

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF ENERGY

### 10 CFR Part 440

[Docket No. EEWAP0515]

RIN 1904-AB-97

#### Weatherization Assistance Program for Low-Income Persons

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

**ACTION:** Notice of proposed rulemaking, request for comment.

**SUMMARY:** The U.S. Department of Energy (DOE) is proposing to amend the eligibility provisions applicable to multi-unit buildings under the Weatherization Assistance Program for Low-Income Persons. As proposed, if a multi-unit building is under an assisted or public housing program and is identified by the U.S. Department of Housing and Urban Development (HUD), and included on a list published by DOE, that building would meet certain income eligibility requirements, and the procedural requirements to protect against rent increases and undue enhancement of the weatherized building would be satisfied, under the Weatherization Assistance Program without the need for further evaluation or verification. If a multi-unit building includes units that participate in the Low Income Housing Tax Credit Program, identified by HUD, and included on a list published by DOE, that building would meet the income eligibility requirements of the Weatherization Assistance Program without the need for further evaluation or verification. DOE believes that the proposed rule would reduce the procedural burdens on evaluating applications from buildings that are part of HUD assisted and public housing programs, and the Federal low-income housing tax credit programs.

**DATES:** Public comments on this proposed rule will be accepted until June 22, 2009.

**ADDRESSES:** You may submit comments identified by the RIN number specified in the heading of this notice of proposed rulemaking (NPR), by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [WXHUDNOPR@ee.doe.gov](mailto:WXHUDNOPR@ee.doe.gov). Include the RIN number in the subject line of the message.

- *Postal Mail:* Gil Sperling, U.S. Department of Energy, Weatherization Assistance Program, Mailstop EE-2K, 1000 Independence Avenue, SW., Washington, DC 20585-0121.

- *Hand Delivery/Courier:* Gil Sperling, U.S. Department of Energy, Weatherization Assistance Program, Room 6050, 1000 Independence Avenue, SW., Washington, DC 20585-0121.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Gil Sperling, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Weatherization Assistance Program, EE-2K, Room 6070, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-1510, *e-mail:* [Gil.Sperling@ee.doe.gov](mailto:Gil.Sperling@ee.doe.gov), or 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](mailto:Christopher.Calamita@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Introduction
- II. Eligibility Requirements for Multi-unit Buildings
- III. HUD Public and Assisted Housing Programs
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- VI. Regulatory Analysis
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#### I. Introduction

Sections 411-418 of the Energy Conservation and Production Act (Act) established the Weatherization Assistance Program for Low-Income Persons (Weatherization Assistance Program). (42 U.S.C. 6861 *et seq.*) The Weatherization Assistance Program reduces energy costs for low-income persons, families, and households by

increasing the energy efficiency of their homes, while promoting their health and safety. DOE works in partnership with State- and local-level agencies to implement the Weatherization Assistance Program. DOE's Project Management Center awards grants to State-level agencies, which then contract with subgrantees (e.g., local agencies). The subgrantees then provide weatherization services to eligible low-income families.

In establishing the Weatherization Assistance Program, Congress found that "a fast, cost-effective, and environmentally sound way to prevent future energy shortages in the United States while reducing the Nation's dependence on imported energy supplies is to encourage and facilitate, through major programs, the implementation of energy conservation and renewable-resource energy measures with respect to dwelling units." (42 U.S.C. 6861(a)(1)) Congress also recognized that many dwellings owned or occupied by low-income persons are energy inefficient and that low-income persons can least afford to make the modifications necessary to improve the energy efficiency of such dwellings. (42 U.S.C. 6861(a)(2)(A) and (B)) Additionally, Congress directed that States, through Community Action Agencies and units of general purpose local government, should be encouraged, with Federal financial and technical assistance, to develop and support coordinated weatherization programs designed to alleviate the adverse effects of energy costs on low-income persons, to supplement other Federal programs serving such low-income persons, and to increase energy efficiency. (42 U.S.C. 6861(a)(4))

Congress, therefore, stated that the purpose of the Weatherization Assistance Program is to develop and implement an assistance program to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential energy expenditures, and improve their health and safety, especially low-income persons who are particularly vulnerable such as the elderly, the handicapped, and children. (42 U.S.C. 6861(b))

The Weatherization Assistance Program statute recognizes that single-family dwelling units are potentially high energy consuming dwelling units,

and grantees should consider appropriate prioritization for such units. (42 U.S.C. 6864(b)(2)) The statute also recognizes that in some instances, weatherization efforts under the program may be appropriate for buildings in which there are multiple rental units. (42 U.S.C. 6863(b)(5))

## II. Eligibility Requirements for Multi-Unit Buildings

In establishing the Weatherization Assistance Program, Congress recognized that additional considerations are necessary when evaluating the eligibility of multi-unit buildings, as opposed to single family dwellings. In any case in which a person requesting weatherization assistance from a subgrantee for a dwelling that consists of a rental unit or rental units, the State, in implementing its weatherization program, must ensure that—

- The benefits of weatherization assistance in connection with such rental units, including units where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units;
- For a reasonable period of time after weatherization work has been completed on a dwelling containing a unit occupied by an eligible household, the tenants in that unit (including households paying for their energy through their rent) will not be subjected to rent increases unless those increases are demonstrably related to matters other than the weatherization work performed;
- The enforcement of the rent increase provision is provided through procedures established by the State by which tenants may file complaints and owners, in response to such complaints, shall demonstrate that the rent increase concerned is related to matters other than the weatherization work performed; and
- No undue or excessive enhancement will occur to the value of such dwelling units. (42 U.S.C. 6863(b)(5))

DOE provided additional direction regarding the eligibility of multi-unit buildings in the Weatherization Assistance Program regulations. Under the DOE regulations a subgrantee may weatherize a building containing rental dwelling units using financial assistance for dwelling units eligible for weatherization assistance, where:

- The subgrantee has obtained the written permission of the owner or his agent;
- Not less than 66 percent (50 percent for duplexes and four-unit buildings,

and certain eligible types of large multi-family buildings) of the dwelling units in the building:

- Are eligible dwelling units, or
- Will become eligible dwelling units within 180 days under a Federal, State, or local government program for rehabilitating the building or making similar improvements to the building; and
- The grantee has established procedures for dwellings which consist of a rental unit or rental units to ensure that:
  - The benefits of weatherization assistance in connection with such rental units, including units where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units;
  - For a reasonable period of time after weatherization work has been completed on a dwelling containing a unit occupied by an eligible household, the tenants in that unit (including households paying for their energy through their rent) will not be subjected to rent increases unless those increases are demonstrably related to matters other than the weatherization work performed;
  - The enforcement of the rent increase provision is provided through procedures established by the State by which tenants may file complaints, and owners, in response to such complaints, shall demonstrate that the rent increase concerned is related to matters other than the weatherization work performed; and
  - No undue or excessive enhancement shall occur to the value of the dwelling units.

10 CFR 440.22(b). An eligible dwelling unit is one that is occupied by a family unit (1) whose income is at or below 200 percent of the poverty level, (2) which contains a member who has received cash assistance payments under certain Social Security programs, or applicable State or local laws at any time during the 12-month period preceding the determination of eligibility under the Weatherization Assistance Program, or (3) if the State elects, is eligible for assistance under the Low-Income Home Energy Assistance Act, provided that such basis is at least 200 percent of the poverty level. 10 CFR 440.22(a); *See also*, 42 U.S.C. 6862(7).

DOE recognizes that determining the eligibility of multi-unit buildings may present difficulties to subgrantees in evaluating the income eligibility of tenants meeting the 200 percent of poverty requirement, and that this difficulty can be overcome where HUD

already has procedures in place for determining such income eligibility. In particular, it may be difficult for a subgrantee to verify the income of the families dwelling in each unit, and that in any event, such income verification likely would be duplicative of income certifications that are already on file with HUD. For some multi-unit buildings, the eligibility requirements could mean that a subgrantee must confirm the income of a hundred families or more for a single building. In addition to the income verification required by the subgrantee, weatherization of a multi-unit building requires that the applicable grantee has established procedures for ensuring that the benefits of the weatherization work accrue primarily to the low-income tenants, the rent will not increase for a reasonable period of time, and no undue or excessive enhancement occurs to the value of the dwelling units.

## III. HUD Public and Assisted Housing Programs

HUD's Qualified Assisted Housing<sup>1</sup> programs generally serve the population for which the Weatherization Assistance Program was established to serve. This assisted and public housing portfolio includes properties that are privately owned, but receive some form of HUD assistance subject to affordability and income requirements. Income targets for HUD programs are set in relationship to a percentage of area median income—generally, 30 to 80 percent of area median income. A review of data from HUD programs indicates that a large majority of residents in HUD assisted and public housing would meet the income eligibility requirements of the Weatherization Assistance Program. HUD data show that nationally close to 100 percent of residents in these properties meet the 200 percent income requirement, far exceeding the 66% threshold required under DOE's regulation. 10 CFR 440.22(b)(2).

Moreover, the income verification process applicable to the HUD programs is rigorous. Under these HUD programs, HUD assisted housing owners or public

<sup>1</sup> For the purposes of this proposed rule, "Qualified Assisted Housing" includes public housing projects, and assisted housing projects that receive project-based Section 8 assistance, under the U.S. Housing Act of 1937, as amended (42 U.S.C. 1437 *et seq.*) (except projects also benefitting from assistance under Section 221(d)(3) and (d)(5), and 236 of the National Housing Act (12 U.S.C. 17151(d)(3) and (d)(5), and 12 U.S.C. 1715z-1, respectively)), Supportive Housing for the Elderly projects receiving HUD assistance under section 202 of the Housing Act of 1959 (12 U.S.C. 17012), or Supportive Housing for Persons with Disabilities under section 811 of the Cranston-Gonzales National Affordable Housing Act, as amended (42 U.S.C. 8013).

housing authorities must determine each participating family's income before the family is permitted to move into the assisted housing, and at least annually thereafter. HUD developed and has implemented a sophisticated system of third-party income verifications, originally designated as the Upfront Income Verification (UIV) system, now known as the Enterprise Income Verification (EIV) system. The EIV system, a central repository and source for income and benefit data, is securely accessible over the internet, for use by public housing authorities and owners or their agents to improve the accuracy of rent and income determinations. HUD monitors compliance with tenant eligibility requirements on an annual basis through management and occupancy reviews in addition to the submission of tenant data to HUD payment systems. Tenant eligibility certifications are required in order for subsidy payments to be authorized. A building owner must verify each family's income, assets, expenses, and deductions three times: (1) Prior to move-in, (2) as part of the annual recertification process, and (3) as a result of changes in income allowances, or family characteristics reported between annual re-certifications.

#### **IV. Low Income Housing Tax Credit Program**

The Low Income Housing Tax Credit (LIHTC) Program was created by the Tax Reform Act of 1986 (Pub. L. 99-514), as an alternate method of funding housing for low- and moderate-income households, and has been in operation since 1987. The LIHTC Program is an indirect Federal subsidy used to finance the development of affordable rental housing for low-income households. To be eligible for consideration under the LIHTC Program, a proposed project must:

- Be a residential rental property.
- Commit to one of two possible low-income occupancy threshold requirements.
- Restrict rents, including utility charges, in low-income units.
- Operate under the rent and income restrictions for 30 years or longer, pursuant to written agreements with the agency issuing the tax credits.

Property owners participating in the LIHTC Program are directed to utilize the same income verification process set forth in HUD Handbook 4350.3 REV1, IRS Code Section 42, and IRS Handbook 8823 (Chapter 5), and incorrect eligibility determinations may adversely affect the utilization of the tax credits.

After the initial determination of eligibility, owners, or their agents, are

required to recertify each low-income household at least annually, within 120 days of the anniversary date of the occupancy. The allocating agency, typically a state housing finance agency, is responsible for monitoring compliance with the provisions during the affordability period and must report the results of monitoring to the Internal Revenue Service. The allocating agency is required to perform an on-site inspection and a review of 20 percent of tenant files at least every three years. The LIHTC Program requires a minimum affordability period of 30 years (i.e., a 15-year compliance period and subsequent 15-year extended use period).

#### **V. Eligibility of Multi-Unit Buildings Identified by HUD**

As indicated previously in this notice, the requirement to demonstrate the income eligibility of each family living in a multi-unit building can create a procedural burden for subgrantees when evaluating a request for assistance under the Weatherization Assistance Program. Demonstration of the income eligibility of at least 66 percent of the units of a multi-unit building (50 percent for duplexes and four unit buildings) helps ensure that the benefits of weatherizing a multi-unit building are realized by low-income tenants, but the necessary income verification may hinder an eligibility determination for such buildings.

In an evaluation of its data, including data generated through the LIHTC Program, HUD has identified buildings that participate in the Qualified Assisted Housing and LIHTC Programs that, upon preliminary review by DOE, would meet the income eligibility requirements for multi-unit buildings under the Weatherization Assistance Program, i.e., at least 66 percent of the dwelling units are occupied by family units whose income is at or below 200 percent of the poverty level. 10 CFR 440.22(b)(2). Moreover, DOE has determined preliminarily that the procedural requirements under the Weatherization Assistance Program to protect against rent increases and undue enhancement of the weatherized building would be satisfied for buildings that are in the Qualified Assisted Housing programs identified by HUD.

##### *A. Income Eligibility of Multi-Family Buildings*

As discussed previously, the income of the families occupying units in buildings under the Qualified Assisted Housing and LIHTC Programs is subject to HUD's rigorous verification

processes, discussed previously. Given the nature of the data collected by HUD and the income verification procedures employed under these housing programs, DOE proposes that buildings identified by HUD as having not less than 66 percent (50 percent for duplexes and four-unit buildings) of dwelling units occupied by family units whose income is at or below 200 percent of the poverty level would meet the minimum income eligibility requirements for multi-unit buildings under the Weatherization Assistance Program.

DOE requests comments on its proposal that income data collected by HUD under the Qualified Assisted Housing and LIHTC programs would be sufficient for the purpose of demonstrating the income requirements of multi-unit buildings under the Weatherization Assistance Program.

##### *B. Limitations on Rent Increases*

Under the Weatherization Assistance Program, a grantee must establish procedures that ensure that for a reasonable period of time after weatherization work has been completed on a dwelling containing a unit occupied by a low-income tenant, the tenant in that unit will not be subjected to rent increases unless those increases are demonstrated to be related to matters other than the weatherization work performed. 10 CFR 440.22(b)(3)(ii). The enforcement of this provision is provided through procedures established by the State by which tenants may file complaints, and owners in response to such complaints must demonstrate that the rent increase concerned is related to matters other than the weatherization. 10 CFR 440.22(b)(3)(iii).

Under the Qualified Assisted Housing programs, tenant rents are capped at thirty percent (30 percent) of their income, so tenants would not be subject to rent increases as a result of the weatherization or otherwise. Although the LIHTC Program provides for rent control, it is DOE's understanding that the program does not have comparable uniform restrictions as under the Qualified Assisted Housing programs.

DOE proposes that the restrictions on rent for units in buildings participating in the Qualified Assisted Housing Programs would provide the assurance required under the Weatherization Assistance Program that for a reasonable period of time after weatherization work is completed on a dwelling occupied by a low-income family unit, rent will not increase.

DOE requests comments on whether the Qualified Assisted Housing Program sufficiently protects low-income tenants

from rent increases so as to satisfy the requirement that grantees under the Weatherization Assistance Program establish procedures to protect low-income tenants against rent increases resulting from the weatherization. Additionally, DOE requests comments on its understanding that the LIHTC Program does not offer sufficiently uniform protections regarding rent increases so as to permit DOE to determine that buildings under the LIHTC Program would meet the rent control requirement of the Weatherization Assistance Program.

#### C. No Undue or Excess Enhancement

Weatherization of a building containing rental units requires that the applicable grantee ensure that no undue or excessive enhancement would occur to the value of the dwelling unit. 10 CFR 440.22(b)(3)(iv). The expenditures allowed under the Weatherization Assistance Program help focus enhancements on those that provide weatherization benefits. For example, repairs to a dwelling unit must be necessary to make the installation of weatherization materials effective. 10 CFR 440.18(b)(9). Moreover, for buildings that are in the Qualified Assisted Housing Programs, HUD controls the capital improvements that may be made. DOE proposes that the existing limits on permissible work under the Weatherization Assistance Program and the HUD control of improvements under the Qualified Assisted Housing programs would provide the necessary assurances that no undue or excessive enhancement will occur as a result of the weatherization of the buildings identified by HUD.

DOE requests comment on whether HUD control of improvements to buildings under the Qualified Assisted Housing programs would ensure that no undue or excessive enhancement would occur as a result of weatherization. DOE also requests information on whether similar controls may be present under the LIHTC Program to a degree sufficient to allow DOE to make a similar finding for the LIHTC Program.

#### D. Eligibility of Buildings in the HUD Programs

Based on the preceding discussion, DOE tentatively has determined that buildings subject to the Qualified Assisted Housing programs and that are identified by HUD would meet the income eligibility, rent control, and no undue or excessive enhancement requirements of the Weatherization Assistance Program for determining eligibility of multi-unit buildings. DOE

has also tentatively determined that buildings subject to the LIHTC Program and that are identified by HUD would meet the income eligibility requirement of the Weatherization Assistance Program for determining eligibility of multi-unit buildings. If today's proposed rule were made final, DOE would post annually a list of such buildings provided by HUD. The list would be available on the Weatherization Program Web site, <http://www.eere.energy.gov/wip>, and would be included in future funding opportunity announcements and program guidance. In evaluating the eligibility of a multi-unit building, inclusion on the most recent published list of Qualified Assisted Housing program buildings would demonstrate that a building meets the income, rent control, and no undue or excessive enhancement requirements established at 10 CFR 440.22(b)(2) and (3)(ii) and (iv). Inclusion on the most recent published list of LIHTC Program buildings would demonstrate that a building meets the income requirement established at 10 CFR 440.22(b)(2).

Today's proposed rule is intended to reduce the review and verification that a subgrantee must undertake when evaluating the eligibility of the identified buildings. DOE does not intend that today's proposal would make buildings eligible under the Weatherization Assistance Program that previously were not eligible. The purpose of today's proposed rule is to reduce the burden on States and subgrantees when evaluating applicability requirements for which HUD has already collected and verified the necessary data. In the event that a subgrantee is presented with a request for weatherization assistance of a multi-unit building, the subgrantee, under the proposed rule, would be able to reference the DOE published list of buildings identified by HUD. If the building which is the subject of a request were on the most recent list, the subgrantee would not need to undertake an independent verification of the income of the building tenants. In the case of buildings on the Qualified Assisted Housing Program list, the procedures required by the relevant grantee to ensure protection from rent increases, and ensure that no undue or excessive enhancement shall occur, would be met.

DOE recognizes that if made final, today's proposal would not address the requirement that, for multi-unit buildings, a grantee must ensure that the benefits of weatherizing a building that consists of rental units, including rental units where the tenant pays for energy through rent, accrue primarily to the

low-income tenants. (42 U.S.C. 6863(b)(5)(A); 10 CFR 440.22(b)(3)(i)) Given the variability with how utility savings could be realized by tenants in the Qualified Assisted Housing and LIHTC Programs, a request for weatherization of a multi-unit building on the list provided by HUD would need to demonstrate that the benefits of the weatherization work accrue primarily to the low-income tenants.

Generally, compliance with the requirement for the benefits of weatherization to accrue to the low-income tenants can be demonstrated by reduced utilities costs for the tenant that result from the weatherization work. Under the Qualified Assisted Housing programs and the LIHTC Program tenants may not directly pay for all or part of their utility bills. In instances in which tenants of a building do not directly pay utility costs and have capped rents, the property owner needs to demonstrate that benefits accrue primarily to the tenant of the weatherized units other than the benefit of reduced utility bills.

DOE requests comment on how to ensure compliance with the requirement that benefits of weatherization accrue primarily to low-income tenants, including information on procedures that may be used by States and subgrantees to determine that the accrual provision is satisfied in the context of buildings in the Qualified Assisted Housing programs and LIHTC Program.

Additionally, today's proposed rule would not alleviate the need for a subgrantee to obtain the written permission of the owner or the owner's agent or confirm that a dwelling unit is not designated for acquisition or clearance by Federal, State, or local program within 12 months from the date of the weatherization. 10 CFR 440.22(b)(1) and 440.18(e)(1), respectively. The proposed rule would not eliminate the ability of States to require financial participation from building owners (10 CFR 440.22(d)), or other requirements of DOE's rules. Moreover, the proposed rule would not impact the prioritization that States and subgrantees rely on in evaluating requests for weatherization work.

Despite the remaining issues that would still need to be addressed when weatherizing a multi-unit building, if finalized, DOE believes that today's proposal would be an important step in facilitating the weatherization of buildings that participate in the Qualified Assisted Housing and LIHTC Programs.

## VI. Regulatory Analysis

### A. Review Under Executive Order 12866

Today's proposed rule has been determined to be an economically significant regulatory action under section 3(f)(1) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993).

Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

The American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5; Recovery Act) provided \$5 billion for the Weatherization Assistance Program. Funding for grants under the Weatherization Assistance Program at a level greater than \$100 million makes this rulemaking economically significant under the Executive Order.

The weatherization grants provided under this program constitute transfer payments. In this case, the payments are from the Government to grantees (e.g., States, units of general purpose of local government, and community action agencies), and the payments do not represent a change in the total resources available to society. The grants do generate impacts such as weatherization benefits, however, which are discussed qualitatively in this proposed rule.<sup>2</sup> See OMB Circular A-4, at 14, 38 and 46. If today's proposal is finalized prior to expenditure of the Recovery Act funds by grantees and subgrantees under the Weatherization Assistance Program, today's proposal could impact the process used by grantees and subgrantees to evaluate applications from multi-unit buildings that are part of HUD's Qualified Assisted Housing and LIHTC Programs for the purpose of distributing funds provided under the Recovery Act. Such changes in the process for application evaluation have the potential to cause a change in the distribution of Recovery Act funding, which may constitute a transfer between different non-Federal entities. Such impacts would also be a consideration when categorizing this rulemaking under EO 12866.

<sup>2</sup> It is important to note that rules that transfer Federal dollars often have opportunity costs or benefits in addition to the budgetary dollars spent because they can affect incentives, and thus lead to changes in the way people behave (e.g., in their investment decisions). For example, OMB Circular A-94 suggests that transfers that result from increased taxes may be associated with a marginal excess burden (deadweight loss) of 25 cents per dollar of Federal revenue collected (p. 12).

### B. Review Under the 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). DOE has made its procedures and policies available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>. If finalized, today's action would revise the eligibility requirements that apply to the administration of the Weatherization Assistance Program grants by grantees and subgrantees. Because the matter of today's action relates to grants, it is not subject to the notice and comment provisions of the Administrative Procedure Act. 5 U.S.C. 553(a)(2). Therefore, the analytical requirements of the Regulatory Flexibility Act do not apply. Although DOE is requesting comment, today's proposed rule on the eligibility of multi-unit buildings under the Weatherization Assistance Program is not subject to any legal requirement to publish a general notice of proposed rulemaking.

### C. Review Under the National Environmental Policy Act of 1969

DOE has determined that, if finalized, today's action 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 the administration of grants. Today's proposal would amend the eligibility provisions for multi-unit buildings under the Weatherization Assistance Program. The regulations would not have direct environmental impacts. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

### D. Review Under Executive Order 13132, "Federalism"

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain

requirements on agencies formulating and implementing policies or regulations that pre-empt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's proposed rule and has determined that if finalized, it would not pre-empt State law and 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. No further action is required by Executive Order 13132.

### E. Review Under 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. The review required by sections 3(a) and 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the pre-emptive 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 sections 3(a) and 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, today's action meets the relevant standards of Executive Order 12988.

### F. Review Under the 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. 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.

If made final, today's proposed rule would not impose a Federal mandate on State, local or tribal governments, and it would not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

#### *G. Review Under the Treasury and General Government Appropriations Act of 1999*

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

#### *H. Review Under the Treasury and General Government Appropriations Act of 2001*

Section 515 of 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), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### *I. Review Under 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 OMB 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 the Office of Information and Regulatory Affairs (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.

Today's regulatory action, if finalized, would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### *J. Review Under Executive Order 13175*

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249; November 9, 2000), requires DOE to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" refers to regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Today's regulatory action is not a policy that has "tribal implications" under Executive

Order 13175. Today's regulatory action amends the eligibility provisions applicable to multi-unit buildings under the Weatherization Assistance Program. DOE has reviewed today's action under Executive Order 13175 and has determined that it is consistent with applicable policies of that Executive Order.

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

The Secretary of Energy has approved publication of today's notice of proposed rulemaking.

#### **List of Subjects in 10 CFR Part 440**

Administrative practice and procedure, Aged, Energy conservation, Grant programs—energy, Grant programs—housing and community development, Housing standards, Indians, Individuals with disabilities, Reporting and recordkeeping requirements, Weatherization.

Issued in Washington, DC, on May 15, 2009.

**Steven G. Chalk,**

*Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.*

For the reasons set forth in the preamble, DOE proposes to amend part 440 of chapter II of title 10, Code of Federal Regulations to read as follows:

#### **PART 440—WEATHERIZATION ASSISTANCE PROGRAM FOR LOW-INCOME PERSONS**

1. The authority citation for part 440 continues to read as follows:

**Authority:** 42 U.S.C. 6861 *et seq.*; 42 U.S.C. 7101 *et seq.*

#### **§ 440.22 Eligible dwelling units.**

2. Section 440.22 is amended by adding paragraph (b)(4) to read as follows:

\* \* \* \* \*

(b) \* \* \*

(4)(i) A building containing rental dwelling units meets the requirements of paragraph (b)(2) and paragraphs (b)(3)(ii) and (b)(3)(iv), of this section if it is included on the most recent list posted by DOE of Qualified Assisted Housing and Public Housing buildings identified by the U.S. Department of Housing and Urban Development as meeting those requirements.

(ii) A building containing rental dwelling units meets the requirement of paragraph (b)(2) of this section if it is included on the most recent list posted by DOE of Low Income Housing Tax Credit buildings identified by the U.S. Department of Housing and Urban

Development as meeting that requirement.

\* \* \* \* \*

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Chapter I

[Docket No. PL09-4-000]

#### Smart Grid Policy; Notice Requesting Supplemental Comments

Issued May 19, 2009.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Request for supplemental comments.

**SUMMARY:** On March 19, 2009, the Federal Energy Regulatory Commission (Commission) issued a Proposed Policy Statement and Action Plan (Proposed Policy Statement) that, among other things, proposed an interim rate policy to encourage the development of smart grid systems. In this notice, the Commission seeks supplemental comments regarding rate recovery for certain smart grid investments.

**DATES:** Comments are due May 28, 2009.

#### FOR FURTHER INFORMATION CONTACT:

Ray Palmer (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-6569.

Elizabeth Arnold (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8818.

#### SUPPLEMENTARY INFORMATION:

1. On March 19, 2009, the Federal Energy Regulatory Commission (Commission) issued a Proposed Policy Statement and Action Plan (Proposed Policy Statement) that, among other things, proposed an interim rate policy to encourage the development of Smart Grid systems.<sup>1</sup> Subsequent to the Commission's issuance of the Proposed Policy Statement, the U.S. Department of Energy (Department) announced two Smart Grid funding opportunities to be

<sup>1</sup> *Smart Grid Policy*, 126 FERC ¶ 61,253 (2009). As the Proposed Policy Statement described, Smart Grid advancements will apply digital technologies to the electric transmission system and enable real-time coordination of information from various resources to bring new efficiencies to the grid. *Id.* P. 1.

offered by the Department that may supply up to 50 percent of the funding for certain Smart Grid projects. In addition, the Department plans to require applicants to identify the source of non-Department funds, along with some evidence as to the certainty of these funds. Given that applicants for these programs might include jurisdictional public utilities that seek rate recovery through FERC-jurisdictional rates for the non-Department portion of funds for transmission-related projects, the Commission seeks supplemental comments on this matter.

#### I. Background

2. In the Energy Independence and Security Act of 2007 (EISA),<sup>2</sup> Congress enacted a number of provisions related to Smart Grid. Section 1301 of the EISA states that it is the policy of the United States to support the modernization of the Nation's electricity transmission and distribution system to maintain a reliable and secure electricity infrastructure that can meet future demand growth and to achieve each of several goals and characteristics, which together characterize a Smart Grid.<sup>3</sup> EISA authorizes the Department to carry out two separate funding programs for Smart Grid projects: (1) Providing up to 50 percent of the cost of certain demonstration projects, as described in section 1304;<sup>4</sup> and (2) providing federal matching funds for Smart Grid investment costs, as described in section 1306.<sup>5</sup> EISA also directed the development of a framework of protocols and standards to achieve interoperability of Smart Grid devices and systems, which was described in detail in the Proposed Policy Statement, and in which the Commission plays a role.<sup>6</sup>

3. In the Proposed Policy Statement, the Commission proposed an interim rate policy for Smart Grid investments, intended to encourage investment in technologies that advance efficiency, security, reliability and interoperability. Specifically, the Commission proposed to accept single-issue rate filings submitted by public utilities under section 205 of the Federal Power Act<sup>7</sup> to recover the costs of Smart Grid

<sup>2</sup> Public Law No. 110-140, 121 Stat. 1492 (2007).

<sup>3</sup> EISA sec. 1301, to be codified at 15 U.S.C. 17381.

<sup>4</sup> To be codified at 42 U.S.C. 17384, as amended by the American Recovery and Reinvestment Act of 2009, Public Law No. 111-5, Title IV, Subpart A (ARRA).

<sup>5</sup> To be codified at 42 U.S.C. 17386, as amended by the ARRA.

<sup>6</sup> See Proposed Policy Statement, 126 FERC ¶ 61,253 at P 7-8.

<sup>7</sup> 16 U.S.C. 824d.

projects involving jurisdictional facilities, provided that certain showings are made.<sup>8</sup> The Commission specifically noted that, "[w]e would also consider applying these rate treatments to the portion of a smart grid pilot or demonstration project's cost that is not already paid for by Department of Energy funds, such as those authorized by EISA sections 1304 and 1306."<sup>9</sup>

4. Subsequent to the Commission's issuance of the Proposed Policy Statement, the Department released two documents relative to forthcoming solicitations for applications for Smart Grid funding; one of these solicitations was authorized by EISA section 1304, and one authorized by EISA section 1306.<sup>10</sup>

5. In the Notice of Intent, electric utilities are specifically identified as a category of eligible bidders. While the Notice of Intent does not specifically require that an applying electric utility get approval from a regulatory commission for non-Federal funds, the document could be read as indicating a preference for such approval.<sup>11</sup>

6. The Draft Funding Opportunity Announcement does not explicitly address regulatory approvals, but does instruct applicants to submit a funding plan that identifies all sources of project funds, and directs applicants to include a commitment letter from third parties providing a specific minimum dollar amount of cost sharing.<sup>12</sup> For public utilities that plan to match the Federal funds with charges to ratepayers, it is possible that public utilities may seek to obtain an order addressing rate recovery from this Commission for charges subject to this Commission's jurisdiction.

#### II. Request for Comments

7. Given the requirements for potential applications by public utilities

<sup>8</sup> Proposed Policy Statement, 126 FERC ¶ 61,253 at P 46. The Commission also discussed other rate treatments. *Id.* P 51-52.

<sup>9</sup> *Id.* P 52 (footnote omitted).

<sup>10</sup> For the section 1304 program, the Department's National Energy Technology Laboratory issued a Draft Funding Opportunity Announcement numbered DE-FOA-0000036 on April 16, 2009 (Draft Funding Opportunity Announcement). For the section 1306 program, the Department's Office of Energy Delivery and Electric Reliability issued a Notice of Intent to Issue a Funding Opportunity Announcement numbered DE-FOA-0000058A on April 16, 2009 (Notice of Intent).

<sup>11</sup> The Notice of Intent states that the evaluation of proposals will include " \* \* \* the likelihood that the proposed work can be accomplished \* \* \* with additional merit given to applications that \* \* \* [o]ffer the greatest extent of institutional and organizational commitment with consideration given to: \* \* \* [r]equired approvals from regulatory organizations." Notice of Intent at 12-13.

<sup>12</sup> Draft Funding Opportunity Announcement at 32-33.