



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

July 3, 2024

Secretary Granholm
U.S. Department of Energy
1000 Independence Ave. SW
Washington, DC 20585

RE: Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, EERE-2017-BT-STD-0014

Dear Secretary Granholm:

Florida and the States represented by the undersigned attorneys general write regarding the Department of Energy's (DOE) recently released direct final rule regulating residential clothes washers.

I. Introduction

This direct final rule marks the latest regulatory overreach from the Biden Administration, this time into American laundry rooms and residential clothes washers. Many manufacturers resented DOE's initial rule regarding residential clothes washers. After many months of pressure by DOE, however, certain appliance manufacturers and advocacy organizations relented and submitted a regulatory proposal resulting in this direct final rule.

While this direct final rule appears to be less demanding than the initial proposed rule concerning energy efficiency standards, it does not consider the economic impact that will be borne by American consumers who will undoubtedly face appliance price hikes due to the new regulations. Not only that, but these overreaching efficiency standards will also leave consumers struggling with washers that take longer to clean clothes, ultimately leading to greater financial burdens falling on American families.

To help DOE reevaluate its latest attack on household appliances, the undersigned States ask DOE to return to abandon this rule or, at a minimum, to proceed with notice and comment rulemaking before enacting these stringent new standards for residential clothes washers.

II. Background

DOE proposed new energy conservation standards for residential clothes washers in March 2023 (the “proposed rule”). Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 88 Fed. Reg. 13,520 (Mar. 3, 2023). DOE received numerous comments, both supporting¹ and opposing² the new regulations. After months of impasse, advocacy organizations and home appliance manufacturers sent a joint statement to DOE (the “joint statement”).³ DOE adopted the joint statement and published a direct final rule (the “direct final rule”). Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 89 Fed. Reg. 19,026 (Mar. 15, 2024).

III. Authority

The Energy Policy and Conservation Act grants DOE the power to regulate residential clothes washers for energy conservation. *See* 42 U.S.C. § 6292(a)(7); 42 U.S.C. § 6295(g). That grant of authority is not limitless. *See* 42 U.S.C. § 6295(o). DOE must also consider the economic burden such regulations will impose on consumers and manufactures, and whether such burden is economically justified. *Id.* at § 6295(o)(2)(B)(i). And DOE may only issue a direct final rule if a joint statement (1) is submitted by interested parties who fairly represent the relevant points of view and (2) satisfies the standards of 42 U.S.C. § 6295(o). *See id.* § 6295(p)(4).

IV. Relevant Points of View

A. The Joint Statement

The Joint Statement represents the consent of the Association of Home Appliance Manufacturers (AHAM), advocacy groups, and a select group of States.⁴ But the joint statement was the result of administrative arm-twisting and did not address issues raised by important stakeholders during the period for comments on the proposed rule.

a. AHAM and Appliance Companies

The Association of Home Appliance Manufacturers (AHAM) is perhaps one the most important parties to this regulation outside the average consumer. AHAM represents multiple appliance companies including GE Appliances, Alliance Laundry Systems, Whirlpool, Samsung, and LG Electronics, among others. Companies represented by AHAM in the joint statement lodged complaints prior to the release of the joint statement related to numerous appliances. AHAM

¹ *See* Comment from Appliance Standards Awareness Project, et al. (May 17, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0459>; Comment from American Council for an Energy-Efficient Economy, et al. (May 2, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0458>.

² Comment from Members of Congress (May 17, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0456>.

³ Joint Statement on Energy Conservation Standards for Residential Clothes Washers (Sept. 25, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0505>.

⁴ *See* Joint Statement, *supra* note 3.

submitted a comment in opposition to the initial rule proposed by DOE.⁵ Whirlpool Corporation and GE Appliances, both members of AHAM, also submitted critical comments.⁶

AHAM's comment stressed that the proposed rule would "eliminate consumer features, reduces choice, significantly increases cost, and/or negatively impacts product performance."⁷ AHAM members' independent testing confirmed that actual performance by washing machines with the new DOE standards are significantly different from previous performance. Machines using DOE's new standards had significantly decreased load turnover, meaning that it would be harder and take longer to remove soil from laundry load.⁸ Not only do the new standards impact actual performance, AHAM's original comment highlights how consumer preference might even be a bigger issue.⁹ GE Appliances, one of AHAM's members, wrote separately to criticize DOE for its failure to realize the cost of consumer dissatisfaction.¹⁰

Further, AHAM's comment letter highlighted DOE's failure to adequately evaluate economic consequences of the proposed rule. Relying, in part, on a study it conducted with Bellomy Research, AHAM determined low-income households would be negatively impacted by having to purchase new residential clothes washers.¹¹ Their findings showed that over half of these households would not be able to purchase a more energy efficient washer and would have to resort to purchasing used washers or delaying purchasing a washer at all.¹² The result of that would be an ultimate delay in more households obtaining energy efficient washers—a result DOE has not taken into account.¹³

Whirlpool, another one of AHAM's members, wrote separately to further emphasize that the proposed rule was not economically justified.¹⁴ Research conducted by Whirlpool showed a 25% increase cost for consumers and a potential 31% loss in industry net present value, which could result in more than 8,000 American job losses.¹⁵ It also criticized DOE for its failure to conduct a supply-chain analysis because the regulatory burdens of disparate standards in markets sharing a supply chain, like the United States and Canada, could have significant burdens to the industry.¹⁶ The direct final rule, like the proposed rule, does not address a North American integrated supply-chain analysis.

Even though AHAM ultimately endorsed the joint statement, the failure to address AHAM and its members' original comments is glaring. The direct final rule does little to assuage the fear

⁵ Ass'n of Home Appliance Mfrs. Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0464>.

⁶ Whirlpool Corp. Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0462>; GE Appliances Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0457>.

⁷ Ass'n of Home Appliance Mfrs. Comment, *supra* note 5, at 1.

⁸ *Id.* at 6–10.

⁹ *Id.* at 10.

¹⁰ GE Appliance Comment, *supra* note 6, at 2.

¹¹ Ass'n of Home Appliance Mfrs. Comment, *supra* note 5, at 27.

¹² *Id.* at 27–28.

¹³ *Id.*

¹⁴ Whirlpool Corp. Comment, *supra* note 6, at 4.

¹⁵ *Id.* at 3, 5.

¹⁶ *Id.* at 15.

of the economic impact such energy efficiency standards for residential clothes washers will have on low-income households. Under DOE’s direct final rule, consumers will bear the burden of DOE’s coercion efforts against manufacturers.

As mentioned, many manufacturers originally wrote complaints regarding the burdensome costs the proposed rule would have on consumers and manufacturers alike before swiftly changing their position. This phenomenon, known as “administrative arm-twisting,” has become increasingly common. *See generally* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873 (1998). Informal ad hoc bargaining is a serious concern, and federal agencies have continually engaged in such practices. *Id.* at 876. Agency arm-twisting has no judicial oversight, *id.* at 875–76, and “potentially arrogates undelegated power,” *id.* at 930. Bargaining for rules and regulations between a subgroup of regulated entities, advocacy groups, and an agency invites standardless and unaccountable actions by agencies. *Id.* at 936. AHAM, along with many other appliance groups, wrote comments criticizing DOE’s proposed regulations. Such comments highlighted the regulations’ impact on low-income individuals. However, after months of AHAM opposing the proposed rule, they changed their minds and submitted a joint statement with the same political advocacy groups that have supported DOE from the beginning. Arm-twisting is not always obvious, *id.* at 941, but when manufacturers raise serious concerns only to suddenly abandon them, it raises questions about the agency’s methods of achieving its seemingly political ends.

b. The Advocacy Groups

The joint statement also relies largely on the support of several advocacy groups, including the Alliance for Water Efficiency, the Northwest Energy Efficiency Alliance, the Natural Resource Defense Council, Earthjustice, and the National Consumer Law Center. These niche advocacy groups do not represent the interests of everyday consumers, and their input should not be given significant weight by DOE.

The Natural Resources Defense Council (NRDC) is an advocacy group whose stated mission is to “expand support for efficiency measures that improve customer savings.”¹⁷ Yet, NRDC does not address the negative economic impact the proposed rule would have on these low-income households.¹⁸ The National Consumer Law Center is an organization that addresses a range of issues from Criminal Justice to Student Loans.¹⁹ In their comment letter, they propose the idea that DOE’s new energy efficiency standards will actual provide significant financial benefits to low-income households, which is contrary to the research done by appliance groups.²⁰ And Earthjustice is a “nonprofit public interest environmental law organization” that seeks “to advance clean energy, and to combat climate change.”²¹ None of these groups has expertise in setting energy efficiency standards for appliances.

¹⁷ *Climate Change: Overview*, Nat. Res. Def. Couns., <https://www.nrdc.org/issues/climate-change#solutions> (2024).

¹⁸ NEEA, ComEd, and NRDC Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 17, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0455>.

¹⁹ *Key Issues*, Nat’l Consumer L. Ctr., <https://www.nclc.org/our-work/#TabListing-tabPanel-9>.

²⁰ Nat’l Consumer Law Center Comment Letter on Energy Conservation Standards for Residential Clothes Washers at 1–2 (May 15, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0448>.

²¹ *About Earth Justice*, Earth Justice, <https://earthjustice.org/about> (last visited June 27, 2024).

The Alliance for Water Efficiency is a water-conservation advocacy group.²² This group might have significant interest in residential clothes washers' water conservation, but it seems to not have expertise in the proposed rule's subject matter in any way.

The organization that comes closest to demonstrating a specialty in energy efficiency relating to residential clothes washers is Northwest Energy Efficiency Alliance. This group has previously conducted independent energy efficiency testing on clothes washers.²³ But, again, it does not appear that this group has any expertise in weighing consumer and manufacturer costs that should lead DOE to rely on their analysis.

B. Key Groups Not in the Joint Statement

Other groups provided comments on the proposed rule regarding residential clothes washers but did not appear in the joint statement. While these groups are not manufacturing specialists, they do have a keen focus on the consumers who will bear the brunt of DOE's burdensome direct final rule.

The National Apartment Association (NAA) and the National Multifamily Housing Council (NHMC), two groups that arguably have a closer connection to residential clothes washers than environmental advocacy groups, raised concerns about the economic impact that low-income households will face from this regulation.²⁴ The NAA and NHMC represent home builders, renters, and property owners and are acutely aware of the economic implications upon consumers and low-income households.²⁵ The groups purchase large quantities of appliances, including residential clothes washers. Neither group joined the joint statement, as their comments make clear why they were absent from this statement.

NAA and NHMC expressed in their comment letter that DOE should avoid new efficiency requirements that undermine the efforts of high construction costs and cause delays, creating increased costs that will be passed onto consumers and renters through the impacts of diminished housing supply.²⁶ These groups are concerned about regulations that impact their ability to deliver new housing units. Already difficult market conditions "are exacerbated by new regulatory burdens and changes to the availability and expense of essential appliances in particular."²⁷ NAA and NHMC explained that modern "clothes washers are already highly energy and water efficient" and that efforts like DOE's "result in only negligible [sic] efficiency gains that should be balanced against the costs and burdens of equipment changes, production disruption and performance impacts."²⁸ NAA and NHMC rightly predict that upfront costs will have significant impacts on consumers, more so than DOE anticipates in its regulation.

²² Alliance for Water Efficiency, <https://www.allianceforwaterefficiency.org/about> (2024).

²³ See *Perfect Pairings? Testing the Energy Efficiency of Matched Washer-Dryer Sets*, Nw. Energy Efficiency All., (Jan. 20, 2022), <https://neea.org/resources/perfect-pairings-testing-the-energy-efficiency-of-matched-washer-dryer-sets>.

²⁴ NAA and NHMC Comment Letter on Energy Conservation Standards for Consumer Residential Clothes Washers (May 16, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0451>.

²⁵ *Id.*

²⁶ *Id.* at 3.

²⁷ *Id.*

²⁸ *Id.* at 4.

Finally, while Massachusetts, New York, and California support the changes DOE seeks to implement, 21 States expressed concern about consumer welfare impacted by DOE's proposed rule.²⁹ By statute, a joint statement must come from "interested persons that are fairly representative of the relevant points of view" and must include "representatives of . . . States." 42 U.S.C. § 6295(p)(4). Properly construed, the statute requires the concurrence of States across the ideological spectrum for DOE to proceed with a direct final rule. Here, DOE does not come close to meeting that standard. Indeed, it come near to approaching the requisite consensus. A handful of States favor DOE's proposal, while a much larger group of States strongly oppose it. DOE cannot cherry pick the States with which it is politically aligned to circumvent the ordinary rulemaking process. Doing so fails the "fairly representative" requirement of § 6295(p)(4).

Along with taking issue with the effects of new energy efficiency standards on consumers, many of the signatory States raised numerous concerns with DOE's proposed rule including its reliance on social costs of carbon, its disregard for federalism, and the Commerce Clause implications.³⁰ States have a direct interest in protecting consumers from the increased costs associated with the implementation of this rule. States are also directly affected by this rule because many State entities purchase industrial clothes washers and thus will directly bear the burden of their increased costs. *See* 42 U.S.C. § 6297(e) (providing that DOE energy efficiency standards preempt less stringent state-law standards.)

Moreover, 42 U.S.C. § 6295(p)(4)(C) states that the Secretary shall withdraw the direct final rule if one or more adverse comments are received, and the Secretary determines that the adverse comment provides a reasonable basis for withdrawing the rule. We believe that this letter serves as the basis for such a reasonable determination. Specifically, this letter outlines the burden outweighing the benefit of the rule as is contemplated by 42 U.S.C. § 6313(a)(6)(B)(ii), and 42 U.S.C. § 6313(a)(6)(B) is explicitly mentioned as a reason for withdrawing a rule in 42 U.S.C. § 6295(p)(4)(C)(i).

V. Direct Final Rulemaking

Florida and the undersigned States believe more voices ought to be heard before DOE may enforce new energy efficiency standards for residential clothes washers. Such public participation is needed, especially given that States are often forced to grapple with the unprecedented use of "the whole of government" approach to implementing regulatory obligation on American consumer and manufacturers. This single DOE direct final rule is one of many that target nearly every household appliance.

DOE has the power to regulate residential clothes washers for energy conservation. *See* 42 U.S.C. § 6295(g)(2). It can only do so using a direct final rule, however, under narrow conditions. *See* 42 U.S.C. § 6295(p)(4). Those conditions are not satisfied here. As previously mentioned, the direct final rule did not adequately respond to the concerns raised in response to the proposed rule, nor does the joint statement form a fairly representative pool of interested parties. DOE should at the very least proceed with notice and comment rulemaking, so that all interested parties can

²⁹ See Joint States Attorneys General Regarding Comment Letter on Energy Conservation Standards for Residential Clothes Washers (May 2, 2023), <https://www.regulations.gov/comment/EERE-2017-BT-STD-0014-0438>.

³⁰ *Id.*

comment on the new standards. The additional comment period will allow DOE to reevaluate the benefits and burdens of its rules under the factors listed in 42 U.S.C. § 6296(o)(2)(B)(i).

Moreover, this direct final rule shows that such procedure should be used sparingly and cautiously. Direct final rulemaking allows the Secretary alone to weigh incredibly important economic decisions without public input, allowing agencies to not be accountable to anyone. Typical notice and comment rulemaking “reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.” *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). It also “allows all stakeholders in a regulatory decision to be heard before a decision is made and ensures that the agency responds to relevant comments.” Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 Alb. L. Rev. 79, 86 (2009). That does not describe DOE’s energy efficiency standards for residential clothes washers.

The notice and comment process—as opposed to direct final rulemaking—is designed to ensure some level of political accountability for internal agency decisions that would otherwise be hidden. *Id.* at 86–87. It also “provides a record” to facilitate judicial review under the Administrative Procedure Act (APA). *Id.* Allowing affected parties to participate may also improve the perceived legitimacy of the decisionmaking process. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980) (describing the benefits to private parties and the government of notice and comment rulemaking). Transparency between the Secretary, DOE, manufacturers, States, and consumers is paramount and sadly lacking with the direct final rule.

These concerns about direct final rulemaking are not a new phenomenon. It is considered that such rulemaking should only be employed “where an agency believe that [a] rule will be noncontroversial and adverse comments will not be received.” Kolber, 72 Alb. L. Rev. at 88 (quoting Administrative Conference of the United States, Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,110 (Aug. 18, 1995)). Historically though, agencies have missed the mark with their predictions about whether a rule will be “noncontroversial” and whether “adverse comments” will be submitted. *Id.* at 80, 104. One of the largest agencies in the United States, the Food and Drug Administration (FDA), has an atrocious track record regarding challenges to its promulgation of direct final rules. The FDA has withdrawn forty percent of rules since 1997 for which it attempted to use direct final rulemaking. *Id.* at 82. DOE’s direct final rule on residential clothes washers would likely face the same fate as those FDA rules if the adverse comments on the proposed rule are any indication.

Not only do agencies poorly determine when to employ direct final rulemaking, this procedure also faces legal risk. For one, the procedure is not mentioned in the APA. *See* 5 U.S.C. §§ 551–59, 701–06. Not only is it not provided in the APA, the hurried nature of direct final rules “does not comport well with the additional demands associated with the continued availability of substantive judicial review.” Lars Noah, *Doubts about Direct Final Rulemaking*, 51 Admin. L. Rev. 401, 403 (1999). Therefore, such rules “may reduce the efficiency of agency rulemaking, can cause confusion about the state of the currently effective law, and erode[] public confidence in the rulemaking process.” Kolber, 72 Alb. L. Rev. at 80.

Here, NAA and NHMC raised legitimate concerns regarding costs to consumers and purchasers, appliance manufacturers stressed that the proposed rule would create supply-chain issues that will harm consumers and manufacturers alike, and many of the States undersigned here have raised legal arguments that question the lawfulness of the direct final rule. DOE should

reevaluate these issues, and going forward with the proposed rule instead of the direct final rule would allow the agency to consider information it lacked in its adoption of the joint statement. *See Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978) (“[P]ublic participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions,”).

VI. A Return to Formal Rulemaking

The States also call on DOE to return to formal rulemaking. Such formal procedures are appropriate when the subject matter is scientifically complex, or when the economic impact will significantly affect industries and consumers. *See Admin. Conference of the U.S., Recommendation 76-3, Procedures in Addition to Notice and Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (1976). That describes the energy efficiency standards for residential clothes washers. Here, however, DOE not only failed to employ formal rulemaking, it did not even engage in the informal notice and comment process. The adversarial process and open debate are cornerstones of democracy, and courts have required agencies to provide rulemaking procedures for safeguarding those inalienable American principles. *E.g., Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

Furthermore, without formal rulemaking, evaluating an agency’s decisionmaking procedures, as well as the weight given to certain comments, studies, and notes, becomes rather difficult. “While an agency in informal [notice and comment] rulemaking ‘must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning.’” Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 Ohio St. L.J. 237, 269 (2014) (quoting Gary S. Lawson, *Reviving Formal Rulemaking: Openness and Accountability for Obamacare* (Heritage Found, Backgrounder No. 2585, 2011)). Comments used in the informal rulemaking process do little to guarantee that an agency seriously considers rules that impact certain parties. With formal rulemaking, however, there is a live hearing with the opportunity for cross-examination. Any rule flowing from a live hearing must be “based on evidence presented there,” and the agency “must respond” to “party’s proposed findings.” *Id.* Having a transparent process, such as formal rulemaking, is paramount in increasing trust in our institutions and agencies. DOE should have—and still can—use formal rulemaking if it wants to prescribe new energy standards for residential clothes washers.

While a return to formal rulemaking is the most prudent course, at a minimum, DOE should employ the informal notice and comment rulemaking process in setting new energy efficiency standards for residential clothes washers. The direct final rulemaking process used by DOE excluded the signatory States, consumers, and manufacturers from participating in the rulemaking process which violates 42 U.S.C. § 6295(p)(4)(A). To foster transparency and instill trust in our agencies, DOE should rescind its direct final rule. “The American people deserve a regulatory system that works for them, not against them.” Executive Order No. 12866: Regulatory Planning and Review 58 Fed. Reg. 51,735 (Sept. 20, 1993).

VII. Conclusion

This direct final rule will impact the lives of nearly all Americans. Given the widespread impact of the rule, DOE should afford the public a chance to comment on a regulation that will reach its way into homes and meaningfully consider that feedback. As of right now, the

implementation of these new energy efficiency standards for residential clothes washers does not give the people that opportunity. Florida and the undersigned States request that DOE seriously reevaluate its direct final rule in light of this comment.

Sincerely,



Ashley Moody
Florida Attorney General



Steve Marshall
Alabama Attorney General



Tim Griffin
Arkansas Attorney General



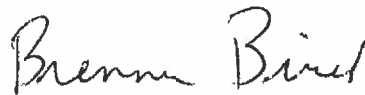
Chris Carr
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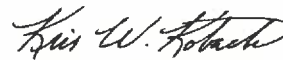
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