

distribution is to be truncated so that the deep percolation rates vary between 10 and 100 mm/year (0.39 and 3.9 in./year).

(3) DOE must assess the effects of general corrosion on engineered barriers. DOE may use a constant representative corrosion rate throughout the period of geologic stability or a distribution of corrosion rates correlated to other repository parameters.

Dated at Rockville, Maryland, this 9th day of March 2009.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. E9-5448 Filed 3-12-09; 8:45 am]

BILLING CODE 7590-01-P

## DEPARTMENT OF ENERGY

### 10 CFR Part 436

RIN 1904-AB68

#### Federal Procurement of Energy Efficient Products

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Energy (DOE) today publishes a final rule to promote Federal procurement of energy-efficient products. The final rule establishes guidelines for Federal agencies regarding the implementation of amendments to the National Energy Conservation Policy Act (NECPA) that require Federal agencies to procure ENERGY STAR qualified and Federal Energy Management Program (FEMP) designated products in procurements involving energy consuming products and systems. Today's final rule includes changes in response to comments received on the notice of proposed rulemaking published June 19, 2007. Most notably, today's final rule does not establish a reporting requirement, as initially proposed, for federal agencies under procurement requirement of NECPA.

**DATES:** This rule is effective April 13, 2009.

**FOR FURTHER INFORMATION CONTACT:** For technical issues contact Mr. Cyrus Nasser, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Federal Energy Management Program, EE-2L, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-9138, *e-mail:* cyrus.nasser@ee.doe.gov. For legal issues contact Mr. Chris Calamita, U.S. Department of Energy,

Office of the General Counsel, Forrestal Building, GC-72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9507, *e-mail:* Christopher.Calamita@hq.doe.gov.

#### SUPPLEMENTARY INFORMATION:

- I. Introduction and Background
  - A. The Energy Policy Act of 2005
  - B. ENERGY STAR Qualified and FEMP Designated Products
  - C. Proposed Rule
  - D. Draft Guidance
- II. Discussion of Comments and the Final Rule
  - A. Definition of "Covered Product"
  - B. Reporting Agency Exceptions to the Procurement Requirement
  - C. Compliance With Section 553
  - D. Definition of Criteria for ENERGY STAR Qualification or FEMP Designation
  - E. Supply Source for Excepted Procurement
- III. DOE Guidance
  - A. Procurements
  - B. Procurement Planning
  - C. Exceptions
- IV. Regulatory Review
  - A. National Environmental Policy Act
  - B. Regulatory Flexibility Act
  - C. Paperwork Reduction Act
  - D. Unfunded Mandates Reform Act of 1995
  - E. Treasury and General Government Appropriations Act, 1999
  - F. Treasury and General Government Appropriations Act, 2001
  - G. Executive Order 12866
  - H. Executive Order 12988
  - I. Executive Order 13132
  - J. Executive Order 13211
- V. Congressional Notification
- VI. Approval of the Office of the Secretary

#### I. Introduction and Background

##### A. *The Energy Policy Act of 2005*

The Energy Policy Act of 2005 (EPACT 2005) (Pub. L. 109-58; August 8, 2005), amended Part 3 of title V of NECPA (42 U.S.C. 8251-8259) by adding section 553. Section 553 of NECPA requires each Federal agency to procure ENERGY STAR qualified or FEMP designated products, unless the head of the agency determines in writing that a statutory exception applies. (42 U.S.C. 8259b(b)) Section 553 of NECPA was further amended by section 525 of the Energy Independence and Security Act of 2007 (Pub. L. 140-110; December 19, 2007) to clarify that the procurement requirement applies to the procurement of a product in a category covered by the Energy Star program or the FEMP program for designated products. (42 U.S.C. 8259b(b)(1)) Further, each Federal agency is required to incorporate into the specifications of all procurements involving energy consuming products and systems, and into the factors for evaluation of offers received for such procurements, criteria for energy

efficiency that are consistent with the criteria used for rating ENERGY STAR qualified products and for rating FEMP designated products. (42 U.S.C. 8259b(b)(3))

Section 553 also requires that all inventories or listings of products operated and maintained by the General Services Administration (GSA) and the Defense Logistics Agency (DLA) clearly identify and prominently display ENERGY STAR qualified and FEMP designated products in any listing or inventory of products, and it requires GSA and DLA to supply only ENERGY STAR qualified and FEMP designated products in all covered product categories, except in cases in which the head of the agency ordering a product specifies in writing that an exception applies. (42 U.S.C. 8259b(c))

Section 553 of NECPA contains two exceptions to the requirement to procure only ENERGY STAR qualified and FEMP designated products, and it excludes a specific category of energy consuming products from coverage.

A procurement may be excepted if the head of an agency finds in writing that either: (1) An ENERGY STAR qualified product or FEMP designated product is not cost-effective over the life of the product taking energy cost savings into account; or (2) no ENERGY STAR qualified product or FEMP designated product is reasonably available that meets the functional requirements of the agency. (42 U.S.C. 8259b(b)(2)) In addition, section 553 excludes from the definition of products subject to these requirements any energy consuming product or system designed or procured for combat or combat-related missions. (42 U.S.C. 8259b(a)(5))

The subsection entitled "REGULATIONS," section 553(f) of NECPA, directs the Secretary of Energy to issue guidelines to carry out the statute. (42 U.S.C. 8259b(f)) NECPA section 553 imposes procurement requirements on agencies and additional requirements on GSA and DLA. DOE does not need to issue regulations to implement those statutory requirements. Moreover, DOE does not have the authority to change by regulation the statutory procurement requirements that are applicable to agencies or the additional requirements that govern GSA and DLA.

Consistent with the direction provided in section 553(f), today's final rule amends 10 CFR part 436, Federal Energy Management and Planning Programs, to establish guidelines for Federal agencies on compliance with section 553.

### B. ENERGY STAR Qualified and FEMP Designated Products

In 1992, the United States Environmental Protection Agency (EPA) introduced ENERGY STAR as a voluntary labeling program designed to identify and promote energy efficient products, in part, to reduce greenhouse gas emissions.

In response to Executive Order 12902, "Energy Efficiency and Water Conservation at Federal Facilities," (59 FR 11463; March 8, 1994) twenty-two federal agencies signed an agreement in 1994 to shift their purchasing of energy-using products to the best 25% of models on the market. Products that were labeled with the ENERGY STAR logo met this requirement. The Department of Energy's Federal Energy Management Program (FEMP) provided additional guidance to Federal agencies to identify efficient products not covered by the ENERGY STAR program, i.e., FEMP designated products.

In 1999, the partnership between EPA and DOE was furthered by Executive Order 13123, "Greening the Government Through Efficient Energy Management," which directed EPA and DOE to expedite the process of designating products as ENERGY STAR qualified and to merge their efficiency rating procedures. 64 FR 30851; June 8, 1999. Executive Order 13123 was replaced with Executive Order 13423, "Strengthening Federal Environmental, Energy, and Transportation Management," which requires, among other things, that in acquisitions of goods and services Federal agencies use sustainable environmental practices, including acquisition of bio-based, environmentally preferable, energy-efficient, water-efficient, and recycled-content products. 72 FR 3919; January 26, 2007.

In EPACT 2005, Congress established statutory parameters for the ENERGY STAR program. (42 U.S.C. 6294a) The statute prescribes the program duties of the Administrator of EPA and the Secretary of Energy; requires the solicitation of public comment before an ENERGY STAR product category, specification or criterion is established or revised; and establishes a lead time before a new or significant revision of a product category, specification, or criterion may become effective.

EPACT 2005 also reaffirmed the authority of the Federal Energy Management Program to identify a product as being "among the highest 25 percent of equivalent products for energy efficiency." (42 U.S.C. 8259b(a)(4))

Currently, ENERGY STAR qualified and FEMP designated products cover 62 types of products in the following categories: (1) Lighting; (2) commercial and industrial equipment; (3) food service equipment; (4) office equipment; (5) home electronics; (6) appliances; (7) residential equipment; (8) plumbing; and (9) construction products. ENERGY STAR qualified and FEMP designated products have been determined to be life-cycle cost-effective in normal usage. However, purchasers are encouraged to evaluate products according to their specific applications and circumstances. Life-cycle cost calculators for many of the ENERGY STAR qualified and FEMP designated products can be accessed at: [http://www.eere.energy.gov/femp/procurement/eep\\_eccalculators.html](http://www.eere.energy.gov/femp/procurement/eep_eccalculators.html).

### C. Proposed Rule

As discussed above, NECPA section 553(f), entitled "REGULATIONS," directs DOE to issue guidelines to carry out the section. (42 U.S.C. 8259b(e)) On June 19, 2007, DOE published a notice of proposed rulemaking that proposed a reporting requirement to track agency compliance with the procurement requirements established in section 553 of NECPA. 72 FR 33696; June 19, 2007. DOE also published draft guidance to assist Federal agencies in complying with the procurement requirements established in section 553.

NECPA section 553 applies to the procurement of energy consuming products. Section 553 defines "product" as excluding energy consuming products or systems designed or procured for combat or combat-related missions. (42 U.S.C. 8259b(a)(5)) For the purpose of the reporting requirement, the proposed rule relied on the term "covered product," i.e., a product or system that is in a category covered by the ENERGY STAR or FEMP program. Covered products are those energy consuming products that the ENERGY STAR or FEMP programs determined to hold the greatest promise for energy savings. Within these product categories, there is typically a broad range of life-cycle costs associated with the products. ENERGY STAR and FEMP identify those products with lower life-cycle costs for federal buyers. Both programs will continue to review market trends and product availability, and may determine that additional products should be added to the list of covered products.

Section 553(a)(1) specifies a definition of agency that includes an agency under any branch of the Government (including a congressional agency). (42 U.S.C. 8259b(a)(1)) The proposed rule defined "agency" consistent with the

definition contained in Title 5 of the United States Code, which essentially limits the term "agency" to those under the Executive Branch. (5 U.S.C. 551(1)) DOE initially determined that the inclusion of non-Executive Branch agencies under the definition in section 553(a)(1) of NECPA was inappropriate for a regulation promulgated by DOE given DOE's authority. 72 FR 33697. Moreover, the definition of "agency" in 5 U.S.C. 551(1) is incorporated by reference into subchapter III, Federal Energy Initiative, of Chapter 91 of Title 42 of the United States Code, which includes section 553. DOE noted that the other branches of the Government may, at their discretion, rely on DOE's regulation and guidance in implementing section 553.

As stated above, section 553 of NECPA contains two exceptions to the requirement to procure only ENERGY STAR qualified and FEMP designated products. In order to track exceptions, DOE proposed reporting requirements to track the exception findings made by agency heads. DOE initially determined that information regarding the procurement of products for which an exception was necessary would help DOE and EPA determine if there is a need for revisions to ENERGY STAR qualified or FEMP designated products. DOE has determined that existing reporting and tracking mechanisms provide an adequate means to collect and analyze information regarding agency procurement of these products.

### D. Draft Guidance

In the preamble to the proposed rule, DOE provided draft guidance on compliance with the procurement requirements set forth in section 553 of NECPA. As discussed previously in this document, section 553(b) requires that when agencies procure energy consuming products, either directly or through part of a larger contract (e.g., construction, renovation, and service or maintenance contracts) that they procure either an ENERGY STAR qualified product or a FEMP designated product. (42 U.S.C. 8259b(b)(1)) Section 553(c) requires GSA and DLA to clearly identify and prominently display ENERGY STAR qualified and FEMP designated products in any inventory or listing of products by these agencies and that they supply only ENERGY STAR qualified and FEMP designated products when appropriate. (42 U.S.C. 8259b(c))

DOE encourages agencies other than GSA and DLA that operate procurement ordering systems to achieve the goals of section 553.

Comments were received on the draft guidance provided in the notice of proposed rulemaking. The discussion below responds to those comments and provides guidance for Federal agencies in complying with section 553.

## II. Discussion of Comments and the Final Rule

Today's final rule contains a number of changes from the proposed rule. Most significantly, the final rule does not include a reporting requirement. The changes are discussed below.

DOE received thirteen comments in response to the notice of proposed rulemaking. The comments covered the following topics: Definition of products covered under the rule—specifically, whether a product must itself be “energy consuming” to be considered a “covered product”; reporting of exceptions granted by each agency; responsibilities of agencies to define procedures to comply with NECPA section 553 requirements; and criteria determining whether a product meets the requirement of “Energy Star-qualified or FEMP-designated.” DOE received several comments in support of the proposed rule.

### A. Definition of “Covered Product”

Several commenters raised issues concerning the definition of covered product. (See comments from Single Ply Roofing Industry, Duro-Last Roofing, Information Technology Industry Council, Chemical Fabrics & Film Association, Inc., Sika Sarnafil, Inc.) Commenters suggested that the definition of “covered product” be expanded to include all products for which an ENERGY STAR qualification or a FEMP designation is established.

Discussion of the term “product” in the preamble of the notice of proposed rulemaking was in the context of “energy consuming” products. 72 FR 33697; June 19, 2007. However, in the proposed regulatory text, “covered product” was defined more broadly as “a product that is of a category for which an ENERGY STAR qualification or FEMP designation is established.” The ENERGY STAR categories cover products that do not consume energy, such as windows and roofing materials.

DOE is maintaining the definition of “covered product” as in the proposed regulatory text. The definition of “covered product” for the purpose of the regulation includes any product that is of a category for which an ENERGY STAR qualification or FEMP designation is established. However, the statutory procurement requirements apply only to the procurement of products as set forth in section 553 of

NECPA. (42 U.S.C. 8259b) As noted above, section 553 of NECPA, as recently amended, specifies that the requirement applies to the procurement of an energy consuming product in a product category covered by the Energy Star Program or the FEMP program for designating products. (42 U.S.C. 8259b(b)(1)) The definition of “covered product” established in today's final rule clarifies that the requirements under section 553 of NECPA apply only with regard to energy consuming products that are of a product category covered by the Energy Star Program or the FEMP program for designating products.

The Information Technology Industry Council stated that it was unclear what the term “category” meant in the definition of covered product. The ENERGY STAR and FEMP programs apply to specified types of products, *i.e.*, categories. A listing of the product categories covered by the ENERGY STAR program can be found at [http://www.energystar.gov/index.cfm?fuseaction=find\\_a\\_product](http://www.energystar.gov/index.cfm?fuseaction=find_a_product).

Currently, there is no companion list of FEMP designated products, but the FEMP specifications for energy efficiency products are located at [http://www.eere.energy.gov/femp/procurement/eep\\_requirements.html](http://www.eere.energy.gov/femp/procurement/eep_requirements.html).

### B. Reporting Agency Exceptions to the Procurement Requirement

Several comments were received regarding the perceived burdens of requiring agencies to report information regarding the finding of an exception under section 553(b)(2) of NECPA. (See comments from Office of Federal Environmental Executive; Department of Justice; Department of Commerce). These commenters indicated that the reporting requirement included in the notice of proposed rulemaking would be unduly burdensome on agencies.

DOE recognizes that there are several existing reporting requirements through which DOE can obtain information on exceptions found under section 533 of NECPA, without the need to establish a separate reporting requirement through regulation. Specifically, Federal agencies are currently required to provide information for DOE's annual report on energy use and the Office of Federal Procurement Policy's annual report on green purchasing requirements. DOE will coordinate with the Office of Management and Budget to incorporate information regarding the finding of exemptions under section 533 of NECPA as part of the data collected for these annual reports. By relying on existing reporting schemes, DOE avoids any potential redundancy in

reporting requirements for Federal agencies. Therefore, DOE is not establishing a reporting requirement in today's final rule.

### C. Compliance With Section 553

Several comments were received regarding agency compliance with the procurement requirements in section 553 of NECPA. Specifically, some of these comments requested that DOE establish regulations:

- Establishing requirements for GSA and DLA to identify energy-efficient products (comment from Alliance to Save Energy);
- Specifying how agencies are to determine the cost-effectiveness of products for the purpose of an exception finding (comments from Office of Federal Environmental Executive; Information Technologies Industry Council; and Department of Veterans Affairs); and
- Providing additional exceptions that may be available to Federal agencies (comments from Office of Federal Environmental Executive and Department of Veterans Affairs).

As stated above, DOE has determined that the procurement requirements and the product listing requirements of section 553 of NECPA are self-executing. However, today's final rule codifies the guidance provided in the preamble of the notice of proposed rulemaking and this document. Placing the guidance in the Code of Federal Regulations, agencies should be able to more readily access the guidance.

With regard to a finding under the exception provision in section 553(b)(2), each agency should develop a process for evaluating its individual product needs. In the guidance section below, DOE does provide guidance on how an agency may evaluate the cost-effectiveness of a product.

The exception provision in section 553 provides specific criteria for determining when such an exception finding can be made. Section 553 does not include provisions granting exceptions beyond those enumerated in that section. While section 553 specifies that a finding of an exception is to be made by the head of an agency, agencies may consider, as appropriate, the delegation of the exception authority to other officials within the agency.

### D. Definition of Criteria for ENERGY STAR Qualification or FEMP Designation

One comment (comment from Arkansas Lamp Manufacturing) dealt with the mechanism by which the ENERGY STAR program determines the

criteria by which ENERGY STAR qualified products are identified. This process is beyond the scope of this regulation. Moreover, as noted above, EFACT 2005 established statutory parameters for the ENERGY STAR program. (42 U.S.C. 6294a)

Another comment (comment from Information Technology Industry Council) dealt with the distinction between a product meeting the functional requirements contained in the technical specifications for ENERGY STAR products and a product that is ENERGY STAR qualified. The language of section 553 of NECPA requires federal agencies to procure an ENERGY STAR qualified product; i.e., a product manufactured by a full participant in the ENERGY STAR program. (42 U.S.C. 8259b(1)(A)) A product must be ENERGY STAR qualified to meet the procurement requirements; functional performance alone is not sufficient.

#### *E. Supply Source for Excepted Procurement*

One comment (comment from Alliance to Save Energy) requested that DOE require the federal supply sources (GSA and DLA) to verify that customers had prepared a written exception before supplying a covered product that is not ENERGY STAR qualified or FEMP designated. As discussed above, DOE does not have the authority to change by regulation the statutory requirements that govern GSA and DLA.

### **III. DOE Guidance**

Section 533(e) of NECPA, titled "Regulations", directs DOE to issue guidelines to carry out the procurement requirements of that section. As indicated previously in this document, DOE is codifying, to the extent practical, the guidance provided in the preamble of the notice of proposed rulemaking and this document. As noted, the guidance provided in the Code of Federal Regulations, should be more readily accessible to agencies, as opposed to guidance provided only in the **Federal Register**.

#### *A. Procurements*

Requirements for Federal procurement are governed, in part, by the Federal Acquisition Regulation (FAR). (48 CFR part 1 *et seq.*). On November 23, 2007, the FAR requirements were revised to reflect the requirements in section 553 of NECPA. 72 FR 65868; Nov. 23, 2007. DOE has worked closely with members of the FAR Council to ensure a consistency between today's final rule and the recent FAR revision.

Federal agencies are generally required to procure an ENERGY STAR qualified or FEMP designated product whenever procuring a covered product. Additionally, products furnished by contractors while performing at a federally controlled facility should be qualified products regardless of whether the government receives title at the end of contract performance.

A list of product categories, which contain ENERGY STAR qualified and FEMP designated products, is located at [http://www.eere.energy.gov/femp/pdfs/eep\\_productfactsheet.pdf](http://www.eere.energy.gov/femp/pdfs/eep_productfactsheet.pdf).

To identify actual products that are ENERGY STAR rated, potential purchasers can go to <http://www.energystar.gov/products>.

Currently, there is no companion list of FEMP designated products, but the FEMP specifications for energy efficiency products are located at [http://www.eere.energy.gov/femp/procurement/eep\\_requirements.html](http://www.eere.energy.gov/femp/procurement/eep_requirements.html).

#### *B. Procurement Planning*

In addition to establishing requirements for the actual procurement of certain products, section 553(b)(3) directs heads of agencies to incorporate into the specifications for all procurements involving covered products criteria for energy efficiency that are consistent with the criteria used to rate ENERGY STAR products and FEMP designated products. (42 U.S.C. 8259b(b)(3)) This requirement applies to general specifications, project specifications, and construction, renovation and service contracts that involve the procurement of covered products. Agencies should consider this requirement to apply to:

- Design, design/build, renovation, retrofit and services contracts; facility maintenance and operations contracts; as well as energy savings performance contracts and utility energy service contracts.
- If applicable, lease agreements for buildings or equipment, including build-to-lease contracts, such as those used to implement the Military Housing Privatization Initiative.

Further, agencies should require the procurement of ENERGY STAR and FEMP designated products in new service contracts and other existing service contracts as they are recompeted and should, to the extent possible, incorporate such requirements and preferences into existing contracts as they are modified or extended through options.

As directed by section 553(b)(3), Federal agencies should include criteria for energy efficiency that are consistent with the criteria used for rating

qualified products in the factors for the evaluation of:

- Offers received for procurements involving covered products, and
- Offers received for construction, renovation, and services contracts that include provisions for covered products.

Agencies should notify their vendors of the Federal requirements for energy efficient purchasing.

Guidance is available for developing model contract language for contracts which involve covered products. Model contract language for all ENERGY STAR qualified and FEMP designated products can be found at [http://www.eere.energy.gov/femp/procurement/eep\\_modellang.html](http://www.eere.energy.gov/femp/procurement/eep_modellang.html). Moreover, there are guide specification requirements which have already been incorporated in existing specifications such as the Unified Facilities Guide Specifications, which are available at [http://www.wbdg.org/ccb/browse\\_org.php?o=70](http://www.wbdg.org/ccb/browse_org.php?o=70), and EPA's Federal Guide for Green Construction Specifications, which is available at <http://www.wbdg.org/design/greenspec.php>.

Further, FEMP offers a series of training opportunities for procurement staff that are listed at [http://www.eere.energy.gov/femp/services/training\\_catalog.html](http://www.eere.energy.gov/femp/services/training_catalog.html). New classes are periodically added to the Web site. Procurement officials are encouraged to take advantage of these training opportunities, which can provide a useful context to understand the benefits of energy efficient technologies and the innovative financing strategies available to fund them.

Although energy consuming products or systems that are designed or procured for combat or combat-related missions are not subject to the requirements of this subpart (see § 436.40 of this subpart), DOE encourages the Department of Defense to incorporate energy efficiency criteria into procurements of combat-related equipment, to the extent practicable.

#### *C. Exceptions*

As stated above, section 553 provides for exceptions to the procurement requirements. Under the statute, an agency may only procure an energy consuming product that is not an ENERGY STAR qualified or FEMP designated product if the head of the agency finds in writing that an exception applies. (42 U.S.C. 8259b(b)(2)) Under section 553(b)(2) a written exception can only be made if one of two criteria are met. (42 U.S.C. 8259b(b)(2)) The first criterion requires an agency head to find that a product is not life-cycle cost-effective in the

application for which it will be used. (42 U.S.C. 8259b(b)(2)(A)) Although ENERGY STAR qualified and FEMP designated products are life-cycle cost-effective under normal use conditions, they may not be if used in a specialized way or for very limited hours. When making a determination that a product is not life-cycle cost-effective, an agency should rely on the life-cycle cost analysis method in part 436, subpart A, of title 10 of the Code of Federal Regulations, or another method determined by the agency to be equivalent.

The second criterion requires an agency head to find that there is no ENERGY STAR qualified or FEMP designated product reasonably available that meets the functional requirements of the agency. (42 U.S.C. 8259b(b)(2)(B))

#### IV. Regulatory Review

##### A. Executive Order 12866

Today's final rule has been determined not to be a "significant regulatory action" under section 3(f)(1) of Executive Order 12866, Regulatory Planning and Review. (58 FR 51735; October 4, 1993).

##### B. National Environmental Policy Act

DOE has determined that this rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to rulemakings that are strictly procedural, such as rulemaking establishing a reporting requirement applicable to contracting practices for the purchase of goods and services. The rule establishes guidance for Federal agencies with regard to the requirements of section 553 to procure energy efficient products and develop procurement practices which facilitate the purchase of energy efficient products.

The rule would not establish any procurement requirements. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

##### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

As required by Executive Order 13272, "Proper Consideration of Small

Entities in Agency Rulemaking," (67 FR 53461; August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990; Feb. 19, 2003. The Department has made its procedures and policies available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>.

DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. Today's final rule applies only to Federal agencies. Today's final rule will not impact small entities. In addition, the final rule only facilitates Federal agency compliance with a statutory mandate to procure ENERGY STAR qualified and FEMP designated products. On the basis of the foregoing, DOE certifies that this rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. This certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

##### D. Paperwork Reduction Act

No new record keeping requirements, subject to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, are imposed by this final rule.

##### E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments, or the private sector. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local,

or tribal governments, or to the private sector, of \$100 million or more.

Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This rule does not impose a Federal mandate on State, local, or tribal governments or the private sector. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

##### F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being.

This final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

##### G. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002). DOE's guidelines were published at 67 FR 62446 (October 7, 2002).

DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

##### H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," (61 FR 4729; February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly

specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them.

DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

#### *I. Executive Order 13132*

Executive Order 13132, "Federalism," (64 FR 43255; August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735; Mar. 14, 2000.

DOE has examined this rule and determined that it does not preempt State law and does 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. No further action is required by Executive Order 13132.

#### *J. Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action.

A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This final rule will not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### **V. Congressional Notification**

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### **VI. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of today's final rule.

#### **List of Subjects in 10 CFR Parts 436**

Energy conservation, Federal buildings and facilities, Reporting and recordkeeping requirements, Solar energy.

Issued in Washington, DC, on March 5, 2009.

**Rita L. Wells,**

*Acting Deputy Assistant Secretary for Business Administration, Energy Efficiency and Renewable Energy.*

■ For the reasons set forth in the preamble, DOE is amending Chapter II of Title 10 of the Code of Federal Regulations as set forth below.

#### **PART 436—FEDERAL ENERGY MANAGEMENT AND PLANNING PROGRAMS**

■ 1. The authority citation for part 436 is revised to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.*; 42 U.S.C. 8258; 42 U.S.C. 8259b.

■ 2. Subpart C is added to part 436 to read as follows:

#### **Subpart C—Agency Procurement of Energy Efficient Products**

Sec.

436.40 Purpose and scope.

436.41 Definitions.

436.42 Evaluation of Life-Cycle Cost Effectiveness

436.43 Procurement Planning.

#### **§ 436.40 Purpose and scope.**

This subpart provides guidance to promote the procurement of energy efficient products by Federal agencies and promote procurement practices which facilitate the procurement of energy efficient products, consistent with the requirements in section 553 of the National Energy Conservation Policy Act. (42 U.S.C. 8259b)

#### **§ 436.41 Definitions.**

*Agency* means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(1) The Congress, and agencies thereof;

(2) The courts of the United States;

(3) The governments of the territories or possessions of the United States; or

(4) The government of the District of Columbia.

*Covered product* means a product that is of a category for which an ENERGY STAR qualification or FEMP designation is established.

*ENERGY STAR qualified product* means a product that is rated for energy efficiency under an ENERGY STAR program established by section 324A of the Energy Policy and Conservation Act (42 U.S.C. 6294a).

*FEMP designated product* means a product that is designated under the Federal Energy Management Program as being among the highest 25 percent of equivalent products for energy efficiency.

#### **§ 436.42 Evaluation of Life-Cycle Cost Effectiveness.**

For the purpose of compliance with section 553 of the National Energy Conservation Policy Act:

(a) ENERGY STAR qualified and FEMP designated products may be assumed to be life-cycle cost-effective.

(b) In making a determination that a covered product is not life-cycle cost-effective, an agency should rely on the life-cycle cost analysis method in part 436, subpart A, of title 10 of the Code of Federal Regulations.

#### **§ 436.43 Procurement planning.**

(a) Agencies should consider the procurement planning requirements of section 553 of the National Energy Conservation Policy Act as applying to:

(1) Design, design/build, renovation, retrofit and services contracts; facility maintenance and operations contracts;

(2) Energy savings performance contracts and utility energy service contracts;

(3) If applicable, lease agreements for buildings or equipment, including build-to-lease contracts;

(b) Agencies should require the procurement of ENERGY STAR and FEMP designated products in new service contracts and other existing service contracts as they are recompeted and should, to the extent possible, incorporate such requirements and preferences into existing contracts as they are modified or extended through options.

(c) Agencies should include criteria for energy efficiency that are consistent with the criteria used for rating qualified products in the factors for the evaluation of:

(1) Offers received for procurements involving covered products, and

(2) Offers received for construction, renovation, and services contracts that include provisions for covered products.

(d) Agencies should notify their vendors of the Federal requirements for energy efficient purchasing.

[FR Doc. E9-5459 Filed 3-12-09; 8:45 am]

BILLING CODE 6450-01-P

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 232, 239, 249, 269 and 274

[Release Nos. 33-9013, 34-59536, 39-2463, IC-28642]

### Attaching Authenticating Documents to Online Form ID Applications

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting rule and form amendments that allow applicants for EDGAR access codes using Form ID to submit their authenticating documents by attaching them to their online Form ID applications in Portable Document Format (PDF) as an alternative to submitting the documents by fax.

**DATES:** *Effective Date:* March 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Corey Jennings, Special Counsel, at (202) 551-3258, for information on legal issues, or Cecile Peters, Chief, Information Technology Office, (202) 551-3600, for information on technical issues, Division of Corporation Finance,

U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20459-3628.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments that will revise Rules 10<sup>1</sup> and 101<sup>2</sup> under Regulation S-T<sup>3</sup> and Form ID.<sup>4</sup>

### I. Background

Form ID is used to apply for access codes to file information electronically through the Commission's Electronic Data Gathering, Analysis and Retrieval or "EDGAR" system. EDGAR access codes include a CIK (Central Index Key) number, which serves as a permanent, public filer identification number, as well as confidential security codes.

Applicants submitting Form ID applications must submit them online. They also must fax to the Commission a notarized document containing the same information as contained in the Form ID application. The additional document is called an "authenticating document." Commission staff matches applicants' online submissions with their faxed authenticating documents before approving the Form ID application and allowing applicants to generate their EDGAR access codes.<sup>5</sup>

Today, we adopt amendments that allow Form ID applicants to submit their authenticating documents as PDF attachments to their online Form ID applications. This provides an alternative method to submitting the authenticating documents by fax. The use of a PDF attachment may provide a simpler and easier method for some applicants to submit their authenticating documents. Filers can use a fillable PDF version of Form ID available on the Commission's Web site to create and print the document. For Form ID applications with the authenticating documents attached, Commission staff will no longer have to match faxed authenticating documents manually with online submissions. This alternative method should enhance the processing efficiency of these Form ID applications. The amendments do not impose any new burdens or requirements on Form ID applicants or others.

The effective date of the new rules, March 16, 2009, coincides with the effective date of our new rules requiring that Form D filings be made online, through the Internet, using the EDGAR

system.<sup>6</sup> At the time we adopted the new Form D rules, we estimated they would result in an increase of approximately 20,000, or 40%, in the number of Form ID applications that we receive annually.<sup>7</sup> Although many Form ID applicants will be applying for EDGAR access codes to make filings other than Form D filings, the increased efficiency in use of Commission staff resources will benefit all applicants. We expect adoption of the Form ID amendments should assist the staff in better managing the expected increase in Form ID applications resulting from the Form D amendments.

At the time we adopted the Form D amendments, we acknowledged concern over the burdens of the Form ID authentication process, particularly in the context of mandating Form D online filing.<sup>8</sup> We stated that we planned to consider ways to simplify the Form ID authentication process before Form D online filing became mandatory on March 16, 2009.<sup>9</sup> The Form ID amendments we adopt today address concerns over the burdens of the Form ID authentication process. They make the process simpler and easier for some applicants. We are hopeful that the increased Commission staff efficiency in processing Form ID applications with attached authenticating documents will allow Form ID applicants to get their EDGAR access codes more quickly. However, we continue to study ways to further streamline the process.

### II. Discussion of the Amendments

#### A. Optional Attachment of Authenticating Document to Online Form ID Application

We are adopting minor revisions to Regulation S-T<sup>10</sup> to allow applicants for EDGAR access codes using Form ID to attach their required authenticating document electronically as a PDF document to their online Form ID

<sup>6</sup> We adopted the rules requiring online filing of Form D information in Release No. 33-8891 (Feb. 6, 2008) [73 FR 10592 (Feb. 27, 2008)], available at <http://www.sec.gov/rules/final/2008/33-8891.pdf>.

<sup>7</sup> See *id.* at 70 [73 FR 10610]. We expect an increase because Form D filings previously were made only in paper format, and no Form ID filings were required because filers do not need EDGAR access codes to make paper filings.

<sup>8</sup> *Id.* at 58 [73 FR 10607].

<sup>9</sup> *Id.* at 59-60 [73 FR 10607-10608].

<sup>10</sup> Regulation S-T is the general regulation governing electronic filing of information with the Commission. In addition to complying with Regulation S-T, filers must submit electronic filings in accordance with the instructions in the Commission's EDGAR Filer Manual. We also are amending the EDGAR Filer Manual to reflect a Form ID filer's ability to attach a PDF copy of its authenticating document to its online Form ID application.

<sup>1</sup> 17 CFR 232.10.

<sup>2</sup> 17 CFR 232.101.

<sup>3</sup> 17 CFR 232.10 *et seq.*

<sup>4</sup> 17 CFR 239.63, 249.446, 269.7 and 274.402.

<sup>5</sup> We approved this process in Release No. 33-8410 (Apr. 21, 2004) [69 FR 22704 (Apr. 26, 2004)], available at <http://www.sec.gov/rules/final/33-8410.htm>.