March 14, 2016

Ms. Brenda Edwards
U.S. Department of Energy
Building Technologies Program, Mailstop EE–5B
1000 Independence Avenue SW.
Washington, DC, 20585–0121
(ImportData2015CE0019@ee.doe.gov)

Re: DOE NOPR for Import Data Collection

Dear Ms. Edwards:

These comments are submitted by the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) in response to the Department of Energy (DOE) notice of proposed rulemaking (NOPR) regarding Import Data Collection for covered products appearing in the Federal Register on December 29, 2015.

AHRI is the trade association representing manufacturers of heating, cooling, water heating, and commercial refrigeration equipment. More than 300 members strong including 35 international members, AHRI is an internationally recognized advocate for the industry and develops standards for and certifies the performance of many of the products manufactured by our members. In North America, the annual output of the HVACR industry is worth more than $20 billion. In the United States alone, our members employ approximately 130,000 people and support some 800,000 dealers, contractors, and technicians.

AHRI recognizes that DOE is concerned with preventing non-compliant products covered under its energy conservation standards from being imported and sold within the U.S. market and supports the intent of this rulemaking. However, as discussed in more detail below, we have serious concerns with the proposed rulemaking.

The proposed reporting requirements add a significant burdensome step to the process whereby covered products are imported. As an example, just one manufacturer has indicated that over 20,000 loads of product representing over one million units per year go through customs for sale within the U.S. The NOPR is missing the detailed explanation necessary for manufacturers to determine the impact of the proposed requirement for an import declaration for each shipment containing covered products. The proposal lacks a
clear explanation of how the requested information would be used by the DOE to achieve the intent of preventing products that do not comply with energy conservation standards from being imported for sale in the U.S. The NOPR indicates that the information would be collected through Automated Commercial Environment (ACE); however, without ACE being fully deployed, manufacturers do not have a clear understanding of how the collection would be executed. During the public meeting, flow charts and examples were requested to clarify the process.

AHRI appreciates that DOE held a public meeting to clarify these details. However, the regulation proposed in the NOPR and explained during the meeting creates an immense reporting burden for importers who are already in compliance. Meanwhile, importers who do not intend to comply can simply choose not report because CBP will not know that a report is required.

During the public meeting, DOE indicated that a Supplemental NOPR (SNOPR) would likely be issued for this rulemaking. AHRI's preferred next step would be for DOE to convene a working group and bring together industry partners to characterize the problem before an appropriate solution can be formed. Stakeholder involvement in the rulemaking process would give a better opportunity to come up with a less intrusive process that accomplishes the same end goal. AHRI respectfully requests that separate working groups be formed for each regulated industry to develop an appropriate solution for their products. As noted below, a one-size-fits all approach is not appropriate for the wide range of regulated products.¹

AHRI has included comments below on the effectiveness of the proposal, the requested data for covered products, the proposal’s requirement to identify the final products for covered components, product-specific issues, general compliance requirements, and legal concerns.

Effectiveness of the Proposal

AHRI supports the general intent of ensuring covered products that do not meet federal energy conservation standards are not imported, alone or as part of a final product. DOE indicated during the public meeting that there are two main purposes of this rule. The first is to educate importers and customs brokers who may not realize they are importing covered products that are required to meet regulations and be reported to the Compliance and Certification Management System (CCMS) before being sold in the U.S., alone or as part of a different final product. The second is for DOE and Customs and Border Patrol (CBP) to maintain a list of models that have been tested and have been determined to be non-compliant, so CBP can refuse admission. We support the intent of the education effort; however, we have reservations with the administrative requirements, the effectiveness of maintaining a list of products for CBP to deny entry and the requirement

¹ If the DOE rejects AHRI’s request to convene a working group and instead decides to publish a SNOPR, AHRI requests that, at a minimum, stakeholder are provided a comment period of at least 90 days.
that all importers of covered products to report information for each shipment that can be cross-checked with this list.

According to DOE, products would be considered non-compliant either because the products have not been reported to CCMS or the products did not to meet the energy efficiency minimums through verification or enforcement testing. However, it is doubtful that the proposed reporting regime will have the intended effect because DOE does not have a method to ensure that importers of covered products will provide the certification of admissibility for non-compliant products. If a product is being sold without reporting to CCMS or has failed enforcement testing, the importer is already committing an infraction and may not provide the certificate of admissibility at the border either purposefully or because it is not aware of the regulations. If enforcement testing has found products to be non-compliant, DOE should have the same recourse to prohibit sale of imported products as domestic non-compliant products.

DOE and CBP have no way to distinguish covered products at the border from any other products. DOE clarified during the public meeting that the list of HTS codes provided in the NOPR were included to ensure that CBP has a complete list of codes that may be accompanied by a certificate of admissibility. DOE indicated that the submissions with the identified HTS would not be flagged to provide a certificate of admissibility. Essentially, this certificate of admissibility would only be provided by importers that are aware of the requirement and are likely already compliant. Because it is unlikely that non-compliant manufacturers and importers will undertake to meet new paperwork requirements, the proposal essentially punishes those importers that are already spending time, money, and effort to comply with DOE regulations.

AHRI appreciates that the importation of non-compliant products presents a complex problem without an easy solution. AHRI is willing to work with our manufacturers to assist DOE in determining a more effective, less burdensome approach. As such, we reiterate our request that DOE convene a working group to get more stakeholder input before moving forward with its proposal.

**Requested Data for Covered Products**

During the public meeting, DOE explained that only covered products being imported for sale in the U.S. are required to comply with energy conservation standards, and therefore importers are required to submit a certificate of admissibility for such products. DOE indicated that if a product is being imported for other reasons besides U.S. commerce, such as product development, research, testing, storage in a Foreign-Trade zone, to be sold outside the U.S., etc., a certificate of admissibility would not be required. AHRI requests that the import data regulations provide a specific exemption for units that are not intended for sale in the U.S. Our understanding from the public meeting is that those covered products that must be certified and reported to CCMS per DOE regulation correspondingly require a certificate of admissibility. However, it is unclear why DOE has proposed separate certificate of admissibility requirements for products that have not been reported to CCMS. This appears to be a reporting option for product that are non-
compliant with current legal requirements. Essentially, DOE has provided a way for non-compliant products to provide a certificate of admissibility, which is unlikely to be utilized.

The proposed reporting requirements are excessive to accomplish the stated intent of the cited comments received in previous rules urging DOE to improve, monitor and enforce imported motors. The proposed requirements penalizes importers who already are following the rules and reporting all covered products to CCMS. A better solution would be for importers/manufacturers with products already listed in CCMS to simply check a box on the electronic form acknowledging under penalty of law that the imported product is certified via DOE’s CCMS. We understand that this solution does not allow DOE and CBP to refuse admission to products that are reported to CCMS and found to be non-compliant. However, we strongly feel that separate action, outside of CBP, should be taken to remove those products from the market and that DOE has not provided a reasoned approach to filtering out non-compliant products.

If DOE determines that it must collect sufficient information to link each shipment to the DOE certification/CCMS entry, the collected information should be as open-ended as possible to allow manufacturers and importers compliance options. DOE should allow importers to decide from many options what information would be provided. Identifying information will differ for each importer depending on the status of the product when it is imported and the specific business needs of the manufacturers and importers. Some examples include: brand and model number; OEM name, brand and model number; PBM name, brand and model number; type of product using the code, brand name, and model number; or CCMS numbers.

At the public meeting, AHRI expressed its objections to employing the CCMS ticket number as required identifying data in the case where the efficiency information has already been certified by the manufacturer or importer. DOE indicated during the public meeting that CCMS numbers were chosen only because staff believed it would be the easiest solution. DOE encouraged commenters to suggest other options. AHRI informed DOE and reiterates the position that the CCMS number is not the easiest solution.

As noted during the public meeting, reporting the CCMS ticket, ID or line number is excessively burdensome for the following reasons:

- AHRI reports new and modified models to CCMS through the AHRI Directory for 349 manufacturers that participate in the AHRI Certification Programs, 48 of which are located outside the U.S. For these models, the CCMS numbers are not currently reported back to the manufacturer. The task of providing CCMS numbers to manufacturers for the purpose of reporting import shipments would be burdensome and an unnecessary change to the current process.
- The manufacturers’ representatives or customs agents who report import shipment information are not likely to be the same individuals involved with submitting the energy efficiency information to CCMS or the AHRI Directory. Therefore, they would not be familiar with CCMS or the CCMS numbers.
- CCMS numbers are arbitrary to the products themselves and may not be tracked by manufacturers.
• Requesting the CCMS numbers in the submission requires the establishment of a stream of data that would only be maintained for this reporting.
• CCMS numbers are updated each year while product specific information may not change.

During the public meeting, DOE indicated that it already has access to all the information filed by an import agent through CBP. With access to the commercial invoice, DOE likely has the information necessary to tie shipments to the CCMS directory and a contact name and email for the importer of record. There is no reason for DOE to request this information be provided again through a different interface. However, the information that DOE accesses should be limited to only that required to verify compliance with its regulations. Commercial invoices include confidential information on product prices and quantities. Many of our member manufacturers are uncomfortable with DOE having access to this type of information.

Identification of Final Products for Components

The NOPR does not effectively describe the requirements related to reporting a covered product that is a component of a final product. The proposed regulatory language could be interpreted to mean that a covered product used as a component would need to be reported to DOE whether the component is imported separately or as part of a final product. DOE clarified during the public meeting that covered components imported separately, as replacement parts for example, would need a certification of admissibility because they are covered. DOE also stated the certificate for a regulated component imported individually would not need to identify the intended final product. This is critical because a component could be intended for dozens of final products. We strongly recommend that DOE clarify this issue in the proposed regulatory language. AHRI requests that DOE address these three cases separately in the regulatory language: component imported separately; component imported within another covered product; and component imported within a product that is not a covered product.

As described during the public meeting, a final product being imported that contains covered components would be required to provide information on the certificate of admissibility (or distinct admissibility data on one certificate) for each embedded covered component. If the final product is also covered, the certification of admissibility would also include the full report on that final product, if the final product is not covered, the brand and model number would be required. This represents an extensive reporting burden for the importer and should be reconsidered. At the very least, if the covered product complies with the DOE efficiency standards, then it is extraneous to also require data for embedded covered components.

The example on slide 23 of DOE’s public meeting presentation states: “An importer of a larger commercial packaged air conditioner that contains a medium motor subject to standards would need to submit a certificate of admissibility for both the air conditioner and the electric motor because both are covered products.” The ongoing rulemaking for fans could add a third certificate of admissibility for this single product. The same product
manufactured or assembled in the U.S. would not be required to report any information pertaining to its components. If there is an applicable DOE regulation on the component, the regulation on the covered product that uses that component will either require the use of a "complying" component or not. If somehow it did not require compliant components then the manufacturer providing a compliant covered product has met the obligation to comply with the regulation for the model that company is manufacturing. In either case, a separate certificate of admissibility for the component should not be required.

One important consideration is that the DOE had recently undertaken to amplify the regulation of embedded components. The DOE has a statutory obligation to consider the cost of an efficiency standard as compared to the energy-saving potential of such a standard. Thus, it must consider all of the additional costs of complying with such standards when promulgating component regulations. This proposal is an example of additional costs that manufacturers and importers incur when DOE creates standards for final covered products as well as embedded components. No energy savings are realized because the final covered product must already meet minimum standard, but there are copious additional costs, such as those proposed by DOE in the NOPR. AHRI requests that going forward DOE consider the additional administrative burden imposed and the value ultimately realized by all aspects of component regulation in final covered products.

We ask that DOE consider revising the section of the proposal on components to reduce the reporting burden. At the very least, DOE should clearly identify the covered products that are expected to be used as components and develop separate regulations appropriate to the circumstances and uses of that component. This should not be treated as a blanket, one-size-fits-all requirement. The complexities of the pending fans and blowers rulemaking will make this reporting particularly challenging to implement. For example, the same fan may or may not be regulated depending on the intended end use.

Product-Specific Issues

As stated during the public meeting, furnace fans represent an instance where further clarification is needed for component reporting requirements. Furnace fans will be covered products, but can only be tested as part of a furnace. If a fan is being imported to be installed in a furnace, but is not otherwise regulated, will a certification of admissibility be required, or only if the furnace fan is imported installed in a furnace? Will all furnaces being imported be required to provide information on a certificate of admissibility for the furnace itself and the furnace fan, necessitating two reports for each furnace?

During the public meeting, AHRI indicated that for air conditioners (AC), heat pumps (HP) and variable refrigerant flow (VRF) systems, a condensing unit is reported to CCMS as part of systems matched with different indoor units. DOE was unable to confirm that separate parts of the system that make up a covered product are not subject to this proposed regulation. These covered products are imported as units, but marketed, regulated and sold as systems. Some of these condensing units are reported to CCMS multiple times with multiple CCMS entries. Therefore, the proposal to collect CCMS
numbers would be confusing for these products. We appreciate that DOE indicated other information could be used for reporting; however, it is still unclear if a report would be necessary when a condenser or an indoor unit are imported individually.

General Compliance

AHRI’s member manufacturers have asked if the proposed reporting requirements included in the NOPR would apply to their unique and specific supply chain. During the public meeting, it was asked if products being imported as part of a sale would be distinguished from products imported by a manufacturer from a location outside the U.S. to a location in the U.S. subsequent sale by the manufacturer to its customers. DOE indicated that there is no difference; regardless of ownership, any covered products or components have the same requirement to submit a certificate of admissibility. AHRI requests that DOE consider modifying these requirements so they do not apply to a U.S. based manufacturer moving products from one location to another. The audience DOE is targeting with this rulemaking appears to be manufacturers outside the U.S. without knowledge of the reporting requirements for energy conservation standards. U.S. manufacturers that report to CCMS and comply with existing regulations should not be burdened by this additional reporting requirement. These efforts should be targeted to those who are not compliant.

The NOPR does not clarify the type of enforcement that would be put in place as a result of this reporting. During the public meeting, DOE explained that CBP has the authority to refuse admission to certain non-compliant products. It was asked what type of penalties there would be for non-compliance. DOE did not have an answer. We ask that DOE clarify if there would be consequences for shipments where the certificate of admissibility was required but not provided. Would there be allowances for importers to correct their records if an error is found after the fact?

During the public meeting, DOE indicated that it had considered coordinating with existing trade programs such as the Trusted Trader program. CBP and DOE decided that benefits for participation in this type of program could be incorporated at a later date once the full program is up and running. We ask that DOE reconsider that decision and again look at eliminating or reducing reporting requirements for participants of this or other programs. Because the targeted importers are those who are unaware of regulations, participants of these types of programs should not be a concern. DOE should also consider developing a program in conjunction with this effort for importers who provide regular CCMS reports and are known to be compliant. Compliant importers should be relieved from providing certificates of admissibility for each shipment.

DOE has provided importers a 2-year compliance period. AHRI requests that DOE and CBP first finalize the necessary updates to the ACE software and then allow for a period of two years prior to the mandatory compliance date to ensure that the systems are in place to allow importers to comply. The ACE system is currently under development and,
according to the deployment schedule dated January 2016,\(^2\) will not be fully deployed until July of 2016. The deployment schedule does not mention the incorporation of a DOE report. During the public meeting, DOE explained that CBP would not collect information until there was a requirement to do so, making implementation of a trial period problematic, although a short pilot may be used to verify the software is functioning properly. DOE did indicate that products could be phased-in. We would strongly encourage DOE to work with stakeholders on one covered product initially, potentially motors, to see if the proposal is effective before requiring all importers to comply.

The proposed reporting requirement represents an added burden to importers far exceeding the estimates DOE provided in the NOPR. DOE states the importer/broker would generally prepare a sheet once a year and reuse the same information. DOE includes 0.03 hours (less than 2 minutes) for added new models to prepare for compliance with these requirements. Importers of a covered product would have to correspond with their import brokers to provide the needed information, which will take well over 2 minutes, particularly for smaller importers who have less models. For a final product that includes covered components, an importer would need to coordinate with the manufacturer of the component and its import broker. DOE has not considered that many manufacturers modify their products throughout the year. Each instance would require the import broker to update their information. The time estimates included have not come close to depicting the actual burden associated with the proposal, particularly in comparison to the current reporting requirements, which only require importers to provide the relevant HTS code. AHRI members would be willing to assist with a more accurate assessment.

Through initial discussions with our members, it appears there would be a range of quantified burden to importers as a result of the proposed requirements. One of the primary costs to the manufacturer and importer is the fees paid to the customs broker. A few members have worked with customs brokers to develop approximate estimates for the increased cost. A typical truckload of equipment may currently only require reporting of one or two HTS codes. Customs brokers charge a standard base price per shipment; importers are able to negotiated cost effective processing at lower than the standard base price due to the simplicity of the current documentation and/or frequency of shipments. However, with the addition of substantial reporting requirements, importers may no longer be able to negotiate, and the higher standard base cost would apply, along with additional costs per line for added model-specific data. If a typical shipment had to be itemized by model number instead of HTS code, the cost will increase dramatically--from three to thirty times the current cost. This estimate does not include covered components or internal costs related to collecting and maintaining the certification data that must be linked to each model number, and then transferring that data to the import broker. Moreover, this estimate does not consider the use of ACE or the ability to automatically enter data, which cannot be determined at this stage.

During the public meeting DOE was asked several times to clearly explain the problem being solved by this NOPR. DOE provided generalized anecdotal evidence about problematic imported products. DOE could not provide specific information or statistics to justify this added reporting burden. DOE admitted that it had not undertaken any studies or analysis to assess the breadth or nature of the problem. AHRI requests that more information be collected and provided by DOE to isolate the problem so a targeted solution can be developed. DOE stated that it received hundreds of phone calls. It would be helpful to see a log of phone calls, and the specific topics addressed. DOE should not require importers to spend their resources testing a solution to an uncharacterized problem. It could be that the problem is only relevant to specific covered products. If so, all covered products should not be subject to onerous regulations. We request that DOE help the stakeholders understand the specific issue so that manufacturers and importers can assist in crafting a solution. Note that AHRI members take seriously their compliance obligations and spend vast time, money, and resources meeting DOE’s energy efficiency requirements and complying with all administrative obligations. Thus AHRI’s importers and manufacturers have valuable insight as to how specific issues of non-compliance should be addressed to solve the problem while avoiding additional burden for compliant manufactures.

This NOPR has been pushed through at an alarming pace with an initial 45-day comment period that included the holidays. During the public meeting, the urgency was questioned and DOE indicated that the project had simply been on the to-do list for too long. When asked if DOE had worked with customs brokers, DOE indicated that they had not yet, but planned to schedule training sessions to introduce the proposal. Customs brokers must be involved in the development of this proposal. They have the understanding of the existing process, and they would be able to give valuable feedback on how and what requirements could be introduced that would be the least cumbersome to accomplish the end goal. Import brokers should also be provided the opportunity to provide comments. The best mechanism for getting appropriate input is to convene a working group to assist DOE with a new proposal. In the alternative, custom brokers and import brokers should have the opportunity to comment following a training session on an SNOPR.

**Conformance with Legal Requirements**

As discussed above, the proposal needs improvement in many respects and fails to abide by substantive and procedural legal requirements. First, the Executive Order 13659: Streamlining the Export/Import Process for America’s Business (the EO) includes several considerations that are contradicted and ignored by the NOPR. For example, the EO establishes a Board Interagency Executive Council (BIEC) to facilitate the development of streamlined import procedures. The goals of the BIEC include coordination among CBP and interested agencies to “develop common risk management principles and methods to inform agency operations”; “to orchestrate, improve, and accelerate agency review of electronic trade data”; and to “engage with and consider the advice of industry and other relevant stakeholders regarding opportunities to improve the supply chain process.”
The NOPR does not acknowledge the existence of the BIEC, and it appears that DOE did not incorporate the goals of the BIEC or EO 13659 into the NOPR. DOE has wholly disregarded these goals by failing to collect or assess any relevant data that would have served as the basis for a risk-based assessment. Although unaddressed in the NOPR, DOE clarified that the two goals of the proposal are to educate customs brokers about efficiency regulations and to prevent the importation of adjudicated non-compliant products. An education campaign does not require and should not involve paperwork obligations. Further, a review of DOE’s website suggests that a total of 20 notices of non-compliance were issued in 2015. Some subset of these 20 products will be imported. The vast majority of these imported products can be located and denied entry based upon information provided by the manufacturer or importer who received the notice of non-conformance. Therefore the total number of products that will be detained as a result of this rule is de minimus. Encumbering millions of individual shipments with administrative requirements so that DOE can locate a handful of strays is anything but “risk-based.” This proposal is likewise and affront to the goals of the EO because it constructing an onerous regulation that renders little to no benefit; DOE never engaged with stakeholders prior to drafting the proposal, and DOE has made no attempting to orchestrate the CCMS system with the ACE system.

Importantly DOE’s NOPR is inconsistent with BIEC administrative requirements. The EO specifies that “within 180 days of the date of this order, agencies with border management interests or authorities shall report to the Board on their anticipated use of international standards for product classification and identification.” AHRI cannot confirm whether DOE has submitted this report to BIEC, but from the proposal, it appears as though the Department has had little to no coordination with CBP or the BIEC, thus indicating that the proposal is inconsistent with the EO.

Second, the proposal lacks sufficient detail to inform the regulated public how to comply. A rule is unlawfully vague if it “is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, and must therefore look to the agency for guidance.” United States v. Lachman, 387 F.3d 42, 57 (1st Cir. 2004). It was evident at the February 19, 2016 public meeting regarding this regulation that stakeholders were at a loss to understand the requirements of this proposal without considerable input from the agency. (AHRI would cite to the transcript, if it were available). Prior to the meeting, AHRI submitted to the DOE over twenty questions regarding obligations and ramifications of the regulation that could be not ascertained from reading the plain text of the proposal. This comment letter contains additional questions and concerns about which products require a certificate of admissibility and what the ramifications of non-compliance may be. Recognizing the limitations of the proposal, DOE acknowledged at the public meeting that a supplemental notice of proposed rulemaking will be required before the proposal would be ready for final publication. AHRI agrees that the DOE should reconsider the proposal and requests that the DOE convene Appliance Standards and Rulemaking Advisory Committee (ASRAC) working groups to assess the impact on stakeholders before promulgating a SNOPR.
Third, as written, the NOPR fails the Motor Vehicle Manufacturers Association “reasoned decisionmaking” test. 463 U.S. 29 (1983) (“the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made, and in reviewing that explanation.”). DOE has done little analysis on the burdens of the requirements it proposes and has provided no information on the benefits, objectives, or problems that this rule is attempting to solve. At the public meeting, DOE stated that it had done no assessment of how many imported products were currently non-compliant. All of the most basic evidence demonstrates that compliance with this rule will cost importers valuable resources, but the DOE has made an arbitrary determination without explanation that a few minutes a month will suffice to comply with the onerous regulation. At a minimum, AHRI requests that DOE explain the basis for its conclusion that the time required for compliance is limited to .03 hours per entry and only 109,955 hours per for all affected importers. How did the DOE come up with this number? There is no evidence in the NOPR to suggest the basis for this assumption, and the anticipated costs as articulated by the stakeholders at the public meeting are astronomically higher than this estimate. AHRI requests that the DOE speak with importers and manufacturers of covered products to make an evidenced-based assessment of the costs and burdens of the proposal.

Fourth, the proposal does not adequately provide for statutorily-mandated exemptions or exceptions. AHRI agrees with the Department’s position that products being imported for reasons other than distribution into U.S. commerce are not covered by the DOE standards, as stated at the public meeting. In fact, EPCA specifies that “[a]ny covered product offered for importation in violation of section 6302 shall be refused admission into the customs territory of the United States under rules issued by the Secretary of the Treasury, except that the Secretary of the Treasury may, by such rules, authorize the importation of such covered product upon such terms and conditions (including the furnishing of a bond) as may appear to him appropriate to ensure that such covered product will not violate section 6302, or will be exported or abandoned to the United States.” 42 U.S.C. § 6301. Similarly, EPCA’s “Exports” provision states that “[f]his part shall not apply to any covered product if (1) such covered product is manufactured, sold, or held for sale for export from the United States (or such product was imported for export), unless such product is in fact distributed in commerce for use in the United States, and (2) such covered product when distributed in commerce, or any container in which it is enclosed when so distributed, bears a stamp or label stating that such covered product is intended for export.” 42 U.S.C. § 6300. Given these two clauses in EPCA, AHRI agrees with the Department that products imported for export as well as those imported for purposes other than distribution in commerce (e.g., research and testing) are not subject to § 6302 and should be allowed into the United States. However, the proposal treats all covered product alike and makes no specific exception for export-only products or research and testing products, as examples. AHRI requests that DOE provide for clear guidance on the importation of covered products that are not subject to energy conversation standards, particularly in light of the many amendments that have been made to EPCA and the introduction of components as covered products that complicate the interpretation and implementation of the “Imports” and “Exports” provision of EPCA.
AHRI requests that DOE specifically consider and address the importation of covered products that are imported for purposes other than distribution in commerce (e.g., research, testing or subsequent export, including any labeling, marking, reporting or other requirements).

Fifth, DOE has only limited authority to refuse the admission of products to the United States Customs Territory, and the proposal is overbroad. While AHRI agrees that DOE and CBP have authority to refuse admission to products that have been subject to DOE enforcement proceedings, tested, and for which a notice of non-conformity has been issued, DOE and CBP lack the authority to refuse admission to covered products merely because the covered product has not been certified prior to import. The “Imports” provision of EPCA, 42 U.S.C. § 6300, governs DOE’s authority to prevent imported products from entering the United States. That provision specifies that the Secretary of Treasury, i.e., CBP, must promulgate the enforcement regulations: “[a]ny covered product offered for importation in violation of section 6302 shall be refused admission into the customs territory of the United States under rules issued by the Secretary of the Treasury” (42 U.S.C. § 6301 emphasis added). DOE’s regulations affirm the intent that CBP’s rules govern border enforcement: “Any covered product or covered equipment offered for importation in violation of this part, or part 430 or 431, shall be refused admission into the customs territory of the United States under rules issued by the U.S. Customs and Border Protection (CBP) and subject to further remedies as provided by law.” (10 C.F.R. § 429.5(b) (emphasis added)). CBP’s rule states that if DOE or the Federal Trade Commission “notifies CBP that a covered import does not comply with an applicable energy conservation standard or energy labeling standard, CBP will refuse admission.” 19 C.F.R. § 12.50(b). The requirement to certify a covered product to DOE is neither an “energy conservation standard” nor an “energy labeling standard.” Id. Thus, the NOPR proposes a regulation designed to refuse admission to products over which neither DOE nor CBP have adequate authority. If the NOPR is not in fact intended to deny admission into the United States to those covered products that have no yet been certified via the CCMS system, then the proposal is overbroad in imposing onerous requirements targeting covered products on the basis of certification status. DOE should reconsider its goals, as well as its legal authority, and tailor its proposal accordingly.

3 It is also notable that DOE may lack the authority to deny admission to non-certified covered products that have not been determined to be non-compliant with energy or labeling standards regardless of CBP’s enforcement regulations. EPCA’s “Imports” section (42 U.S.C. § 6300) grants DOE the authority to deny entry to non-compliant products, which are defined as those that violate 42 U.S.C. § 6302, which is EPCA’s “Prohibited Acts” section. By statute, “Prohibited Acts” include: (1) selling products without a compliant label; (2) removing a required label; (3) a manufacturer’s failure to maintain or provide access to information or failure to provide required information; (4) failure to comply with 42 U.S.C. § 6296(a), (b)(2), (b)(3), or (b)(5); and the sale of a product that is not in compliance with energy efficiency standards. Subsection (4) is important because it specifically references only a few of the requirements of 42 U.S.C. § 6296—and the obligation to certify one’s products with the DOE via the CCMS is authorized by 42 U.S.C. § 6296 (b)(1) and (d)—both of which appear to be intentionally excluded from the “Prohibited Acts” section of EPCA. It appears that Congressional intent in drafting EPCA what that mere failure to certify a product to DOE prior to distribution in commerce does not prevent its importation into the United States. CBP’s regulations support this interpretation.
Conclusion

DOE has released many rulemakings in the recent past and they have all been accompanied by extensive studies that include manufacturer interviews and analyses. The NOPR itself did not clearly explain what would be required from manufacturers and how the requirements would be implemented. Flow charts and examples would be very helpful in clarifying these details. DOE has proposed an overly burdensome solution to a problem that is not fully understood. We request that DOE work with import brokers, CBP and importers to come up with a more workable solution to this important issue.

AHRI requests that separate working groups for each industry of covered products be formed to develop an appropriate solution for their industry’s unique situation. A one-size-fits-all covered products approach does not exist that would be efficient or effective. It is necessary for DOE to bring together each industry to gain a better understanding of the existing situation. Manufacturers and importers will be able to provide an inside perspective for the most effective market surveillance. We request that DOE use the expertise that exist among our member manufacturers to develop a better solution to this problem.

AHRI appreciates the opportunity to provide these comments. If you have any questions regarding this submission, please do not hesitate to contact me.

Sincerely,

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