challenged." *Mississippi Comm'n on Env'tl. Quality v. EPA*, \_\_\_ F.3d. \_\_\_, 2015 WL 3461262, at \*40 (D.C. Cir. June 2, 2015) (first alteration in original) (quoting 44 U.S.C. § 3516 note). "By its terms, this statute creates no legal rights in any third parties." *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); see *Mississippi v. EPA*, 744 F.3d 1334, 1347 (D.C. Cir. 2013). Accordingly, the Information Quality Act provides no basis for challenging the standards rule.

**D. There is no merit to AHRI's assertion that DOE failed to properly consider the tradeoffs implicated by the revised standards.**

AHRI additionally makes the vague and sweeping assertion that DOE failed to consider the "tradeoff[s]" implicit in the revised standard. AHRI Br. 56. But the bulk of DOE's analysis in this rulemaking was directed at calculating and weighing the standards' costs and benefits—*i.e.*, its tradeoffs. See 79 Fed. Reg. at 17,728-30. It is petitioners, not DOE, who fail to acknowledge the standards' tradeoffs, as where AHRI contends that DOE should have accounted for the likelihood that increased equipment costs will lead to higher food prices, and, in turn, to a reduction in the discretionary funds of the broader population, "thereby leading to a reduction in employment and downward pressure on wages and demand for other goods." AHRI Br. 57; see *id.* at 28. This wholly unsubstantiated parade of horrors

ignores DOE's reasoned conclusion that the revised standards will produce a significant net benefit for consumers of commercial refrigeration equipment, 79 Fed. Reg. at 17,810, and that the expected payback period for recovering the initial cost increases associated with new equipment is substantially shorter than the expected life of the equipment, *id.* at 17,728, 17,784.

Accordingly, the revised standards are not expected to produce the price increases and downstream effects that AHRI posits. The administrative record as a whole plainly shows that DOE exhaustively considered the costs and benefits of the rule, and it supports DOE's determination that the benefits of the chosen standards outweigh the costs. *See id.* at 17,783-803.

#### **IV. Petitioners' Challenges to DOE's Engineering Analysis Similarly Lack Merit.**

##### **A. NAFEM's criticisms of the engineering spreadsheet are premised on a misunderstanding of the spreadsheet's inputs and function.**

1. With respect to the engineering analysis, NAFEM first contends that DOE did not make the engineering spreadsheet available sufficiently early in the rulemaking process for interested parties to comment on its operation. This argument fails at the outset because the spreadsheet does not provide any new information beyond that provided elsewhere in the record, and its availability was not necessary for interested parties to be accorded a full and fair opportunity to comment on the proposed rule. The

spreadsheet functions as a tool for demonstrating how the incremental implementation of more efficient components affects equipment cost and efficiency. All of the inputs and key formulas used in the engineering spreadsheet, as well as the results of the analysis, were made available earlier in the rulemaking, *see* Prelim. TSD, No. 30, at ch. 5.6; NOPR TSD, No. 51, at ch. 5.6, and stakeholders commented on these inputs and analysis, *see* 79 Fed. Reg. at 17,751-52. Accordingly, there can be no plausible contention that DOE failed to provide timely access to the data on which it relied in performing its engineering analysis. *See American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008).

NAFEM has failed to advance any credible argument that it was prejudiced by the timing of DOE's publication of the spreadsheet. "[T]he court will not set aside a rule absent a showing by the petitioners that they suffered prejudice from the agency's failure to provide an opportunity for public comment in sufficient time so that the agency's decisions may be framed with comment in full view." *American Radio Relay*, 524 F.3d at 237 (alterations, citations, and internal quotation marks omitted). DOE made the spreadsheet available very shortly after it was requested, and numerous other stakeholders were able to comment on the spreadsheet in the time provided. *See, e.g.*, Traulsen Cmt., No. 65-A1, at 6; AHRI Cmt., No. 75-A1, at 4; Structural Concepts Cmt., No. 85-A1, at 3.



2. There is likewise no merit to NAFEM's contention that the spreadsheet is deficient because it "does not reveal how the resulting daily energy use varies with changes to inputs on either [total display area] or volume." NAFEM Br. 38-39 & n.11. That argument is premised on a flawed understanding of the spreadsheet's purpose and operation. As discussed, the engineering spreadsheet is designed to account for the impact of more efficient equipment components that are implemented at each standard level. The spreadsheet calculates the energy consumption of a representative unit incorporating those components according to the conditions of the DOE test procedure, and it uses the resulting energy-consumption values and corresponding manufacturing costs to produce a cost-efficiency curve for each unit. *See Eng'g Spreadsheet, No. 59-A1, at results tab* (explaining the spreadsheet's operation). The spreadsheet can thus be used to quantify the effect of different components on a unit's cost and efficiency. Adjusting these inputs will generate a corresponding change in the output of the spreadsheets, as petitioner AHRI has acknowledged. *See AHRI Cmt., No. 75-A1, at 9.*

Total display area and volume—the values that NAFEM attempted to change—are not among the variables that are meant to change during the intended use of the spreadsheet. The spreadsheet utilizes specific representative volumes for each equipment class and holds them constant as

more efficient components are added. To view the effect of changes to total display area or volume on the efficiency requirements for equipment in a particular class, a party need only use the formulas provided at 79 Fed. Reg. at 17,727-28, tbl.I.1, as NAFEM does elsewhere in its brief (albeit with unrepresentative values), *see* NAFEM Br. 27-28.

3. NAFEM also errs in suggesting that DOE was required to validate the results of its engineering spreadsheet. NAFEM Br. 39-42. Indeed, NAFEM itself does not specify what the purported validation requirement would entail. The only authorities NAFEM cites for this contention are *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003), and *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998). Neither stands for the proposition that validation of an agency's model is necessary in every instance. Rather, in *BCCA* the court observed that the validation tests performed by EPA in that case, together with the agency's reasonable explanation for discrepancies in the model's performance, made the agency's reliance on the model reasonable notwithstanding those discrepancies. 355 F.3d at 833-34. And in *Columbia Falls* the court held that the agency's defense of its model was insufficient where it "kn[ew] that 'key assumptions' underlying the [model] [we]re wrong and yet . . . offered no defense of its continued reliance on it." 139 F.3d at 923.

Here, petitioners have not identified any discrepancies in the performance of DOE's models. Instead, they erroneously assert that validation was necessary because "the spreadsheet did not allow stakeholders to evaluate equipment other than the base[line] product," NAFEM Br. 40—a contention refuted above—and because DOE's models were "theoretical" and not based on existing equipment units, *id.* at 41-42.

While it is true that the design-option analysis used in this rulemaking (as in the 2009 rule) considers the cost and efficiency of different equipment configurations that do not replicate any particular model currently on the market, that fact in no way undermines the agency's analysis. *See* 79 Fed. Reg. at 17,763. DOE ascertained the energy use of increasingly efficient equipment configurations, calculating the daily energy consumption of representative units under each configuration. To confirm the accuracy of this approach, DOE subsequently subjected a number of models available on the market to the same analysis and then compared the analytical results to existing data regarding the equipment's tested performance. *See id.*; Final TSD, No. 102, at 5-41. DOE found that the results were in agreement. *See* 79 Fed. Reg. at 17,763. This "validation" of the agency's model was above and beyond the inquiry that DOE was required to undertake to demonstrate the reasonableness of its analysis and conclusions.

**B. The inputs to the engineering analysis are reasonable, and petitioners' challenges overlook the substantial deference to which the agency's technical judgments are entitled.**

**1. Equipment classes and offset factors.** NAFEM urges that the equipment classes used by DOE and the offset factors<sup>7</sup> established for each equipment class do not accommodate “the multitude of custom-built and niche equipment that exists.” NAFEM Br. 44 (internal quotation marks omitted). But NAFEM identifies no specific unit type that is not properly accounted for by the forty-nine equipment classes considered by DOE, nor any unit for which the offset factor is likely to be problematic. That failure is significant because neither the equipment classes nor the offset factors tread substantially new ground. Of the forty-nine equipment classes, thirty-eight were retained from the 2009 rule, and the other eleven refer to equipment for which energy conservation standards were established by the Energy Policy Act of 2005. *See* Final TSD, No. 102, at 5-3. For the thirty-eight equipment classes covered in the 2009 rulemaking, DOE retained the offset factors used in that rulemaking. *See id.* at 5-69. Petitioners and other commenters did

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<sup>7</sup> The offset factor for each equipment class is a figure derived by DOE to control for the fact that energy use does not uniformly scale with equipment size, and smaller equipment therefore tends to use more energy per unit of volume than larger equipment in the same equipment class. *See* Final TSD, No. 102, at 5-67. For equipment classes not covered by the 2009 final standards rule, DOE adjusted the offset factors set by the Energy Policy Act of 2005 based on available data from directories of certified product performance. 79 Fed. Reg. at 17,742.

not identify any issues arising from the prior use of these equipment classes or offset factors. Against the weight of this history, NAFEM's unsupported assertions do not cast doubt on the reasonableness of DOE's choices.

**2. Compressor efficiency.** NAFEM also challenges DOE's assumptions with respect to compressor efficiency for self-contained units. Based on discussions with manufacturers, DOE initially estimated that manufacturers could produce compressors using currently available technology that are 10% more efficient than the baseline model. *See* Prelim. TSD, No. 30, at 5-26; NOPR TSD, No. 51, at 5-16. Following publication of the notice of proposed rulemaking, however, commenters called the reasonableness of the 10% improvement into question. *See* 79 Fed. Reg. at 17,760. One of the largest compressor manufacturers suggested that a 1-to-2% efficiency gain in compressor efficiency would be a more realistic assumption. *See id.*; Danfoss Cmt., No. 61-A1, at 2. This comment applied generally to the equipment classes covered by the rulemaking. Based on feedback that DOE's initial 10% efficiency gain assumption was too high and that a more modest efficiency increase was more realistic, DOE substantially revised its assumption downward to a 2% efficiency improvement. 79 Fed. Reg. at 17,760.

In criticizing DOE's use of the 2% figure, NAFEM ignores DOE's earlier analysis supporting a 10% efficiency gain. As DOE explained, that initial

assumption, reflected in the agency's preliminary analysis and notice of proposed rulemaking, was based on independent agency research, expert consultation, and interviews with manufacturers. *See* NOPR Pub. Mtg. Tr., No. 62, at 71. DOE's technical assessments in this respect are entitled to deference. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers v. Department of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005). DOE's downward adjustment of that assumption from 10% to 2% was a reasonable response to comments suggesting that the agency's initial assumption was too high. *See* 79 Fed. Reg. at 17,760.

Contrary to petitioners' suggestion, "[t]hat an agency changes its approach to the difficult problems it must address does not signify the failure of the administrative process." *American Med. Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989). To the contrary, "an agency's change of course, so long as generally consistent with the tenor of its original proposals, indicates that the agency treats the notice-and-comment process seriously, and is willing to modify its position where the public's reaction persuades the agency that its initial regulatory suggestions were flawed." *Id.*; *see also Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (noting that an agency "may use supplementary data, unavailable during the notice and comment period, that . . . addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown" (internal quotation marks omitted)).

There is no plausible argument that DOE gave insufficient notice of its assumptions with respect to compressor efficiency. The public plainly was on notice that DOE was considering including more efficient compressors among the options for improving equipment efficiency, as evidenced by the numerous comments provided on that subject. *See, e.g.,* Danfoss Cmt., No. 61-A1, at 2; Traulsen Cmt., No. 65-A1, at 12; AHRI Cmt., No. 75-A1, at 9; True Cmt., No. 76-A1, at 2. Based in large part on those comments, DOE ultimately adopted a significantly more modest assumption with respect to compressor efficiency than the one it initially proposed.

NAFEM's invocation of cases requiring that a final rule be a logical outgrowth of the proposed rule, *see* NAFEM Br. 47-48, is misplaced in this context. The logical outgrowth requirement applies to the rule itself, not to each of its myriad underpinnings. Cases applying that principle “consider an agency's ability to promulgate a final rule that differs significantly from the proposed one.” *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 528 (7th Cir. 1993). Where “the change between the proposed rule and final rule [is] an important one,” the Court must “ask whether the final rule is a logical outgrowth of the proposed one.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 729 (D.C. Cir. 2000). Here, NAFEM has not alleged (nor could it plausibly) that the standard level ultimately selected by DOE—which was among the options identified in the proposed rule—fails to meet

that standard. Even if the logical-outgrowth requirement applied equally to the agency's underlying assumptions, moreover, it would easily be satisfied in these circumstances because DOE's assumption of a 2% increase in compressor efficiency, as used in the final analysis, "was 'contained' in the proposed version" and plainly put affected parties on notice that the issue of compressor efficiency "was on the table." *American Med. Ass'n*, 887 F.2d at 768-69; *cf. Sierra Club v. Costle*, 657 F.2d 298, 354 (D.C. Cir. 1983) (noting that "incremental changes are permissible").

NAFEM additionally errs in urging that DOE's assumption was inconsistent with the agency's stated approach of using "currently available technologies." NAFEM Br. 46-47. DOE's assumption of a 2% efficiency gain is premised on marginal improvements to the existing class of hermetic, reciprocating hydrofluorocarbon compressors for commercial refrigeration applications. *See* Final TSD, No. 102, at 5-33 to 5-34. DOE reasonably determined that this small, incremental improvement over a three-year period would not require any disruptive technological developments or technology deployment into the market. DOE has consistently viewed incremental improvements of this type as falling within the category of available technologies that it has determined are appropriate for consideration in establishing energy conservation standards under EPCA. *See, e.g.*, 73 Fed. Reg. 50,072, 50,090 (Aug. 25, 2008) (discussing similar



assumptions regarding compressor-efficiency improvements). Notably, DOE also considered other compressor technologies in the rulemaking at issue—namely, variable-speed and scroll compressors—and rejected them as not being consistent with available technology in a sufficiently large number of applicable equipment classes. *See* NOPR TSD, No. 51, at 3-38 to 3-39, 5-30 to 5-31. DOE’s compressor assumptions thus fit comfortably within the agency’s understanding of currently available technologies.

**3. Improved insulation.** NAFEM next urges that DOE erred in considering increased foam insulation thickness as an option for improving energy efficiency. NAFEM Br. 48. Specifically, NAFEM urges that DOE’s assumptions are unrealistic because additional insulation cannot be added to all equipment classes without increasing the footprint of the equipment or decreasing the interior space—either of which could diminish the equipment’s utility to consumers. *Id.* at 49. DOE adequately addressed these comments. At the outset, it is significant that the rule does not prescribe any particular approach to achieving the established standards, and it is not necessary for an equipment type to adopt every improvement that DOE considered. *See* 79 Fed. Reg. at 17,750. Accordingly, if a particular option for improving efficiency is less desirable for certain equipment classes, manufacturers may avoid using that option. *See id.* With respect to insulation foam thickness, DOE found that some manufacturers are already utilizing increased

insulation thickness as a means of improving energy efficiency, and that it was accordingly appropriate to include improved insulation among the available options for increasing efficiency. *Id.*

There is likewise no merit to AHRI's contention that DOE erred in not responding directly to a comment regarding the agency's basis for updating its engineering-cost data between the 2009 and 2014 rulemakings. AHRI Br. 36. The 2009 and 2014 rulemakings are procedurally distinct, and DOE appropriately gathered new data, and formed new cost estimates, for the 2014 rule. DOE explained that it "estimated the conversion costs associated with increases in foam thickness based on direct input from the industry in interviews, as well as through analysis of production equipment that is part of the engineering cost model." 79 Fed. Reg. at 17,775. This analysis "included capital conversion costs, including . . . tooling costs and production line upgrades, and product conversion costs, including redesign efforts, testing costs, industry certifications, and marketing changes." *Id.*

AHRI's comment did not raise any specific concerns with the assumptions underlying DOE's calculation of the engineering costs associated with improved insulation in the 2014 rule, nor did it provide any information to support a different assumption. *See* AHRI Cmt., No. 75, at 5; *USA Group Loan Servs.*, 82 F.3d at 713-14 (requiring commenters to provide data to support their claims). Indeed, no commenter raised any specific issue

pertaining to the data relied on by DOE or the resulting cost estimate.

Against this backdrop, AHRI's "unsupported claim" that the agency's cost estimate is flawed because it does not bear a sufficient relationship to the figure arrived at in a previous rulemaking "simply did not rise to the level of a comment which required a response from the" agency. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); see *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). The lack of substance underlying this comment is underscored by the fact that AHRI devotes only two sentences to the issue in its brief. See AHRI Br. 36. Where commenters raised specific, technical issues relating to increased insulation thickness, DOE addressed them in detail. See 79 Fed. Reg. at 17,760-61, 17,775.

**V. DOE Properly Considered the Rule's Effect on Small Businesses and Competition.**

**A. DOE complied with requirements in the Regulatory Flexibility Act to consider the rule's effect on small businesses.**

Petitioners urge that the energy conservation standards rulemaking did not meet the requirements set forth in the Regulatory Flexibility Act regarding the agency's consideration of a rule's effect on small businesses. See 5 U.S.C. §§ 603(c), 604(a)(6). In particular, AHRI argues that DOE failed to consider the appropriateness of exempting small businesses from the rule, and NAFEM asserts more generally that DOE failed to consider significant

alternatives that would have mitigated the rule's effect on small businesses, although it does not identify the alternatives that DOE should have considered. There is no merit to these arguments.

As an initial matter, the Regulatory Flexibility Act does not provide for judicial review of an agency's compliance with the initial regulatory flexibility analysis required by 5 U.S.C. § 603—the provision on which AHRI principally relies. *See id.* § 611(a)(2); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000). Although the final regulatory flexibility analysis delineated in § 604 is subject to review, it “requires nothing more than that the agency file [an analysis] demonstrating a reasonable, good-faith effort to carry out [the Act's] mandate.” *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (internal quotation marks omitted); *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000). It is well established that “the Act's requirements are purely procedural” and impose “no substantive constraint on agency decisionmaking.” *National Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (alteration and internal quotation marks omitted).

The text of the Regulatory Flexibility Act in any event does not support the reading petitioners would give it. Contrary to AHRI's contention, § 603 does not require an agency to consider exempting small businesses. Instead, it cites the exemption of small businesses as among the types of significant alternatives an agency might consider in its analysis. *See* 5 U.S.C. § 603(c)(4)

(directing agencies to consider significant alternatives “such as” exempting small businesses). In the context of EPCA, exempting small businesses is not a reasonable alternative. EPCA contemplates the establishment of a single, national standard for each class of commercial refrigeration equipment. *See* 42 U.S.C. §§ 6295(a)(2), (o)(2)(A). In recognition of the additional burdens that the standards may impose on small businesses, EPCA identifies specific circumstances in which, upon application to DOE, small manufacturers may be exempted from a standard for up to two years. *Id.* § 6295(t). Congress’s delineation of limited circumstances in which a narrow exception for a particular small business may be appropriate counsels against the wholesale exemption of the entire category of such businesses through the rulemaking process.

Consistent with the Regulatory Flexibility Act, DOE described the steps it took to minimize the rule’s impact on small businesses, and it considered and explained its reasons for rejecting significant alternatives. *See* 5 U.S.C. §§ 603(c), 604(a)(6). As DOE explained, “[t]he primary alternatives to the proposed rule are the [trial standard levels] other than the one proposed” by the agency. 78 Fed. Reg. at 55,983. Both the notice of proposed rulemaking and the final rule reflect DOE’s careful consideration of the different standards’ likely impact on businesses, and on small businesses in particular. *See* 79 Fed. Reg. at 17,784-98. Indeed, DOE ultimately

adopted less rigorous standards than it initially proposed after further considering the costs of the proposed standards. *See id.* at 17,810. As petitioners acknowledge, AHRI Br. 47, DOE also considered a number of other alternatives that might place less of a burden on small business, but it ultimately rejected those alternatives on the ground that they would produce substantially less energy savings than the approach adopted by DOE. *See* 79 Fed. Reg. at 17,814; 78 Fed. Reg. at 55,983. The revised standards are designed to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified, as EPCA expressly requires. 42 U.S.C. § 6295(o)(2)(A).

**B. DOE satisfied its obligation to consider the rule's effect on competition.**

AHRI also urges that “the federal government did not meet its obligations concerning Attorney General review of the impacts of the [energy conservation standards] rule on competition.” AHRI Br. 48 (capitalization omitted). This argument misapprehends the nature of the requirement that DOE obtain the views of the Department of Justice (DOJ) with respect to the rule's likely effect on competition. Pursuant to that requirement, DOJ must “make a determination of the impact, if any, of any lessening of competition likely to result from such standard” and “transmit such determination, not later than 60 days after the publication of a proposed rule prescribing or

amending an energy conservation standard, in writing to the Secretary, together with an analysis of the nature and extent of such impact.” 42 U.S.C. § 6295(o)(2)(B)(ii). The statute then directs DOE to consider “the impact of any lessening of competition . . . that is likely to result from the imposition of the standard” in determining whether the standard is economically justified. *Id.* § 6295(o)(2)(B)(i)(V).

The reviews conducted by DOJ and DOE in this case readily satisfy the statutory criteria. In urging otherwise, AHRI errs in suggesting that the review provided by DOJ is intended for public comment. The sixty-day period that Congress provided for DOJ to transmit its views to DOE, *see* 42 U.S.C. § 6295(o)(2)(B)(ii), runs concurrently with the usual comment period for energy conservation standards rulemakings, 42 U.S.C. § 6295(p)(2). Thus, the transmittal of DOJ’s views to DOE will generally align with the close of the comment period and afford no opportunity for public comment on those views. It is evident from these statutory timeframes that the analysis provided by DOJ is intended for DOE’s consideration, not for general debate.

There is likewise no merit to the contention that DOJ was required to provide a fuller analysis in these circumstances. The statute requires DOJ to “make a determination” with respect to whether the proposed rule will lessen competition, and to provide “an analysis of the nature and extent” of any lessening that is likely to result. 42 U.S.C. § 6295(o)(2)(E)(ii). Where, as

here, DOJ makes a determination that no lessening of competition is likely to result, it will suffice to state that conclusion. The statute does not require DOJ to explain how it reached that conclusion. The focus is on the rule's impact on competition, and here DOJ concluded that the rule was not likely to have one. *See* DOJ Letter, No. 106. DOE reasonably relied on that conclusion. *See* 79 Fed. Reg. at 17,803.

Regrettably, DOE did not publish DOJ's letter in the Federal Register and rulemaking docket with its usual promptness. *See* 42 U.S.C. § 6295(o)(2)(B)(ii). This oversight resulted in part from the government shutdown that took place during the relevant period. DOE has subsequently worked to correct these shortcomings, and its delay in publishing DOJ's determination in no way undermines the reasonableness of the final rule. Petitioners have in any event not demonstrated that they were prejudiced by the delay in publishing DOJ's letter. *Cf. American Radio Relay League*, 524 F.3d at 236-37. As discussed above, there is no public right to comment on the views provided by DOJ in these circumstances, and petitioners have not suggested how the timelier publication of those views could have changed the outcome of the rulemaking.



## CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32(b) because it has been prepared in 13-point Century Schoolbook, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,334 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Lindsey Powell  
LINDSEY POWELL

**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2015, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell  
LINDSEY POWELL