

the guaranteed lender used to fund eligible loans;

(4) The applicant provides a certified list of eligible loans and their outstanding balances as of the date the guarantee is to be issued;

\* \* \* \* \*

(8) The applicant shall provide evidence of a credit rating on its senior secured debt or its corporate credit rating, as applicable, without regard to the guarantee and satisfactory to the Secretary; and

\* \* \* \* \*

■ 10. Amend § 1720.12 by revising paragraph (a)(5) to read as follows:

**§ 1720.12 Reporting requirements.**

(a) \* \* \*

(5) Credit rating, by a Rating Agency, on its senior secured debt or its corporate credit rating, as applicable, without regard to the guarantee and satisfactory to the Secretary; and

\* \* \* \* \*

■ 11. Revise § 1720.13 to read as follows:

**§ 1720.13 Limitations on guarantees.**

In a given year the maximum amount of guaranteed bonds that the Secretary may approve will be subject to budget authority, together with receipts authority from projected fee collections from guaranteed lenders, the principal amount of outstanding eligible loans made by the guaranteed lender, and Congressionally-mandated ceilings on the total amount of credit. The Secretary may also impose other limitations as appropriate to administer this guarantee program.

**Jonathan Adelstein,**

*Administrator, Rural Utilities Service.*

[FR Doc. 2010-17817 Filed 7-21-10; 8:45 am]

BILLING CODE P

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 274a**

[ICE 2345-05; DHS-2005-0046]

RIN 1653-AA47

**Electronic Signature and Storage of Form I-9, Employment Eligibility Verification**

**AGENCY:** U.S. Immigration and Customs Enforcement, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security regulations to provide that employers and recruiters or referrers for a fee who

are required to complete and retain the Form I-9, Employment Eligibility Verification, may sign this form electronically and retain this form in an electronic format. This final rule makes minor changes to an interim final rule promulgated in 2006.

**DATES:** This final rule is effective August 23, 2010.

**FOR FURTHER INFORMATION CONTACT:**

Allen Vanscoy, Office of Investigations, U.S. Immigration and Customs Enforcement, 500 12th St., SW., Washington, DC 20024. Telephone (202) 732-5798 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Employment Eligibility Verification Requirement*

Section 274A of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1324a, requires all U.S. employers, agricultural associations, agricultural employers, farm labor contractors, or persons or other entities that recruit or refer persons for employment for a fee, to verify the employment authorization and identity of all employees hired to work in the United States after November 6, 1986. To comply with the law, an employer, or a recruiter or referrer for a fee, is responsible for the completion of a Form I-9, Employment Eligibility Verification (Form I-9), for each new employee, including United States citizens. 8 CFR 274a.2.

The completed Form I-9 is not filed with the Department of Homeland Security (DHS). Rather, the Form I-9 is retained by the employer who must make it available for inspection upon a request by Immigration and Customs Enforcement (ICE) investigators or other authorized federal officials. Employers are required to retain a Form I-9 in their own files for three years after the date of hire of the employee or one year after the date that employment is terminated, whichever is later. 8 CFR 274a.2(c)(2). Recruiters or referrers for a fee are required to retain each Form I-9 for three years after the date of hire. *Id.* at (d)(2). Failure to properly complete and retain each Form I-9 may subject the employer or recruiter or referrer for a fee to civil money penalties. INA section 274A(e)(5), 8 U.S.C. 1324a(e)(5).

*B. Format of the Form I-9*

The Form I-9 has been available to the public in numerous paper and electronic means since 1986. The Form I-9 is available online at the U.S. Citizenship and Immigration Services (USCIS) Web site as a Portable Document Format (.pdf) fillable and

printable form. <http://uscis.gov/files/form/i-9.pdf>.

This final rule permits employers to complete, sign, scan, and store the Form I-9 electronically (including an existing Form I-9), as long as certain performance standards set forth in this final rule for the electronic filing system are met. DHS has separately revised the substantive documentary requirements for employment verification that form the basis for the Form I-9. *Documents Acceptable for Employment Eligibility Verification*, 73 FR 76505 (Dec. 17, 2008).

*C. Regulatory History*

In June 2006, DHS published an interim final rule to permit electronic signature and storage of the Form I-9. 71 FR 34510 (June 15, 2006). The interim rule implemented Public Law 108-390, 118 Stat. 2242 (Oct. 30, 2004), and INA section 274A, 8 U.S.C. 1324a. The interim rule amended DHS regulations to permit employers to complete, sign, scan, and store the Form I-9 electronically (including an existing Form I-9), as long as certain performance standards set forth in this final rule for the electronic filing system are met. See 8 CFR 274a.2. This final rule responds to public comments received on the interim final rule and adopts the interim final rule with changes noted below.

**II. Changes Made by This Final Rule**

In this final rule, DHS makes minor modifications to 8 CFR 274a.2 to clarify certain provisions that:

- Employers must complete a Form I-9 within three business (not calendar) days;
- Employers may use paper, electronic systems, or a combination of paper and electronic systems;
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations;
- Employers need not retain audit trails of each time a Form I-9 is electronically viewed, but only when the Form I-9 is created, completed, updated, modified, altered, or corrected; and
- Employers may provide or transmit a confirmation of a Form I-9 transaction, but are not required to do so unless the employee requests a copy. The final rule makes technical and conforming amendments to the regulations.

**III. Comments and Responses**

This final rule responds to the nine comments received from trade associations and agencies and

organizations involved in human resource management and modifies the interim final rule as explained above. DHS has carefully considered the views expressed and, to the extent practical and appropriate, incorporated those suggestions in the final regulation. The interim final rule merely provided an additional option for employers to sign and store the Form I-9 and supporting documents electronically rather than by retaining paper, microfilm or microfiche copies of the Form I-9. This final rule makes modest adjustments to the interim final rule.

#### A. Time To Complete Form I-9

Several commenters expressed concern regarding the timeframes involved in completing the Form I-9. A commenter questioned the meaning of the term "at the time of hire." The commenters were concerned with the language that required the employer to complete the verification section of a Form I-9 within three (3) days and suggested that the final rule specifically state three (3) "business days." This question is clarified on the revised Form I-9 (rev. 06/05/07) that states: "Employers must complete Section 2 by examining evidence of identity and employment eligibility within three (3) business days of the date employment begins." The interim rule inadvertently omitted the word "business." In this final rule DHS has revised 8 CFR 274a.2(b)(1)(ii)(B) to state three "business" days instead of the implied three calendar days.

#### B. Electronic Storage Options

Several commenters raised concerns about the employers' ability to implement new systems as technology changes and improves. Commenters suggested that to specify processes and systems in this final rule would likely inhibit the use of future developments and the resulting cost savings and improved efficiencies. The interim final rule and this final rule do not specify any technology based system, but provide only for a performance-based system that ensures accessibility.

One commenter asked if an employer could use a combination of electronic and paper storage systems for storing a Form I-9. In response, DHS has revised 8 CFR 274a.2(b)(2)(i) to provide that employers may use paper, electronic systems, or a combination of the two.

One commenter asked if electronic storage systems that permit the storage of all data but do not produce a facsimile of the Form I-9 could be used. DHS believes the existing regulations establish that an employer must be able to produce a reasonable facsimile or

copy of the Form I-9. 8 CFR 274a.2(a)(2), (e)(7) (authorizing use of "reasonable data compression or formatting technologies").

Several commenters requested guidance on the storage of ancillary documents used to verify an employee's identity and eligibility to work in the United States. Employers may, but are not required to, copy or make an electronic image of a document used to comply with the requirements of INA section 274A(b), 8 U.S.C. 1324a(b). 8 CFR 274a.2(b)(3). Employers should be cautious, however, to apply consistent policies and procedures for all employees to avoid a potential of discrimination.

A commenter asked if the Form I-9 could be stored with the employee's other employment records. Similarly, several commenters were concerned about storage of documents they use to verify an employee's identity and employment authorization. The Form I-9 and verification documentation may be stored in a separate Form I-9 file or as part of the employee's other employment records. 8 CFR 274a.2(b)(3). Further, DHS has added language in 8 CFR 274a.2(e)(4) to make clear that employers may change electronic storage systems as long as such systems meet the requirements of this rule.

Two commenters asked whether the entire Form I-9 must be retained or only the pages on which the employer and employee enter data. Only the pages of the Form I-9 containing employer and employee-entered data need be retained. 8 CFR 274a.2(e)(1). Other pages of the current form are instructions for completing the Form I-9 and need not be retained by the employer.

Several commenters inquired if DHS would provide additional guidance concerning the use of contract services for the electronic storage of the Form I-9. DHS does not intend to provide any additional guidance or requirements for employers choosing to use contract electronic storage and generation systems. DHS intends that the regulation allow for flexibility.

#### C. Audit Trail Requirements

Several commenters suggested that the audit trail requirements of 8 CFR 274a.2(g)(1)(iv) would be burdensome, particularly for small businesses, but could pose issues for all businesses. Commenters stated that the audit trail requirement would significantly diminish any cost savings over the more traditional paper-based systems, particularly if the audit trail must include every accession of the record. DHS agrees with comments that

suggested that it is unnecessary to require an audit trail to record every time a Form I-9 is simply viewed or accessed but not modified. An audit trail is important, however, whenever a record is created, completed, altered, updated, or otherwise modified. Accordingly, 8 CFR 274a.2(g)(1)(iv) has been modified to ensure that whenever the electronic record is created, completed, updated, modified, altered, or corrected, a secure and permanent record is created that establishes the date of access, the identity of the individual who accessed the electronic record, and the particular action taken. Additionally, DHS revised 8 CFR 274a.2(e)(1)(iv) to delete the requirement that the electronic storage system be searchable by any data element and has inserted language that requires searchability to be consistent with 8 CFR 274a.2(e)(6).

A commenter stated the word "documents" should be used instead of the term "books" in 8 CFR 274a.2(e)(6). DHS agrees and has adopted the recommendation.

#### D. Employee Receipt

Several commenters objected to the requirement in 8 CFR 274a.2(h)(1)(iii) that a printed transaction record be given to the employee. Commenters argued it is contrary to the goals of a paperless system, and that the requirements before this rule did not require the employer to provide an employee with a printed transaction record. One commenter noted that some companies process thousands of new employees annually and another noted that, in the modern work environment, many employees work off-site. Overall, these commenters expressed concern that requiring paper receipts could be a significant burden to businesses both large and small. Commenters noted that the employer, not the employee, must demonstrate compliance.

DHS disagrees. DHS believes this requirement is feasible and not, in most cases, unduly burdensome. DHS believes that providing a transaction receipt, such as a printed copy of the electronic record, may be an important protective step for the employee if errors are later discovered. The employee may not be the person inputting the information into the electronic record. In response to comments, however, DHS has amended this final rule to require employers to provide or transmit a confirmation of the transaction only if an employee requests it. In addition, DHS removed the language requiring the employer to provide the confirmation at the time of the transaction. DHS understands that in certain situations it

may be impracticable for employers to transmit or print a confirmation of the transaction because the employee may not have access to a computer or the employer may not have the capability to print a paper copy of the electronic record at the time the document is completed electronically. If, however, the employee requests confirmation, it is reasonable for the employer to be required to give the employee a copy of the information provided within a reasonable period of time. Providing the option of electronic preparation and storage does not in any way alter the requirement that the employer physically examine any documentation provided by the employee in the presence of the employee prior to completing the Form I-9. Though not required when preparing a paper Form I-9, DHS believes requiring an employer to provide a receipt upon employee request when completing an electronic record allows employers and employees to confirm the accuracy of the information provided.

#### *E. U.S. Government Access to Employer Electronic Systems*

One commenter objected to the requirement in 8 CFR 274a.2(e)(3) that electronic generation or storage systems not be subject to license or contract restrictions that would inhibit access by U.S. Government agencies to those Form I-9 preparation and storage systems. The commenter also objected to the requirement that an employer give the government unlimited access to the employer's electronic generation and storage system. DHS declines to alter 8 CFR 274a.2(e)(3). The provision does not require unlimited government access; it prevents contract and license restrictions from denying government access to electronically stored Form I-9.

#### *F. Improvements to Form I-9*

A number of comments suggested improvements to the Form I-9, including revisions to the ancillary documents list used for verification and to improve the readability of the Form I-9. This rulemaking concerns only the storage of the Form I-9, not its content. Those issues, therefore, are beyond the scope of this rulemaking. DHS has separately amended the regulatory requirements for documentation of employment eligibility and this rule makes minor technical corrections to comport with that rulemaking.

*Documents Acceptable for Employment Eligibility Verification*, 73 FR 76505 (Dec. 17, 2008); *Documents Acceptable for Employment Eligibility Verification*, 74 FR 2838 (Jan. 16, 2009) (correction);

*Documents Acceptable for Employment Eligibility Verification*, 74 FR 5899 (Feb. 3, 2009) (delayed effective date); *Documents Acceptable for Employment Eligibility Verification*, 74 FR 10455 (March 11, 2009) (correction). See also *Handbook for Employers, Instructions for Completing the Form I-9 (M-274)*, available at <http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/m-274.pdf>.

Finally, one commenter suggested that requiring an employer to download the Form I-9 electronically poses a burden on small businesses that do not use a computer or the internet in their business operations. The interim rule and this final rule do not require that Form I-9 be downloaded electronically from any source. Form I-9 continues to be available in the paper format that can be obtained, upon request, from USCIS, at (800) 870-3676 or (800) 375-5283. The interim rule and this final rule simply provide an option for an employer to electronically store the Form I-9.

### **IV. Regulatory Requirements**

#### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). DHS previously determined that good cause exists under 5 U.S.C. 553(b)(B) to exempt this rule from the notice and comment requirements of 5 U.S.C. 553(b). Therefore, no RFA analysis under 5 U.S.C. 603 or 604 is required for this rule. DHS notes, however, that because electronic signature and storage technologies are optional, DHS expects that small entities will choose electronic methods only if those methods will save costs, lessen overall burden, or otherwise improve efficiency.

#### *B. Unfunded Mandates Reform Act of 1995*

This final rule will not result in any expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million (adjusted for inflation) or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *C. Small Business Regulatory Enforcement Fairness Act of 1996*

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104-121, tit. II, 110 Stat. 847, 857 (March 29, 1996), 5 U.S.C.

601 note. This final rule will not result in an annual effect of \$100 million or more on the economy; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### *D. Executive Order 12866 (Regulatory Planning and Review)*

This final rule is considered by DHS to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, the rule has been submitted to the Office of Management and Budget (OMB) for review.

DHS analyzed the cost and benefits of this final rule as required by Executive Order 12866 section 1(b)(6), and made a reasoned determination that the benefits of this final rule justify its costs to the public and Government. Whether to create and store the Form I-9 in an electronic or traditional paper format will be within the discretion of employers or recruiters or referrers for a fee, who are already required under 8 CFR 274a.2 to retain the Form I-9. This final rule permits the employers to continue using their current Form I-9 policies and practices to prepare and store the Form I-9 in the paper format; electing to prepare and store the Form I-9 electronically is voluntary. The regulation does not require any additional actions or expenses, it merely provides employers with an additional option that may result in improved efficiency and cost-savings.

#### *E. Executive Order 13132 (Federalism)*

This final rule will 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### *F. Executive Order 12988 (Civil Justice Reform)*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### *G. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, agencies are required to submit any reporting or

recordkeeping requirements inherent in a rule to the OMB for review and approval. This final rule makes minor adjustments to an interim final rule affecting electronic completion of Form I-9, which has been approved for use by OMB under Control Number 1615-0047. The final rule permits the employer also to continue to retain Form I-9 in paper, microfiche, or microfilm, and allows a new option: to retain Form I-9 electronically. DHS estimated that the interim final rule permitting storage of the Form I-9 electronically reduced the burden on businesses by 650,000 hours. 71 FR at 34514. Accordingly, DHS submitted the required Paperwork Reduction Change Worksheet (OMB-83C) to OMB reflecting the reduction in burden hours for Form I-9, and OMB approved the changes. The amendments made by this final rule to clarify storage options do not alter in any significant quantifiable way the recordkeeping hours or burdens from those associated with the interim final rule. Accordingly, no Paperwork Reduction Change Worksheet (Form OMB 83-C) was required to be submitted to OMB.

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, part 274a of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

- 2. Section 274a.2 is amended:
a. By revising paragraph (b)(1)(ii)(B);
b. By revising paragraph (b)(2)(i) introductory text;
c. By revising the first and last sentences of paragraph (b)(2)(ii);
d. By revising the second sentence of paragraph (b)(3);
e. By revising paragraph (e)(1) introductory text;
f. By revising paragraph (e)(1)(iv);
g. By revising paragraph (e)(4);
h. By revising the first and last sentences of paragraph (e)(6);
i. By revising the last sentence of paragraph (e)(8)(i);
j. By revising paragraph (e)(8)(ii);
k. By revising the last sentence of paragraph (f)(3);
l. By revising paragraph (g)(1)(iv); and
m. By revising paragraph (h)(1)(iii).

The revisions and additions read as follows:

§ 274a.2 Verification of identity and employment authorization.

- (b) \* \* \*
(1) \* \* \*
(ii) \* \* \*

(B) Complete section 2—"Employer Review and Verification"—on the Form I-9 within three business days of the hire and sign the attestation with a handwritten signature or electronic signature in accordance with paragraph (i) of this section.

- (2) \* \* \*

(i) A paper (with original handwritten signatures), electronic (with acceptable electronic signatures that meet the requirements of paragraphs (h) and (i) of this section or original paper scanned into an electronic format, or a combination of paper and electronic formats that meet the requirements of paragraphs (e), (f), and (g) of this section), or microfilm or microfiche copy of the original signed version of Form I-9 must be retained by an employer or a recruiter or referrer for a fee for the following time periods:

(ii) Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three business days notice prior to an inspection of Forms I-9 by officers of an authorized agency of the United States. Nothing in this section is intended to limit the subpoena power under section 235(d)(4) of the Act.

(3) Copying of documentation. If such a copy or electronic image is made, it must either be retained with the Form I-9 or stored with the employee's records and be retrievable consistent with paragraphs (e), (f), (g), (h), and (i) of this section.

(1) Any person or entity who is required by this section to complete and retain Forms I-9 may complete or retain electronically only those pages of the Form I-9 on which employers and employees enter data in an electronic generation or storage system that includes:

(iv) In the case of electronically retained Forms I-9, a retrieval system that includes an indexing system that permits searches consistent with the requirements of paragraph (e)(6) of this section; and

(4) A person or entity who chooses to complete or retain Forms I-9 electronically may use one or more

electronic generation or storage systems. Each electronic generation or storage system must meet the requirements of this paragraph, and remain available as long as required by the Act and these regulations. Employers may implement new electronic storage systems provided:

(i) All systems meet the requirements of paragraphs (e), (f), (g), (h) and (i) of this section; and

(ii) Existing Forms I-9 are retained in a system that remains fully accessible.

(6) An "indexing system" for the purposes of paragraphs (e)(1)(iv) and (e)(5) of this section is a system that permits the identification and retrieval for viewing or reproducing of relevant documents and records maintained in an electronic storage system. The requirement to maintain an indexing system does not require that a separate electronically stored documents and records description database be maintained if comparable results can be achieved without a separate description database.

- (8) \* \* \*

(i) \* \* \*. Generally, an audit trail is a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time;

(ii) Provide a requesting agency of the United States with the resources (e.g., appropriate hardware and software, personnel and documentation) necessary to locate, retrieve, read, and reproduce (including paper copies) any electronically stored Forms I-9, any supporting documents, and their associated audit trails, reports, and other data used to maintain the authenticity, integrity, and reliability of the records; and

- (f) \* \* \*

(3) \* \* \*. Nothing in this section is intended to limit the subpoena power of an agency of the United States under section 235(d)(4) of the Act.

- (g) \* \* \*
(1) \* \* \*

(iv) Ensure that whenever the electronic record is created, completed, updated, modified, altered, or corrected, a secure and permanent record is created that establishes the date of access, the identity of the individual who accessed the electronic record, and the particular action taken.

- (h) \* \* \*
(1) \* \* \*

(iii) Upon request of the employee, provide a printed confirmation of the transaction to the person providing the signature.

\* \* \* \* \*

**Janet Napolitano,**  
*Secretary.*

[FR Doc. 2010-17806 Filed 7-21-10; 8:45 am]

BILLING CODE 9111-28-P

## DEPARTMENT OF ENERGY

### 10 CFR Part 430

[Docket No. EERE-2010-BT-TP-0022]

RIN: 1904-AC25

#### Energy Conservation Program for Consumer Products: Test Procedure for Microwave Ovens; Repeal of Active Mode Test Procedure Provisions

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Energy (DOE) repeals the regulatory provisions establishing the cooking efficiency test procedure for microwave ovens under the Energy Policy and Conservation Act (EPCA). DOE has determined that the microwave oven test procedure to measure the cooking efficiency does not produce accurate and repeatable test results and is unaware of any test procedures that have been developed that address the concerns with the DOE microwave oven cooking efficiency test procedure.

**DATES:** *Effective date:* This rule is effective on July 22, 2010.

**ADDRESSES:** The public may review copies of all materials related to this rulemaking at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC, (202) 586-2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

**FOR FURTHER INFORMATION CONTACT:** Mr. Wes Anderson, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Program, EE-2J, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Tel.: (202) 586-7335. E-mail: [Wes.Anderson@ee.doe.gov](mailto:Wes.Anderson@ee.doe.gov).

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC-71, 1000 Independence Avenue,

SW., Washington, DC 20585-0121. Tel.: (202) 586-7796. E-mail: [Elizabeth.Kohl@hq.doe.gov](mailto:Elizabeth.Kohl@hq.doe.gov).

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#### I. Legal Authority and Background

##### Legal Authority

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291 *et seq.*; EPCA or the Act) sets forth a variety of provisions designed to improve energy efficiency. Part A of Title III (42 U.S.C. 6291-6309) establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles" for consumer products, including microwave ovens. (42 U.S.C. 6291(1)-(2) and 6292(a)(10)) Under the Act, this program consists essentially of three parts: testing, labeling, and establishing Federal energy conservation standards.

Manufacturers of covered products must use DOE test procedures to certify that their products comply with energy conservation standards adopted under EPCA and to represent the efficiency of their products. (42 U.S.C. 6295(s); 42 U.S.C. 6293(c)) DOE must also use DOE test procedures in any action to determine whether covered products comply with EPCA standards. (42 U.S.C. 6295(s)) Criteria and procedures for DOE's adoption and amendment of such test procedures, as set forth in EPCA, require that test procedures be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. Test procedures must also not be unduly

burdensome to conduct. (42 U.S.C. 6293(b)(3))

EPCA also specifies that State law providing for the disclosure of information with respect to any measure of energy consumption is superseded to the extent that such law requires testing or the use of any measure of energy consumption or energy descriptor in any manner other than provided under section 323 of EPCA. (42 U.S.C. 6297(a)(1)(A); 42 U.S.C. 6297(f)(3)(G)) Therefore, in the absence of a Federal test procedure or accompanying conservation standard, States may prescribe their own test procedures and standards pursuant to applicable State law. *Id.*

##### Background—Active Mode Test Procedure

DOE's test procedure for microwave ovens is codified at appendix I to subpart B of Title 10 of the Code of Federal Regulations (CFR). That test procedure was part of an October 3, 1997, final rule that also revised the test procedures for other cooking products to measure their efficiency and energy use more accurately. 62 FR 51976. The microwave oven test procedure incorporates portions of the International Electrotechnical Commission (IEC) Standard 705-1998 and Amendment 2-1993, "Methods for Measuring the Performance of Microwave Ovens for Households and Similar Purposes," (IEC Standard 705) and measures microwave oven cooking efficiency and energy factor (EF). *Id.*

##### Background—Active Mode Standards

The National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100-12), which amended EPCA, established prescriptive standards for kitchen ranges and ovens, but no standards were established for microwave ovens. (42 U.S.C. 6295(h)) The NAECA amendments also required DOE to conduct two cycles of rulemakings to determine whether to revise the standard. DOE undertook the first cycle of these rulemakings and issued a final rule on September 8, 1998 (63 FR 48038), in which DOE found that no amended standards were justified for electric cooking products, including microwave ovens. In a final rule published on April 8, 2009 (74 FR 16040) (hereafter referred to as the appliance standards rulemaking), DOE established amended standards for gas cooking products, but again found that no active mode cooking efficiency standards were justified for electric cooking products, including microwave ovens. This rulemaking completed the second cycle of rulemakings required by