

**COMMENTS OF THE NATIONAL CONSUMER LAW CENTER AND
CONSUMER FEDERATION OF AMERICA**

**ON DEPARTMENT OF ENERGY DOCKET EERE-2018-BT-PET-0017
OPENED IN RESPONSE TO PETITION OF AIR-CONDITIONING, HEATING AND
REFRIGERATION INSTITUTE**

Submitted January 14, 2019

I. INTRODUCTION

The National Consumer Law Center® (“NCLC”) and Consumer Federation of America (“CFA”) (collectively, “Consumer Groups”) file these comments on the petition of the Air-Conditioning, Heating and Refrigeration Institute (“AHRI”) submitted to the Department of Energy (“Department”) on or about October 12, 2018. AHRI’s petition seeks the opening of a notice-and-comment rulemaking to develop a new, unified test procedure and standards for residential furnaces, which would replace current and separate metrics for annual fuel utilization efficiency, fan efficiency ratio, and standby mode/off mode energy consumption.

II. INTEREST OF THE CONSUMER GROUPS

NCLC is a 501(c)(3) non-profit organization founded 50 years ago, with the mission of advocating for justice and economic security for low-income consumers. Throughout its history, NCLC has worked to ensure that these households can afford the home energy they need for heating, cooling, lighting, refrigeration and other essential needs. Support for energy efficiency programs and policies has been a key part of our strategy, since cost-effective efficiency reduces both energy consumption and households bills. NCLC has been actively involved in DOE rulemaking dockets, including those involving furnace standards, for the past 15 years. We have taken a particular interest in furnaces for two key reasons: for many households in colder climates, the heating bill is the single largest energy bill; and for low-income tenants,¹ standards ensure that the owner installs at least minimally efficient heating equipment.

CFA is an association of more than 250 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

¹ Renters are, by far, disproportionately of low-income. For example, data collected by the Department of Housing and Urban Development (“Economic and Market Analysis Division-HUD – Special Tabulations of 2016 ACD 5-year Survey Data – Households by income, Tenure, Age of Householder, and Housing Conditions”) shows that 57% of owner households had income of \$60,000 or greater annually, whereas only 27% of renter households had income of \$60,000 or greater annually. [See: https://www.huduser.gov/ast/odb/Select_Parameters.odb].

CFA has long advocated for cost-effective energy efficiency standards for consumer products as they save consumers money on their energy bills and defer the need for new power plants and utility infrastructure which can lead to higher electricity and gas costs. For at least 15 years, CFA has been involved in federal rulemakings affecting furnaces, advocating for higher efficiency standards which would lead to greater pocketbook savings for consumers. Heating costs are a significant household energy expense. DOE's Energy Saver webpage states that heating a home uses more energy and costs more money than any other system in the home -- typically making up about 42% of the home utility bill².

III. OVERVIEW OF CONSUMER GROUPS COMMENTS

As detailed more fully below, Consumer Groups make these main points:

1. The AHRI petition, in its very first paragraph, cites reducing "regulatory burden" as one of its key justifications. While reductions in regulatory burden, in the abstract, are desirable – assuming no adverse impacts under the relevant statutory scheme – nothing in 42 U.S.C. §§ 6291 – 6309 establishes "reducing regulatory burden" as a statutory goal, and the actual contents of the AHRI petition violate explicit provisions of that statutory scheme. AHRI concerns over "regulatory burden" do not obviate the Department's obligation to comply with the law.
2. The AHRI petition explicitly asks the Department to put on hold enforcement of a duly promulgated furnace fan efficiency test procedure and standard, and the Department has granted that request.³ Consumer Groups believe the refusal to enforce a duly promulgated standard runs counter to the intent of the Energy Policy and Conservation Act ("EPCA")⁴ and violates the anti-backsliding provision of 42 U.S.C. § 6295(o)(1). The non-enforcement policy will lead to litigation that will leave all interested parties – including manufacturers themselves – in an undesirable limbo, particularly because private parties are granted the ability to enforce violations of EPCA. The Department is placing itself in legal peril by announcing its intent not to enforce a duly promulgated standard.
3. AHRI is proposing to upend and, effectively, abolish standards that were duly promulgated as far back as 2007.⁵ Its petition relies heavily on its as-yet unproven assertion that a "crosswalk"

² <https://www.energy.gov/energysaver/heat-and-cool/home-heating-systems>

³ "Enforcement Policy Statement – Furnace Fans" (Nov. 2, 2018), available at: <http://www.energy.gov/gc/enforcement/> (last accessed December 28, 2018).

⁴ 42 U.S.C. §§ 6291 – 6309.

⁵ The current furnace (AFUE) standard was last promulgated in 2007; the fan (FER) standard in 2014. The Department is explicitly required by law to adopt and periodically revise furnace standards (42 U.S.C. § 6295(f)(1))

can, as a practical and legal matter, be made from the three current standards (furnace/AFUE, fan/FEER and standby/off mode), without: (a) diminishing the energy savings that would be achieved in the absence of the granting of the AHRI petition, (b) harming consumers, or (c) violating EPCA. AHRI's factual assertion about a successful "crosswalk" is unknowable, at least not until the passage of significant time (likely, years) in highly technical and contentious proceedings before the Department. Legally, EPCA does not allow such a "crosswalk." Harm to consumers is discussed immediately below.

4. While AHRI – itself highly knowledgeable about the components of furnaces, applicable efficiency standards for furnaces and fans, and relevant energy prices – blithely asserts that consumers will be better off from the proposed combined standard (AFUE2), nothing could be further from the truth of the actual lives of consumers, especially low-income consumers. Consumer Groups have decades of experience working directly with consumers and the front-line agencies that help them. Based on that experience, we believe the proposed AFUE2 standard will not only prove hard for consumers to understand, it will, in many instances, mislead them into buying furnaces that are in fact more expensive to operate than would appear from the rating itself.

IV. A GOAL OF "REDUCING REGULATORY BURDEN" DOES NOT ALLOW THE DEPARTMENT TO AVOID FULL COMPLIANCE WITH EPCA

At the outset of its petition, AHRI states: "A whole-product test procedure and single performance metric will reduce regulatory burden and increase innovation." However, as AHRI notes, most of the asserted regulatory burden is due to the fact that the schedules for reviewing the separate tests and standards for furnaces, fans, and standby/off mode use are currently on different schedules.⁶ A much less drastic solution for that problem would be to bring those currently separate schedules into synch with one another, as the comments from the Appliance Standards and Awareness Project more fully explain.

Consumer Groups do not question that reducing regulatory burden, in the abstract, is usually desirable. The current Administration is strongly committed to reducing regulation.⁷ But

and circulating fans (42 U.S.C. § 6295(f)(4)(D)). There is no explicit authority to combine these standards, and doing so would violate EPCA.

⁶ AHRI Petition, III.A. "A Combined Test Procedure and Metric Reduces Burden."

⁷ Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017). It is worth noting that the Presidential Executive Order, while clearly enunciating a policy of reducing regulatory burdens, contains the caveats "unless prohibited by law"; "unless otherwise required by law" and the like no less

almost all regulations are promulgated within the context of a statutory structure that contemplates benefits to the public if regulations are in fact promulgated. Reducing regulation for its own sake thus can run afoul of the very purpose of the statutes that authorize the relevant agency to promulgate regulations at all.

Here, the relevant authorizing statute is the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 *et seq.* Two of the seven stated purposes of the Act are “to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses” and “to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products.”⁸ Consistent with those statutory purposes, Title III, Part B established an Energy Conservation Program for Consumer Products Other Than Automobiles.⁹

AHRI’s proposal flies in the face of the explicit requirements of EPCA, as amended. The statutory scheme mandates that the Department adopt and enforce standards for furnaces, separate from standards for furnace fans;¹⁰ and standards for furnace fans, separate from standards for furnaces.¹¹ In the name of reducing regulatory burden, AHRI would simply wipe these explicit statutory requirements off the books. Instead, AHRI assumes that there is legal authority – where there is none - for combining these separate, legally-mandated requirements into a single test procedure and efficiency standard for all energy usage connected with a furnace. Were the Department to adopt AHRI’s proposal, it would expose itself to near-certain legal challenge.

V. THE NON-ENFORCEMENT POLICY IS ILLEGAL

On November 2, 2018, AHRI wrote a letter to Laura Barhydt, Assistant General Counsel, Enforcement, asking for a “non-enforcement policy applicable to reporting, certification, and compliance obligations for the Fan Energy Rating requirements to go into effect in July 2019.” The request was expeditiously granted the same day.

than four times, thus limiting agency discretion to reduce regulatory burden. Even a well-intentioned desire to reduce regulation cannot trump existing statutes, such as the Energy Policy and Conservation Act.

⁸ Pub. L. 94-163. § 2 (4) & (5), 89 Stat. 874.

⁹ Pub. L. 94-163, Part B, §§ 321-339.

¹⁰ *See*, 42 U.S.C. § 6291(23)(defining “furnace”); § 6291 (22)(setting “annual fuel utilization efficiency” as the “efficiency descriptor” for “furnaces”); § 6295(f)(1)(setting initial AFUE standards for furnaces).

¹¹ 42 U.S.C. § 6295(f)(4)(D). Note that there are yet further, separate requirements for furnace standby and off mode energy use. 42 U.S.C. § 6295(gg).

A policy of non-enforcement, writ large, would eviscerate the core, mandatory provisions of EPCA regarding the establishment of appliance and product efficiency standards. While the Department in its November 14, 2018 “Notice of petition for rulemaking; request for comment” unequivocally states that it “takes no position at this time regarding the merits of the suggested rulemaking or the assertions in AHRI’s petition,” it did almost instantaneously grant AHRI’s request for the non-enforcement statement. Thus, it either has already formed an opinion that the underlying petition to adopt an AFUE2 standard should be granted, which (arguably) could form the basis for a non-enforcement policy statement,¹² or it has opened the door to any standard being effectively frozen by an industry actor filing a petition to change an existing standard and asking for a similar non-enforcement policy in the interim. To the extent industry actors manufacture or sell products that do not comply with the fan standard scheduled to go into effect in July 2019, litigation is likely to follow, as “any person” is authorized to bring suit against “any manufacturer or private labeler who is alleged to be in violation of any provision of this part or any rule under this part.”¹³

Further, a “non-enforcement” policy regarding a duly promulgated standard violates the intent of the anti-backsliding provisions 42 U.S.C. § 6295(o)(1). In effect, the non-enforcement policy repeals a duly promulgated standard and replaces it with the possibility of a docket that may (or may not) replace the fan standard (as well as the furnace/AFUE and standby/off mode standards) with combined AFUE2 that would unquestionably allow an increase in the “maximum allowable energy use” of fans.¹⁴ Since a fan standard has been duly promulgated in accordance with 42 U.S.C. § 6295(F)(4)(D), the Secretary cannot promulgate AHRI’s requested AFUE2 because it clearly would allow manufacturers to make and distribute furnaces that have a lower fan efficiency than mandated by the published standard.

VI. THERE IS NO LEGAL AUTHORITY FOR AHRI’S PROPOSED “CROSSWALK”, AND IMPLEMENTING IT WOULD VIOLATE EPCA

AHRI proposes, if its petition is granted, a “crosswalk” of the now separate standards for furnace efficiency, fan efficiency, and standby/off mode use to a new, unified standard since “the transition from three independent metrics to one integrated product metric will demonstrably

¹² However, forming such an opinion even before any comments have been filed would appear to violate the Administrative Procedures Act.

¹³ 42 U.S.C. § 6305(a)(1).

¹⁴ 42 U.S.C. § 6295(o)(1).

‘alter the measured efficiency’”.¹⁵ AHRI cites 42 U.S.C. § 6293(e) as if it provides explicit legal authority to replace the three current standards with the proposed AFUE2 standard. This assertion seriously misreads § 6293(e).

The first sub-paragraph of section 6293(e) speaks of “any amended test procedure” (in the singular) and the “extent, if any” of the impact “of any covered product” (also in the singular). Throughout the section, there are repeated references to “amended test procedure;” “applicable” or “amended” “energy conservation standard;” and “covered products.”

The fallacy of AHRI’s reliance on § 6293(e) is that AHRI is not proposing to amend an existing test procedure for a covered product, but rather to eliminate existing test procedures (and related standards) for two covered products [furnaces (42 U.S.C. § 6292(a)(5)) and furnace fans (42 U.S.C. § 6295(F)(4)(D) & 10 C.F.R. 430.32(y))], and the standard for standby and off mode power consumption for furnaces (10 C.F.R. 430.32(e)(1)(iii)). The provisions of § 6293(e) have rarely, if ever, been implemented so it is hard to know the exact contours of the types of agency action that this sections authorizes. However, it clearly does not authorize the elimination of standards for covered products, nor the de facto repeal of duly established appliance standards and test procedures. It does not give the Department authority to halt implementation of 10 C.F.R. 430.32(y) regarding furnace fan efficiency simply because it has received a petition proposing a radically-new approach to regulating furnace efficiency that is not contemplated anywhere in EPCA.

VII. CONSUMERS WILL BE HARMED IF AN AFUE2 STANDARD IS ADOPTED

Most consumers are not energy experts, nor heating equipment technicians. They may not know the difference between furnaces and boilers, nor between permanent split capacitor motors and brushless permanent magnet motors. In fact, those with furnaces may not know that the heating equipment in the home includes a fan that can cost a consumer over \$100/year in electricity. However, consumers – especially those in colder climates – are generally aware that their heating bills are large, and that more efficient heating equipment would reduce those bills.

Unfortunately, an AFUE2 standard would make it harder for many consumers to get the information they may want. For example, assume a consumer in an area of the country with higher-than-average natural gas prices, but average electricity prices, wants to ensure that he/she is buying a furnace that is highly efficient in burning gas. Under an AFUE2 approach, the

¹⁵ AHRI Petition, IV., “Metric Changes Require a Crosswalk”

consumer could look at two furnaces that have identical AFUE2 ratings, yet one could have a much more efficient fan – and thus be less efficient in burning gas – while the other would have the opposite characteristics: more efficient in gas consumption, but with a less efficient fan. Thus, even consumers who take the time to carefully read the disclosure labels might end up buying a furnace that does not meet the consumer’s energy efficiency needs.

Moreover, it is not clear how manufacturers would comply with existing labeling requirements, if an AFUE2 standard is adopted. Under 16 C.F.R. § 305.12(f)(5) & (6), manufacturers are required to display “the annual fuel utilization efficiency (AFUE) for furnace models. . .” and “ranges of comparability consisting of the lowest and highest annual fuel utilization efficiency (AFUE) ratings for all furnaces of the model’s type. . . .” Under the AHRI proposal, testing to develop AFUE numbers would no longer be done. Yet labeling is required for each “covered product.”¹⁶

Even if the AHRI proposal can be brought into compliance with labeling requirements under 42 U.S.C. § 6294 and implementing Federal Trade Commission regulations, a unified AFUE2 standard would simply make it harder for consumer to make informed choices. Right now, a reasonably informed consumer can make smart choices based on AFUE simply by having a reasonable understanding of the consumer’s current heating bill, and some basic math sense. For example, if the current furnace uses natural gas and is 90% efficient (AFUE), and two models being considered are 92% and 95% efficient, the consumer can easily determine that the higher-efficiency model (95%) will yield more than double the gas savings of the lower efficiency model (92%), when comparing both to the current unit (90%).¹⁷ Under the AFUE2 approach, the consumer doesn’t know how efficient the unit is in terms of gas consumption or electric usage. Consumers would have no ability to even estimate the extent to which a new furnace would reduce, separately, the gas bills and the electric bills.

Additionally, an AFUE2 would allow manufacturers of many condensing furnaces to meet the combined metric without any improvement in furnace fan efficiency. Using DOE’s analysis accompanying the final furnace fan rule issued in 2014, purchasers of condensing furnaces who would otherwise buy a furnace with “baseline” fan efficiency would be robbed of

¹⁶ 42 U.S.C. § 6294(a)(1).

¹⁷ That is, going to 95% AFUE is a 5% gain over the current unit, whereas going to 92% is only a 2% gain.

\$666 in life-cycle cost savings.¹⁸ In the aggregate, failure to implement and enforce the furnace fan rule will cost consumers billions of dollars, since the rule was estimated to save them billions.¹⁹

VIII. CONCLUSION

AHRI's AFUE2 proposal is neither good for consumers nor allowed by law. By announcing its "non-enforcement" policy, the Department is effectively eviscerating a duly promulgated fan efficiency standard scheduled to take effect in 2019. Doing so invites litigation. Moreover, were the Department to move to an AFUE2 standard – and thus abandon the current AFUE standard for furnaces – it would eliminate a standard that is required by law for a covered product. This would likely violate the anti-backsliding provision of 42 U.S.C. § 6295(o)(1). Finally, an AFUE2 would make it harder for consumers to make informed choices and rob them of greater savings on their heating costs which is typically the most costly part of the home energy bill.

AHRI's petition should be rejected. The Department should not open a notice-and-comment rulemaking proceeding.

Respectfully Submitted,



Charles Harak
Senior Attorney for Energy Issues
National Consumer Law Center
On behalf of its low income clients



Mel Hall-Crawford
Director, Energy Programs
Consumer Federation of America

¹⁸ See 79 Fed. Reg. 38130, 38184, Table V.3 (July 3, 2014). The life-cycle cost for the "Baseline" unit is \$2,478, versus a life-cycle cost of \$1,812 for a furnace with a fan at TSL 4 level efficiency. Thus, the savings is \$666 for a consumer who would buy a furnace with the efficiency level mandated by the July 3, 2014 rule, versus a furnace with "baseline" fan efficiency. The "average" savings of only \$341 is due to the fact that the average includes consumers who would buy furnaces with the efficient fans, even in the absence of any rule, and who therefore are assumed to have \$0 savings in the "average" analysis.

¹⁹ See 79 Fed. Reg. 38130, 38132 (July 3, 2014) ("The cumulative net present value (NPV) of total consumer costs and savings of today's standards for residential furnace fans ranges from \$10,024 million (at a 7-percent discount rate) to \$28,810 million (at a 3-percent discount rate)").