STATE OF TENNESSEE

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**SUBMITTED ELECTRONICALLY**
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Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, D.C. 20585

**Re: Energy Conservation Program: Energy Conservation Standards for Consumer Boilers, No. EERE-2019-BT-STD-0036**

Dear Secretary Granholm,

The Department of Energy's efforts to micro-manage virtually every aspect of American life continue unabated. At issue this time is a new set of efficiency standards (the "Proposed Standards" or "Standards") for consumer boilers that the Department has proposed under the Energy Policy and Conservation Act (EPCA). *See generally* Dep't of Energy, *Energy Conservation Program: Energy Conservation Standards for Consumer Boilers*, 88 Fed. Reg. 55,128 (Aug. 14, 2023). The States of Tennessee, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, and Virginia appreciate the opportunity to comment on the same.

Tennessee and other States have previously expressed concerns with many of the Department's proposed EPCA standards, *see, e.g.*, Cmt. of Tennessee on Energy Conservation Standards for Consumer Water Heaters (Sept. 26, 2023) *available at* https://tinyurl.com/yunfd3xy (State Water Heaters Cmt.); Cmt. of Tennessee *et al.* on Energy Conservation Standards for Residential Clothes Washers (May 2, 2023), *available at* https://tinyurl.com/4h3hjbey (State Washer Cmt.); Cmt. of Tennessee *et al.* on Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and

Freezers (Apr. 28, 2023), *available at* https://tinyurl.com/38457upd (State Refrigerator Cmt.), and we renew those objections here. The proposal to impose more stringent annual fuel utilization efficiency standards for gas-fired and oil-fired boilers is problematic for the following reasons:

1. The Standards Wrongly Rely on Faulty Social-Cost Estimates. The Department's Proposed Standards rely significantly on a misguided estimate of the social costs of carbon, methane, and nitrous oxide (the "IWG estimates"), *see, e.g.*, 88 Fed. Reg. at 55,179, as developed by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG), *see* IWG, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990 (Feb. 2021) (discussing development of those estimates).[1] We question the requirement of the Office of Information and Regulatory Affairs (OIRA) that agencies use the IWG estimates, *see* OIRA, *Social Cost of Greenhouse Gas Emissions: Frequently Asked Questions (FAQs)* (June 3, 2021), https://tinyurl.com/3xce6t73, particularly when problems with the estimates are so well documented, including through prior comments to the Department's other proposed energy-conservation standards. *See, e.g.*, Cmt. Of Louisiana *et al.* on Energy Conservation Standards for Consumer Conventional Cooking Products (Apr. 3, 2023) (including declarations of Kevin D. Dayaratna, Ph.D., and Anne E. Smith, Ph.D.) *available at* https://tinyurl.com/yby4zhav (Louisiana Cooking Products Cmt.). We incorporate those comments' criticisms of the IWG estimates, in addition to those contained in *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022). Although the Fifth Circuit reversed the district court's decision on standing grounds, its analysis highlighted that the Department "must exercise discretion in … deciding to use the" IWG estimates. *Louisiana ex rel. Landry v. Biden*, 64 F.4th 674, 681 (5th Cir. 2023). Here, the use of the fundamentally flawed IWG estimates, and the Department's blanket reliance on the IWG estimates generally, fails this directive.[2]

2. The Standards Violate Executive Order 13,132 by Discounting Federalism Concerns. Executive Order 13,132 requires that agencies consult with state and local officials to reduce the intrusive effect of "policies that have federalism implications." E.O. 13,132 § 3(c). The Proposed Standards' boilerplate, one-paragraph analysis is woefully deficient. The Department "tentatively determined that [the Standards] would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" because (1) "EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule" and (2) "States can petition [the Department] for exemption from such preemption." 88 Fed. Reg. at 55,212. Therefore, according to the Proposed Standards, "no further action is required by Executive Order 13,132." *Id.*

[1] *Available at* https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[2] The Department claims that it "would reach the same conclusion … in the absence of the" IWG estimates and that the IWG estimates "did not affect the rule ultimately proposed by DOE." 88 Fed. Reg. at 55,179. These statements stand in tension, however, with the Department's statement that it is "important to take" such emissions into account via the IWG estimates, as well as its extensive discussion of IWG estimates throughout the Proposed Standards. *Id.* at 55,141; *see also id.* at 55,131, 55,179-182. This tension underscores the importance of commenters' previous requests that the Department forego use of the IWG estimates altogether.

As Tennessee and other States have previously discussed, *see, e.g.,* State Water Heater Cmt. 2-3; State Refrigerator Cmt. 2-3; State Washer Cmt. 3, the Proposed Standards do have significant federalism implications within the meaning of E.O. 13,132. First, the Department's standards have a preemptive effect on States' procurement standards. *See* 42 U.S.C. § 6297(e). Furthermore, States own and purchase appliances like consumer boilers. The Proposed Standards' effect on consumer boiler costs therefore directly affects States as purchasers. The Department's Proposed Standard directly implicates federalism, and this should have triggered E.O. 13,132 review.

3. The Standards Ignore EPCA's Constitutional Issues. Under the Commerce Clause, Congress is only authorized to regulate intrastate activity when that activity "substantially affects interstate commerce." *United States v Lopez*, 514 U.S. 549, 559 (1995). But the Proposed Standards, tracking the EPCA itself, fail to distinguish between inter- and intrastate commerce and instead cover *all* commercial activity. For the Proposed Standards to be constitutional, the Department must show that the covered intrastate activity substantially affects the interstate market for covered products. The Proposed Standards are completely devoid of any such analysis, and there is no constitutional basis for applying the Standards to intrastate commerce in consumer boilers. This flaw pervades the Proposed Standards and renders them unconstitutional because the Commerce Clause does not give Congress the authority to regulate *all* activities merely because they "'substantially affect' interstate commerce." *Id.* at 587 (Thomas, J., concurring). Furthermore, the Proposed Standards will dominate a field that traditionally belonged to the States—*i.e.*, the regulation of consumer goods. That surely flips "the Tenth Amendment on its head," *id.* at 589 (Thomas, J., concurring), and suggests the EPCA does not provide the Department with such extensive authority, *see*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

4. The Standards Fail to Adequately Consider Important Rulemaking Factors Such as Time for Meaningful Review, Economic Hardship, and Strain on the Energy Infrastructure. The undersigned States are concerned that the Department both failed to consider certain "important aspect[s]" of the regulatory problem and "offered an explanation for its decision that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Department shortened the comment period to 60 days despite the requirement that the comment period "will not be less than 75 calendar days." DOE, *Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 86 Fed. Reg. 70,892 (Dec. 13, 2021), https://tinyurl.com/4vhjb9tu; *see also* 10 C.F.R. Part 430, Subpart C, Appendix A. The Department justified this deviation from its own procedures by noting that it previously provided stakeholders the chance "to comment on the … preliminary results" and "extended the comment period for the … [Request for Information] by 30 days." 88 Fed. Reg. at 55,136. But the Department fails to acknowledge that it subsequently "altered its analysis" and "present[ed] different results." Cmt. of Am. Gas Ass'n *et al.* at 2-3. Furthermore, despite the substantially shortened comment period, the Department still "seeks comments, information, and data" on *twenty-three* significant issues. 88 Fed. Reg. at 55,215. This substantial deviation is highly prejudicial because it fails to provide stakeholders with sufficient time to respond to the Department's burdensome comment requests. *See, e.g.*, Cmt. of Air-Conditioning, Heating, and Refrigeration Institute (AHRI) at 1.

The Standards also impose a significant hardship on American businesses. The Department acknowledges that the Proposed Standards will likely cause domestic job loss, and American foundry owners will "face reduced profitability" and "fare worse" than their international competitors. 88 Fed.

Reg. at 55,177, 55,194, 55,196. This is because 90% of non-condensing consumer boilers, which the standards will essentially render obsolete, are manufactured in the United States, while only 60% of condensing consumer boilers are manufactured in the United States. 88 Fed. Reg. at 55,177, 55,194 (discussing that the Standard would require American manufacturers to "shift" from "sourcing or producing non-condensing heat exchangers … to sourcing condensing heat exchangers that are typically manufactured in foreign countries"). The Standards will be particularly burdensome on small businesses. The Department identified three American manufacturers that satisfied the small business criteria, and all three will be adversely impacted by the Standards. 88 Fed. Reg. at 55,210-211. Two of the businesses currently lack the infrastructure to satisfy the Standards' requirements and would incur "crush[ing]" conversion costs under the Proposed Standards. Cmt. of Nat'l Propane Gas Ass'n at 4; 88 Fed. Reg. at 55,211.

Consumers will also be adversely impacted by the Standards. The Standards will push non-condensing boilers off the market entirely, and many American homes are architecturally designed only for non-condensing boilers. *See* Cmt. of Am. Soc. of Gas Eng'rs at 1 ("[C]ondensing products are incompatible with the utility infrastructure in most existing homes with gas boilers.") Thus, many Americans would be forced to spend significant time and expense replacing the boiler in their home, and this would particularly impact low-income households. *See* Cmt. of Philadelphia Gas Works at 1-2. And because some older buildings are not architecturally capable of housing a condensing boiler at all, these Standards would leave some families out in the cold entirely. *Id.* at 1. Furthermore, although the Department projects that consumers will receive marginal annual savings over the lifetime of the boiler, the Department admits that these marginal savings will come at the expense of higher installation costs. 88 Fed. Reg. at 55,130, 55,185. This means that some consumers may never experience savings over the lifetime of the boiler because they cannot afford the higher upfront costs in the first place.

Finally, the Department has failed to meaningfully address the cumulative impact of its proposed standards, particularly on the nation's electric grid. At a time when "[e]lectric shortages have become more acute," Milton Ezrati, *America's Electric Grid Is Weakening*, Forbes (Mar. 24, 2023), https://tinyurl.com/2s3d2bvb, this Standard, like so many others, calls for an increase in electricity consumption. 88 Fed. Reg. at 55,131; *see also* 88 Fed. Reg. at 49,160 (anticipating that standard will cause share of gas-powered water heaters to decrease and share of electric pump-powered storage water heaters to increase from 5% to 63% by 2030). Given this reality, the Department should analyze the cumulative impact of this Standard alongside all others that place demands on the already overworked energy grid. The Department must reliably demonstrate it can implement these changes without exacerbating the "looming reliability crisis in our electricity markets" and subjecting Americans to skyrocketing electric costs and rolling blackouts. *E.g.*, *FERC Commissioners Tell Senators of Major Grid Reliability Challenges, with Some Blaming Markets*, Utility Daily (May 5, 2023), https://tinyurl.com/2c3zdf3c. It has failed to do so here.

* * *

The undersigned States are alarmed by the Department's continued efforts to control the lives of Americans. Tennessee, and numerous other States, have objected to many of the Department's proposed new energy-conservation standards. *See, e.g.* State Refrigerator Cmt; Louisiana Cooking Products Cmt. These objections apparently have been ignored, as many of the same issues continue to appear in one proposed set of standards after another. We again call on the Department to stop

micro-managing Americans' lives and to start addressing the serious concerns presented by its proposed standards. Americans deserve better.

Sincerely,



Jonathan Skrmetti
Tennessee Attorney General & Reporter



Steve Marshall
Alabama Attorney General



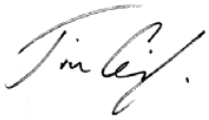
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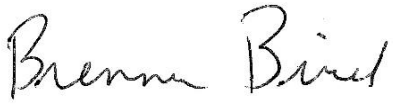
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