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United States Court of Appeals for the Ninth Circuit
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Molly C. Dwyer
Clerk of Court

October 16, 2020

No.:	20-73091
Short Title:	NRDC, et al v. Dan Brouillette, et al

Dear Petitioners/Counsel

Your Petition for Review has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

The due dates for filing the parties' briefs and otherwise perfecting the petition have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the petitioner to comply with the time schedule order will result in automatic dismissal of the petition. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 16 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; ENVIRONMENT AMERICA; U.S. PUBLIC INTEREST RESEARCH GROUP,

Petitioners,

v.

DAN BROUILLETTE, in his official capacity as Secretary of the United States Department of Energy; U.S. DEPARTMENT OF ENERGY,

Respondents.

No. 20-73091

DOE No.
Department of Energy

TIME SCHEDULE ORDER

The parties shall meet the following time schedule.

Fri., October 23, 2020	Petitioners' Mediation Questionnaire due. If your registration for Appellate CM/ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.
Mon., January 4, 2021	Agency petitioner brief due
Wed., February 3, 2021	Respondents' answering brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

The optional petitioners' reply brief shall be filed and served within 21 days of service of the respondents' brief, pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Failure of the petitioners to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Bradley Ybarreta
Deputy Clerk
Ninth Circuit Rule 27-7

Case. No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SIERRA CLUB; ENVIRONMENT AMERICA; and U.S. PUBLIC INTEREST RESEARCH GROUP,

Petitioners,

v.

DAN BROUILLETTE, in his official capacity as Secretary of the United States Department of Energy; and the UNITED STATES DEPARTMENT OF ENERGY,

Respondents.

PETITION FOR REVIEW
of a final order of the U.S. Department of Energy

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Dated: October 16, 2020

PETITION FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 15 and Section 336(b)(1) of the Energy Policy and Conservation Act, 42 U.S.C. § 6306(b)(1), Petitioners Natural Resources Defense Council, Sierra Club, Environment America, and U.S. Public Interest Research Group hereby petition this Court to review and set aside the final rule of the U.S. Department of Energy titled "Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards," published in the Federal Register at 85 Fed. Reg. 50,937 on August 19, 2020. A copy of the final rule is attached as Exhibit A.

Dated: October 16, 2020

Respectfully submitted,

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Exhibit A

U.S. Department of Energy, Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards

85 Fed. Reg. 50,937 (Aug. 19, 2020)

Rules and Regulations

Federal Register
Vol. 85, No. 161
Wednesday, August 19, 2020

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2017–BT–STD–0062]

RIN 1904–AE84

Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards

AGENCY: Office of Energy Efficiency and Renewable Energy (EERE), Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy is amending its decision-making process for selecting energy conservation standards by specifying that it will conduct a comparative analysis of the relative benefits and burdens of potential energy conservation standard levels in determining whether a specific energy conservation standard level is economically justified.

DATES: The effective date of this rule is October 19, 2020.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov*. All documents in the docket are listed in the *https://www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at: *https://www.regulations.gov/docket?D=EERE-2017-BT-STD-0062*. The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–7432. Email: *Francine.Pinto@hq.doe.gov*.

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I. Summary of the Final Rule

With respect to the establishment of Federal energy conservation standards, Federal law requires that any new or amended energy conservation standard for covered products (and certain types of commercial and industrial equipment) be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6316(a)) In determining whether an energy conservation standard is economically justified, the United States Department of Energy (''DOE'' or ''the Department'') determines whether the benefits of the standard exceed its burdens by considering the seven factors laid out in 42 U.S.C. 6295(o)(2)(B)(i). In this document, DOE is finalizing the requirement that determinations of economic justification for a specific Trial Standard Level (''TSL''), as assessed using the seven factors, must include a comparison of the benefits and burdens of that TSL against the benefits and burdens of the baseline case (''no new standards'' case) and across all other TSLs. DOE will, in accordance with EPCA, continue to determine whether the benefits of a standard exceed its burdens by, to the greatest extent practicable, considering the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will then use the results of this analysis in determining whether a standard is economically justified in a ''walk-down'' process. In conducting this analysis, DOE may determine that some TSLs are not economically justified based on comparisons to the baseline, while DOE may determine other TSLs are not economically justified based on comparisons to other TSLs. From the technologically feasible and economically justified TSLs, DOE will select as the energy conservation standard the TSL that represents the maximum improvement in energy efficiency. This process ensures that the selection of an energy conservation standard is made in consideration of the economic factors contained in EPCA.

II. Introduction

A. Authority

Title III, Parts B [1] and C [2] of the Energy Policy and Conservation Act, as amended, (''EPCA'' or ''the Act''), Public Law 94–163 (42 U.S.C. 6291–6317, as codified), established the Energy Conservation Program for consumer products and certain industrial equipment.[3] Under EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) certification and enforcement procedures; (3) establishment of Federal energy conservation standards; and (4) labeling.

In determining whether a standard is economically justified, EPCA also requires DOE, to the greatest extent

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[3] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

practicable, to consider the following seven factors: (1) The economic impact of the standard on the manufacturers and consumers; (2) the savings in operating costs, throughout the estimated average life of the products (*i.e.,* life-cycle costs), compared with any increase in the price of, or in the initial charges for, or operating and maintaining expenses of, the products which are likely to result from the imposition of the standard; (3) the total projected amount of energy savings likely to result directly from the imposition of the standard; (4) any lessening of the utility or the performance of the products likely to result from the imposition of the standard; (5) the impact of any lessening of competition, after consultation with the Department of Justice; (6) the need for national energy and water conservation; and (7) other factors DOE finds relevant. (42 U.S.C. 6295(o)(2)(B)(i))

B. Background

DOE had conducted a formal effort between 1995 and 1996 to improve the process used to develop energy conservation standards for covered appliance products. This effort involved many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties. The result was the publication of a final rule in the **Federal Register** on July 15, 1996, titled, ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products.'' 61 FR 36974. This document was codified at 10 CFR part 430, subpart C, appendix A, and became known colloquially as the ''Process Rule.''

On December 18, 2017, DOE issued a Request for Information (''RFI'') to address potential improvements to the Process Rule, so as to achieve meaningful burden reduction while continuing to discharge the Department's statutory obligations in the development of energy conservation standards and test procedures. 82 FR 59992. Subsequently, on February 13, 2019, DOE published a Notice of Proposed Rulemaking (''NOPR'') to update and modernize the Process Rule. 84 FR 3910 (''February 2019 NOPR''). Among other changes, DOE proposed that in making a determination of economic justification for a specific TSL, it would consider whether an economically rational consumer would choose a product meeting that TSL over products meeting the other TSLs after considering relevant factors, including but not limited to, energy savings, efficacy, product features, and life-cycle costs. *Id.* at 84 FR 3938.

DOE received numerous comments asking for clarification on how this concept would be implemented and what effect it would have on DOE's ''walk-down'' process for selecting standard levels. In response, DOE did not finalize that aspect of the proposal when it issued a final Process Rule. *See* 85 FR 8626 (Feb. 14, 2020). (''2020 Process Final Rule'') Instead, DOE proposed in a supplemental NOPR (''SNOPR'') to separately revise section 7 of the Process Rule, *Policies on Selection of Standards,* to clarify its earlier proposal and explain how this approach would be incorporated into DOE's decision-making process for selecting energy conservation standards. *See* 85 FR 8483 (Feb. 14, 2020) (''February 2020 SNOPR''). More specifically, DOE clarified that its proposed revisions to section 7 would require the agency to conduct a comparative analysis of the relative costs and benefits of all of the proposed TSLs in order to make a reliable determination that the chosen TSL is economically justified. This comparative analysis, DOE explained, would include assessing the incremental changes in costs and benefits for each TSL's benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs. *Id.* at 85 FR 8485. DOE also explained that the factors an economically rational consumer would consider in selecting a TSL (*e.g.,* energy savings, efficacy, product features, and life-cycle costs), arise out of EPCA's seven factors for determining economic justification. See 42 U.S.C. 6295(o)(2)(B)(i). As a result, DOE stated that it was not necessary to refer to the concept of an economically rational consumer in determining whether a TSL is economically justified. *Id.*

In response to the February 2020 SNOPR, DOE received written comments from the following parties:

TABLE OF ENTITIES SUBMITTING WRITTEN COMMENT

Commenter	Affiliation
Joint Industry Commenters – Air Conditioning, Heating, & Refrigeration Institute, Association of Home Appliance Manufacturers, and the National Electrical Manufacturers Association.	Industry.
Earthjustice	Energy Efficiency Advocate.
Spire	Utilities.
American Public Gas Association (''APGA'')	Utilities.
Energy Efficiency Advocacy and State Joint Commenters (''Joint Efficiency'')—Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, California Energy Commission, Consumer Federation of America, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Northwest Energy Efficiency Alliance.	State Government, Energy Efficiency Advocate.
California Investor-Owned Utilities (''Cal-IOUs'')—Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison.	Utilities.
Institute for Policy Integrity at New York University (''IPI'')	Public Policy Advocate.
Mercatus Center at George Mason University (''Mercatus'')	Public Policy Advocate.
Anonymous	Unaffiliated.
Derek McLaughlin	Unaffiliated.
North American Association of Food Equipment Manufacturers (''NAFEM'')	Industry.
Jim McMahon	Unaffiliated.

III. Discussion of Revisions to DOE's Policies on Selecting Standard Levels

A. Use of Consumer Impacts in Determining Economic Justification

Following the SNOPR, DOE received several comments supporting DOE's efforts to account for the impacts of energy conservation standards on consumers through the seven factors in EPCA.[4] For example, APGA noted that DOE's revised approach will incorporate the economic aspects of consumer welfare impacts. (APGA, No. 166 at p. 5)[5] Similarly, NAFEM indicated that it believes that using a comparative approach would be a positive step towards evaluating how customers actually make decisions. (NAFEM, No. 168 at p. 3) Jim McMahon indicated that DOE would be wise to abandon the framework of an economically rational consumer as the seven factors specified in 42 U.S.C. 6295(o)(2)(B)(i) provide the legal and appropriate basis for evaluating economic justification when calibrated to actual markets and their behaviors. (Jim McMahon, No. 169 at p. 1)

B. Comparison of Benefits and Burdens Across All Proposed TSLs

In the February 2020 SNOPR, DOE proposed that determinations of economic justification must include a comparative analysis of the relative costs and benefits of all of the proposed TSLs to make a reliable determination that a specific TSL is economically justified. 85 FR 8486. This analysis includes assessing the incremental changes for each TSL's benefits and burdens relative to other TSLs as part of a holistic analysis across all TSLs.[6] *Id.* Further, in order to show that this comparative analysis of benefits and burdens is consistent with past DOE practices, DOE provided an example of a rulemaking in which economic justification was based, at least in part, on comparisons between TSLs. *Id.* 85 FR 8487 (*noting* DOE's use of a comparative approach when examining TSLs during the dehumidifiers standards rulemaking to minimize disproportionate impacts to small, domestic manufacturers). Finally, DOE noted that it would still ''walk-down'' from the TSL with the highest energy savings when selecting the energy conservation standard level that represents the maximum energy savings that is technologically feasible and economically justified but would now also formalize for consistency and clarity its comparative approach as part of its consideration of economic justification.[7] *Id .*

In response, DOE received comments both in support of and against the use of a comparative analysis that assesses each TSL's benefits and burdens relative to other TSLs. For example, with regard to support for the proposal, the Joint Industry Commenters indicated that the proposal did not present a new approach towards setting standards and it noted a number of examples from the past in which DOE had effectively applied the same holistic process in various rulemakings (Joint Industry Commenters, No. 167 at p. 2). They added that the proposal would build this holistic approach into DOE's routine rulemaking process, which would enable DOE to fully consider the seven factors already required under EPCA and to help ensure that DOE does not review its TSLs in isolation. *Id.* APGA also supported DOE's proposed approach. It noted that the proposal was responsive to APGA's past criticisms of DOE's process for developing energy conservation standards for covered appliance products, which, in APGA's view, did not always result in standards that were economically justified (APGA, No. 166 at pp. 4–5). APGA agreed that the most logical way to determine whether a particular consumer option is economically justified is to compare it to the full range of available consumer choices. As a result, APGA supported requiring determinations of economic justification to consider comparisons of economically relevant factors across TSLs. *Id.* at p. 5.

As for the commenters who opposed the proposal, several expressed concerns that using a comparative analysis for economic justification would not result in the selection of a TSL in accordance with EPCA. For example, the CA–IOUs stated that the purpose of EPCA's seven factors is to select the standard that achieves the maximum improvement in energy efficiency, but that the February 2020 SNOPR proposed to improperly substitute comparison of the relative burdens of each TSL in place of EPCA's expressed aim of approving the ''highest TSL'' for which benefits exceed burdens. (CA–IOUs, No. 173 at pp. 3–4) The CA–IOUs added that if DOE chooses to compare economically justifiable TSLs against one another, this may not only prevent the maximum energy savings for a given standards cycle, but may also hinder cost-effective savings for future code cycles. *Id.* at p. 4. Similarly, the Joint Efficiency Commenters stated that the proposal could result in DOE choosing efficiency levels lower than the maximum levels that are technologically feasible and economically justified. (Joint Efficiency Commenters, No. 171 at p. 2) The Joint Efficiency Commenters added that, contrary to DOE's statement in the February 2020 SNOPR, DOE did not conduct a comparative analysis of economic justification in the dehumidifiers rulemaking. *Id.* at p. 3.

With respect to these concerns, DOE notes that a simple cost-savings determination fails to satisfy the more complex economic justification requirement in EPCA. DOE reiterates that, in accordance with EPCA, it will select the TSL that represents the maximum improvement in energy efficiency that is both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Contrary to the statement from the CA–IOUs, the purpose of EPCA's seven factors is not to select the standard that achieves the maximum improvement in energy efficiency, no matter how minute an estimated cost savings; it is to aid in assessing economic justification when selecting the standard that represents the maximum improvement in energy efficiency that is technologically feasible and also economically justified. EPCA states that, in determining whether a standard is economically justified, the Secretary must determine whether the ''benefits of the standard exceed its burdens''. (42 U.S.C. 6295(o)(2)(B)(i)) Further, as evidenced by the seven factors listed for consideration, determining whether the benefits of a standard exceed its burdens is not simply a calculation exercise. Rather, EPCA recognizes that economic impacts are broader than those that occur in isolation as may be depicted in

[4] All comments can be found at *https://www.regulations.gov* in Docket No. EERE–2017–BT–STD–0062.

[5] This type of notation identifies the commenter, the docket document number assigned to the comment, and the relevant pages of that document.

[6] Consistent with prior determinations, there may be instances where a potential standard impacts a subset of factors so significantly as to preclude economic justification, irrespective of the other economic factors.

[7] DOE is required under 42 U.S.C. 6295(p)(1) to determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible when proposing a new or amended conservation standard and explain the reasons for any deviation in the proposed standard from the maximum technologically feasible improvement. DOE focuses its rulemaking analyses on energy savings as there may not always be a direct correlation between efficiency improvements and energy savings. For example, if the maximum improvement in energy efficiency significantly increases the cost of a covered product, many consumers may choose to repair, instead of replace, their less-efficient covered products. The standard ultimately promulgated by DOE continues to represent the maximum improvement in energy efficiency that is technologically feasible and economically justified. *See* 42 U.S.C. 6295(o)(2).

an average life-cycle cost analysis or manufacturer impact analysis.

The enumeration of the seven factors in the statutory text recognizes the complex and broad assessment necessary in evaluating benefits and burdens of TSLs. As further context, these statutory factors can be framed in a more general economic construct that would shed light on how DOE's analyses in support of energy conservation standards mesh with standard tools for analyzing market impacts associated with regulation. The first of the seven factors states that economic justification should take into consideration the ''economic impact of the standard on the manufacturers and on the consumers of the product subject to such standard.'' In evaluating such effects, comparison of relative burden is necessary to meaningfully evaluate the economic impacts to both manufacturers and consumers. From the economic construct perspective, the most comprehensive measures for evaluating economic impacts on manufacturers and consumers are producer surplus and consumer surplus.[8] Producer surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the area between the price and the supply curve for that unit. Consumer surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit. It is measured by the area between the price and the demand curve for that unit. These measures or their approximations are often used to illustrate the economic impact of regulations on both manufacturers and consumers.

The next three statutory factors spell out more specific economic effects consumers would experience, such as operating cost savings of covered products, any price increase of the covered products, any increase in maintenance expense of the covered products, the energy and water savings that would accrue to consumers, and any lessening of the utility of the covered product. From an economic construct perspective, these factors can also be viewed as components of consumer surplus. In application, depending on the quantity and quality of data, these factors may be analyzed separately or inter-relatedly as components of consumer surplus, with appropriate weight given in decision-making, as permitted by the statute. Choosing a standard that simply maximizes improvement in energy efficiency, without regard to technological feasibility and economic justification, would not be consistent with the requirements of 42 U.S.C. 6295(o)(2). To holistically evaluate the economic impact on consumers, DOE must simultaneously evaluate and balance these interrelated factors.

The fifth statutory factor recognizes that greater energy savings could be at the expense of consumer choice, and that anti-competitive effects should also be considered. The sixth factor accounts for changes over time in the need for national energy and water conservation. Finally, the seventh factor recognizes that an exclusive list of factors for assessing economic justification could not anticipate (for example) product-specific market conditions, and authorizes the Secretary to consider any other factor that at the time may be relevant to assess the economic justification of a TSL.

Assessing such impacts, for purposes of the statutory determination of economic justification, requires the exercise of agency judgment and discretion, informed by the aforementioned analysis. For instance, not all life-cycle cost savings are directly comparable. From a more holistic analytic perspective, the benefits of life-cycle cost savings that impose net costs to 20% of consumers may on net need to be considered differently than the benefits of life-cycle cost savings that impose net costs to 10% of consumers because the TSL that imposes net cost to 20% of consumers might have better product utility than the TSL that imposes net cost to 10% of consumers. Similarly, not all manufacturer impacts are directly comparable. Manufacturer impacts that disproportionately affect small businesses need to be weighed differently than those that do not. DOE is seeking to resolve this issue by using a comparison across multiple TSLs, which will enable DOE to consider incrementally both some of the distinctive benefits and burdens that are not immediately apparent from simply looking at a single TSL's numbers (*e.g.,* life-cycle costs or changes in industry net present value), as well as those relative changes in numbers in moving from one TSL to another. Thus, DOE is not proposing to unilaterally select an economically justified, technically feasible TSL with less energy savings over another economically justified, technically feasible TSL. Instead, as stated previously, DOE is requiring a comparative analysis of the relative costs and benefits of all proposed TSLs in order to make a reliable determination that a specific TSL is economically justified. This comparative analysis brings into sharper and more transparent focus the balancing contemplated by the statute in assessing economic justification. DOE is clarifying its regulatory text consistent with this approach.

With regard to the comment from the Joint Efficiency Advocates that DOE has not compared the benefits and burdens of TSLs in the past, DOE disagrees. In the dehumidifier example cited in the February 2020 SNOPR, DOE, in discussing why TSL 2 is economically justified, stated that ''TSL 2 will minimize disproportionate impacts to small, domestic dehumidifier manufacturers *relative* to TSL 3 and TSL 4.'' 81 FR 38338, 38388 (June 13, 2016) (emphasis added). This is an explicit, and appropriate, comparison of the burdens (*i.e.,* impacts on small manufacturers) between three TSLs.

Similarly, the Joint Efficiency Advocates' characterization of DOE's reference in the February 2020 SNOPR to a 2015 final rule amending standards for general service fluorescent lamps (''GSFLs'') is mistaken. In that rule, DOE determined that a TSL with positive net benefits was not economically justified because it would have net costs for 22 percent of consumers and would decrease industry net present value by 24 percent. 85 FR 8487. The Joint Efficiency Advocates interpreted this reference to mean that DOE was claiming that it had not selected the maximum energy efficiency level that was economically justified. (Joint Efficiency Advocates, No. 171 at p. 3) That is incorrect. DOE cited this rulemaking to address concerns that a comparative analysis will result in DOE selecting standards that are the most economically justified instead of standards that result in the maximum improvement in energy savings that is technologically feasible and economically justified. 85 FR 8487. DOE explained that it would not just use one criterion (*e.g.,* maximum net benefits) in determining economic justification. *Id.* Using only one criterion would be contrary to the statutory mandate to consider multiple factors for purposes of determining whether a given standard is economically justified. DOE will continue, as it has in the past, to look

[8] Discussions of producer and consumer surplus are provided in economics texts extensively such as Mas-Colell, Andreu & Whinston, Michael D. & Green, Jerry R., 1995. ''Microeconomic Theory,'' OUP Catalogue, Oxford University Press, number 9780195102680; and Kreps, David M., 1990. ''A Course in Microeconomic Theory.'' Princeton University Press. See also OMB's Circular A–4 on conducting regulatory impact analyses, at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

at the full range of benefits and burdens encompassed by the seven factors listed in 42 U.S.C. 6295(o)(2)(B)(i). DOE cited the GSFL rule as an example of its consideration of industry net present value and the proportion of consumers who bear net costs in determining whether a TSL was economically justified.

Commenters also expressed concerns that a comparative analysis would improperly affect DOE's consideration of the seven factors laid out in 42 U.S.C. 6295(o)(2)(B)(i). For example, IPI stated that the proposed change would allow the Department to irrationally and inconsistently give preference to whichever subset of economic impacts the Department wants to focus on in order to conclude that standards that otherwise achieve net benefits are not economically justified. (IPI, No. 170 at p. 1) Earthjustice stated that the seven factors repeatedly direct DOE to compare a standard level only to the baseline case, by requiring DOE to analyze impacts likely to result from the imposition of the standard. As a result, in Earthjustice's view, EPCA does not authorize the proposed comparative analysis approach to determining economic justification. (Earthjustice, No. 174 at p. 2) The Joint Efficiency Advocates stated that a comparative analysis of the seven factors would not be a simple task and would make it more difficult for DOE to fulfill its obligation to review standards. (Joint Efficiency Advocates, No. 171 at p. 4)

In response, DOE first notes that use of a comparative analysis does not fundamentally change DOE's consideration of the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will, in accordance with EPCA, continue to determine whether the benefits of a standard exceed its burdens by, to the greatest extent practicable, considering the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will then use the results of this analysis in determining whether a standard is economically justified. This process, as noted in the GSFL example, has previously resulted in the conclusion that TSLs with positive net benefits fail to satisfy the economically justified criterion. As for IPI's characterization of such a result as ''irrational,'' DOE does not agree that it is ''irrational'' to determine that a TSL that causes a significant number of consumers to experience net costs is not economically justified.

Earthjustice's argument that EPCA precludes a comparative analysis in determining economic justification is based on the assumption that DOE only has two options: (1) select the TSL under analysis as the new energy conservation standard; or (2) decline to adopt a new energy conservation standard (baseline case). This assumption ignores the fact that DOE evaluates several proposed TSLs in each of its rulemakings before selecting one (or none) as the new energy conservation standard. Thus, a TSL not only has impacts relative to the baseline case, but it also has impacts relative to each of the other proposed TSLs. EPCA does not prohibit DOE from considering relative impacts, and a comparative analysis that assesses the incremental changes in the benefits and burdens of each TSL relative to the other TSLs is essential in determining whether a specific TSL is economically justified.

With regard to the Joint Efficiency Advocates' comment that a comparative analysis of the seven factors will increase DOE's analytical workload and make it more difficult to review standards, DOE appreciates the concern, but finds it unwarranted. The vast majority of DOE's analytical work involves evaluating the seven factors for each TSL (*e.g.,* life-cycle costs, manufacturer impacts, total energy savings). The additional step of comparing these values across TSLs is unlikely to pose a significant incremental burden to DOE's analytical workload.

C. Other Issues Raised by Commenters

Commenters raised a number of other issues not directly related to DOE's proposal. Some of these comments concerned issues that were already finalized in the 2020 Process Final Rule and, as a result, are not addressed in this document. Several commenters submitted recommendations for improving DOE's rulemaking analysis. For example, Mercatus offered four broad recommendations for improving DOE's analysis: (1) Base the analysis on revealed preferences unless compelling evidence exists to support alternative assumptions; (2) carefully distinguish between individual and social discount rates; (3) properly account for the opportunity cost of capital; and (4) distinguish between consumption and investment. (Mercatus, No. 172 at pp. 1–6) DOE notes that it has engaged the National Academies of Sciences, Engineering, and Medicine to undertake a peer review of the assumptions, models, and methodologies used by DOE in establishing energy efficiency regulations. *See https://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.* The review committee is aware of this rulemaking and DOE will send them a copy of the final rule so it may be accounted for in their report. DOE encourages the public to submit written comments related to DOE's assumptions, models, and methodologies via email to these National Academies at *bice@nas.edu.* For further information regarding this process, interested persons should contact the National Academies directly at *bice@nas.edu. For information regarding access to materials docketed by the National Academies related to this review, interested persons should contact the Public Access Records Office using the fillable on-line form found at https://www8.nationalacademies.org/pa/managerequest.aspx?key=DEPS-BICE-19-02.*

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This regulatory action is a significant regulatory action under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' 82 FR 9339 (Jan. 30, 2017). More specifically, the Order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda.'' 82 FR 12285 (March 1, 2017). The Order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

To implement these Executive Orders, the Department, among other actions, issued a request for information (RFI) seeking public comment on how best to achieve meaningful burden reduction while continuing to achieve the Department's regulatory objectives. 82 FR 24582 (May 30, 2017). In response to this RFI, the Department received numerous and extensive comments pertaining to DOE's Process Rule.

This final rule is an amendment of DOE's February 14, 2020, final rule (2020 Process Rule) that revised and updated the Department's ''Process Rule.'' For purposes of Executive Order 13771, the February 14, 2020 final rule was a de-regulatory action for which DOE anticipates that the changes rule will reduce total administrative burdens by between $53.5 million and $59.7 million (undiscounted) for annualized cost savings of between $0.5 million to $0.6 million, discounted at 7%. The important, but incremental, change to the 2020 Process Rule amendments are difficult to quantify beyond the benefits achieved by the Process Rule as a whole. As such, for purposes of Executive Order 13771, this final rule constitutes an ''other'' action.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, 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 DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website at *http://energy.gov/gc/office-general-counsel.*

Because this rule does not directly regulate small entities but only imposes procedural requirements on DOE itself, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required. *Mid-Tex Elec. Co-Op, Inc.* v. *FERC,* 773 F.2d 327, 341–42 (D.C. Cir. 1985).

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products/equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public-reporting burden for certifications is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Specifically, this rule, addressing clarifications to the Process Rule itself, does not contain any collection of information requirement that would trigger the PRA.

E. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE is revising a portion of its Process Rule, which outlines the procedures that DOE follows in conducting rulemakings for new or amended energy conservation standards and test procedures for covered consumer products and commercial/industrial equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing of regulations at 10 CFR part 1021. Specifically, this rule is strictly procedural and is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it 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. It will primarily affect the procedure by which DOE develops proposed rules to revise energy conservation standards and test procedures. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification

and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires that Executive agencies review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met, or whether it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause 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 (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at *http://www.energy.gov/gc/office-general-counsel* under ''Guidance & Opinions'' (Rulemaking).) DOE examined the rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may 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 year. Accordingly, no further assessment or analysis is required under UMRA.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

L. 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 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 promulgates 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 either (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that the regulatory action in this document, which makes clarifications to the Process Rule that guides the Department in proposing energy conservation standards, is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this rule.

M. Review Consistent With OMB's Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report

involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report,'' dated February 2007, has been disseminated and is available at the following website: *https://www.energy.gov/eere/buildings/peer-review.* Because available data, models, and technological understanding have changed since 2007, DOE has engaged the National Academies of Sciences, Engineering, and Medicine to undertake a new peer review of its analytical methodologies, as noted above.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses, Test procedures.

Signing Authority

This document of the Department of Energy was signed on July 17, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on July 20, 2020.

Treena V. Garrett

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE is amending part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. In appendix A to subpart C of part 430, revise paragraph 7(e) to read as follows:

Appendix A to Subpart C of Part 430—Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products

* * * * *

7. Policies on Selection of Standards

* * * * *

(e)(1) *Selection of proposed standard.* Based on the results of the analysis of impacts, DOE will select a standard level to be proposed for public comment in the NOPR. As required under 42 U.S.C. 6295(o)(2)(A), any new or revised standard must be designed to achieve the maximum improvement in energy efficiency that is determined to be both technologically feasible and economically justified.

(2) *Statutory policies.* The fundamental policies concerning the selection of standards include:

(i) A trial standard level will not be proposed or promulgated if the Department determines that it is not both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. (o)(3)(B)) For a trial standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the factors listed in 42 U.S.C. 6295(o)(2)(B)(i). In making such a determination, the Secretary shall compare the benefits and burdens of the standard against the benefits and burdens of the baseline case (''no new standards'' case) and all other trial standard levels under consideration. This comparative analysis includes assessing the incremental changes in costs and benefits for each TSL's benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs. 42 U.S.C. 6295(o)(2)(B). The Secretary will also consider, consistent with the statute, other economic measures such as life-cycle cost analysis, manufacturer impact analysis, and other relevant measures. A standard level is subject to a rebuttable presumption that it is economically justified if the payback period is three years or less. (42 U.S.C. 6295(o)(2)(B)(iii))

(ii) If the Department determines that interested persons have established by a preponderance of the evidence that a standard level is likely to result in the unavailability in the United States of any covered product/equipment type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time of the determination, then that standard level will not be proposed. (42 U.S.C. 6295(o)(4))

(iii) If the Department determines that a standard level would not result in significant conservation of energy, that standard level will not be proposed. (42 U.S.C. 6295(o)(3)(B))

* * * * *

[FR Doc. 2020–15967 Filed 8–18–20; 8:45 am]

BILLING CODE 6450–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

Truth in Lending (Regulation Z) Annual Threshold Adjustments (Credit Cards, HOEPA, and Qualified Mortgages)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretation.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule amending the regulation text and official interpretations for Regulation Z, which implements the Truth in Lending Act (TILA). The Bureau is required to calculate annually the dollar amounts for several provisions in Regulation Z; this final rule revises, as applicable, the dollar amounts for provisions implementing TILA and amendments to TILA, including under the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), the Home Ownership and Equity Protection Act of 1994 (HOEPA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Bureau is adjusting these amounts, where appropriate, based on the annual percentage change reflected in the Consumer Price Index (CPI) in effect on June 1, 2020.

DATES: This final rule is effective January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Rachel Ross, Attorney-Advisor; Jaydee DiGiovanni, Counsel, Office of Regulations, at (202) 435–7700. If you require this document in an alternative

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition for Review, the exhibit thereto, and Corporate Disclosure Statement to be served by FedEx on each of the following:

Dan Brouillette, Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue, SW
Washington, DC 20585

William P. Barr
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dated: October 16, 2020

s/ Peter J. DeMarco
Peter J. DeMarco

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Office of the Clerk

After Opening an Agency Case: An Introduction for Attorneys

You have received this guide because you filed a petition for review of a federal agency decision in the U.S. Court of Appeals for the Ninth Circuit. It provides information you need to know to represent a petitioner before the court.

This guide is not for immigration cases. If you opened an immigration case, please request our immigration packet.

Read this guide carefully. If you don't follow instructions, the court may dismiss your case.

This Guide Is Not Legal Advice

Court employees are legally required to remain neutral; that means they can't give you advice about how to win your case. However, if you have a question about procedure—for example, which forms to send to the court or when a form is due—this packet should provide the answer. If it doesn't, you may contact the clerk's office for more information.

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HOW AN AGENCY PETITION WORKS

The chart below shows the path of an agency petition from the agency to the highest court. Review these steps to make sure you understand where you are in the process.

Federal Agency. Cases come to the U.S. Court of Appeals from several different federal agencies. For example, a petition may arise from a final decision at the Federal Aviation Administration, National Labor Relations Board, Federal Trade Commission, or another agency. The important thing to understand is that you must have exhausted all of your options for appeal within the agency itself before filing a petition for review with the court of appeals. Many agency decisions must first be challenged in a U.S. District Court before you can come to the court of appeals.

U.S. Court of Appeals. When reviewing the federal agency decision in your case, the court of appeals (usually a panel of three judges) will carefully consider everything that has happened so far. The court will also read all the papers that you and opposing counsel file during your case. The court will look to see whether any agency, officer, or lower court has made a legal or factual mistake. You are not allowed to present new evidence or testimony on appeal.

U.S. Supreme Court. If you do not agree with the decision of the court of appeals, you can ask the United States Supreme Court to review your case. The Supreme Court chooses which cases it wants to hear. It reviews only a small number of cases each year.

Your case may not go through all of the stages shown above. For example, if the U.S. Court of Appeals resolves your case the way that you want, you won't need to file a petition in the U.S. Supreme Court.

PRACTICE RULES AND RESOURCES

This guide highlights rules that you **absolutely must follow** after filing a case. You are also responsible for reviewing and following the Federal Rules of Appellate Procedure (Fed. R. App. P.), the Ninth Circuit Rules (9th Cir. R.), and the general orders. The Federal Rules and the Ninth Circuit Rules are available at www.ca9.uscourts.gov/rules.

Practice Guides

In addition to the rules above, the following guides can support your practice before this court. You can find these and other resources on the court's website under *Legal Guides*:

- **Appellate Practice Guide.** A thorough manual of appellate practice prepared by the Appellate Lawyer Representatives.

- **Perfecting Your Appeal.** You can view this video for free at www.ca9.uscourts.gov or purchase it from the clerk's office for $15.00.

Appellate Mentoring Program

The appellate mentoring program provides guidance to attorneys who are new to federal appellate practice or who would benefit from mentoring at the appellate level. Mentors are volunteers who have experience in immigration, habeas corpus, or appellate practice in general. If you are interested, a program coordinator will match you with a mentor, taking into account your needs and the mentor's particular strengths.

To learn more, email the court at mentoring@ca.9.uscourts.gov or go to www.ca9.uscourts.gov. On the website, select the "Attorneys" tab, look for "Appellate Mentoring Program," then choose "Information."

IMPORTANT RULES FOR ALL CASES

The rules in this section apply to all attorneys who file an agency petition in the court of appeals. You must understand and follow each one.

Ninth Circuit Bar Admission

To practice before the court of appeals, you must be admitted to the Bar of the Ninth Circuit. For instructions on how to apply, go to www.ca9.uscourts.gov. Select the "Attorneys" tab, look for "Attorney Admissions," then choose "Instructions."

Register for Electronic Filing

Unless the court gives you an exemption, you must use the Ninth Circuit's electronic filing system, called CM/ECF (Case Management/Electronic Case Files). To learn more and to register, go to www.ca9.uscourts.gov then click "Filing a Document – CM/ECF."

For additional guidance on filing documents and making payments electronically, read the Ninth Circuit Rules, especially Rule 25-5. For a complete list of the available types of filing events, see the CM/ECF User Guide. To find the guide, go to "Filing a Document" as described just above, look for "Documentation & Training," then select "CM/ECF User Guide."

Complete a Mediation Questionnaire

After you file a petition for review of an agency decision, you must complete a mediation questionnaire. (9th Cir. R. 15-2.) The court uses the questionnaire to assess settlement potential.

You must file the questionnaire no later than **seven days** after the clerk's office dockets your petition. To find the form, go to www.ca9.uscourts.gov/forms.

If you want to request a conference with a mediator, call the Mediation Unit at (415) 355-7900, email ca09_mediation@ca9.uscourts.gov, or make a written request to the Chief Circuit Mediator. You may request conferences confidentially. For more information about the court's mediation program, go to www.ca9.uscourts.gov/mediation.

Meet Your Deadlines

Read all documents you get from the court. They will contain important instructions and deadlines for filing your court papers. **If you miss a deadline or fail to respond to the court as directed, the court may dismiss your case.**

Complete Your Forms Properly

Everything you send to the court must be clear and easy to read. If we can't read your papers, we may send them back to you. To make the clerk's job easier, please:

- ✓ Include your case number on all papers you send to the court or to opposing counsel.
- ✓ Number your pages and put them in order.
- ✓ If you are not filing electronically, use only one paper clip or a single staple to keep your documents organized. The clerk's office must scan your documents and extra binding makes that job difficult.

Deliver Papers the Right Way

When you deliver papers to the court or to opposing counsel, you must take certain steps to show you sent them to the right place on time.

✓ **Use the correct address.** Before you put anything in the mail, make sure the address is current and correct.

- To find current addresses for the court, see "How to Contact the Court," at the end of this guide. You may deliver a document to the court in person, but you must hand it to someone designated to receive documents in the clerk's office.

- To find the correct address for opposing counsel, see opposing counsel's notice of appearance. Opposing counsel should have sent a copy of this notice to you after you filed your petition for review. The notice states opposing counsel's name and address.

✓ **Attach a certificate of service.** You must attach a signed certificate of service to each document you send to the court or to opposing counsel unless all parties will be served via CM/ECF. *See* 9th Cir. R. 25-5(f).

✓ **Send a copy of *all* documents to opposing counsel.** When you file a document with the court, you must also send a copy (including any attachments) to opposing counsel unless they will be served via CM/ECF.

Keep Copies of Your Documents

Make copies of all documents you send to the court or to opposing counsel and keep all papers sent to you.

Pay the Filing Fee or Request a Waiver

The filing fee for your case is $500.00. The fee is due when you file a petition for review. If you don't pay the fee, you will receive a notice informing you that you have **21 days** to either pay the fee or request a waiver because the petitioner can't afford to pay.

- **If the petitioner can afford the fee.** Submit your payment through the electronic filing system, or send a check or money order to the court. Make the check out to "Clerk, U.S. Courts." Don't forget to include the case number. Please note that after you pay the fee, we cannot refund it, no matter how the case turns out.

- **If the petitioner can't afford to pay.** You may ask the court to waive the fee by filing a motion to proceed in forma pauperis. See "Stage One: Opening Your Case," below.

If you do not pay the fee or submit a waiver request by the deadline, the court will dismiss your case. (9th Cir. R. 42-1).

If You Move, Tell the Court

If your mailing address changes, you must immediately notify the court in writing. (9th Cir. R. 46-3.)

- **CM/ECF.** If you are registered for CM/ECF, update your information online at https://pacer.psc.uscourts.gov/pscof/login.jsf.

- **Paper filing.** If you are exempt from CM/ECF, file a change of address form with the court. You can find the form on the court's website at www.ca9.uscourts.gov/forms.

If you don't promptly change your address, including your email address, you could miss important court notices and deadlines. As noted above, missing a deadline may cause the court to dismiss your case.

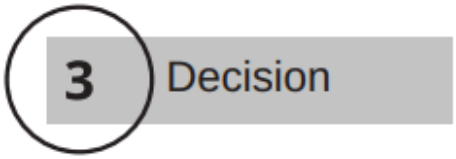
HANDLING AN AGENCY CASE: THREE STAGES

This section will help you understand and manage the different parts of your case. We describe the basic documents you must file with the court and the timing of each step.

To begin, review the chart below. It introduces the three stages of a case.

- You file a petition for review.
- The court sends you a case schedule.
- You pay filing fees or get a waiver.
- You start compiling excerpts of record.
- You and opposing counsel may file motions.
- You respond to any court orders or motions from opposing counsel.

- You submit an opening brief and excerpts of record.
- Opposing counsel submits an answering brief.
- You may submit a reply to opposing counsel's brief.



- The court decides your case.
- If you don't like the result, you decide whether to take further action.

Stage One: Opening a Case

By the time you receive this guide, you have already opened a case by filing a petition for review. In response, the clerk's office created the case record and gave you a case number and a briefing schedule.

If you haven't already paid the filing fee, you must do so now. See "Pay the Filing Fee or Request a Waiver," above.

The court may dismiss your case at any time. Even if you pay the fees and get a briefing schedule, the court may decide not to keep your case for a variety of legal reasons. If the court dismisses your case and you think the court was wrong, see "If You Don't Agree with a Court Decision," below.

Now is also the time to start compiling excerpts of record and to file any opening motions with the court. This section discusses each step in turn.

Preparing Excerpts of Record

The Ninth Circuit Court of Appeals does not require an appendix of record. Instead, you must file excerpts of record with your opening brief. (*See* 9th Cir. R. 17-1.) Your excerpts of record should be clear and well-organized. They should include all the documents that the court will need to understand and decide the issues in your petition.

Start putting together your excerpts of record now, before you write your opening brief. Then, as you write the brief, you can mark each record page that you reference so you can easily add the marked pages to your excerpts.

To learn the rules that govern what your excerpts should and should not include, and how to format them, read 9th Cir. R. 17-1 and 30-1. We also recommend that you read Chapter X of Appellate Practice Guide; see "Practice Guides," above.

Filing Opening Motions

Here are two common motions that you might make at the beginning of your case.

Motion to Proceed in Forma Pauperis

File this motion to ask the court to waive the petitioner's filing fee. To file your motion, you must complete and include Form 4: Motion and Affidavit for Permission to Appeal in Forma Pauperis. The form is available on the court's website at www.ca9.uscourts.gov/forms. In addition, please follow the instructions in "How to Write and File Motions," below.

Motion for Injunction Pending Appeal

You can also file a motion for injunction pending appeal, sometimes called a motion for injunctive relief. This type of motion asks the court to order someone to do something or to stop doing something while your case is in progress. Be specific about what type of relief you are asking for, why the court should grant the relief, and the date by which you want the court to respond. In addition, be sure to follow the instructions in "How to Write and File Motions," below.

Stage Two: Preparing and Filing Briefs

During the second stage of your case, you and opposing counsel will prepare and file written briefs. The required components of a brief are set out in Fed. R. App. P. 28 and 32, and 9th Cir. R. 28-2, 32-1, and 32-2. You should familiarize yourself with those rules and follow them carefully. In this section, we cover some key points of briefing practice.

Opening Brief

You will write and file the first brief in your case. In the opening brief, you must:

- state the facts of the case
- describe the relief you are seeking for the petitioner
- provide legal arguments to support your petition, and
- include citations to the excerpts of record.

Deadline for filing. You must file your opening brief and excerpts of record by the deadline stated in the briefing schedule.

If you do not file your brief on time or request an extension, the court will dismiss your case.

Tips for Writing Your Briefs

Keep these points in mind to write a better brief:

Avoid unnecessary words. Don't use 20 words to say something you can say in ten.

Think things through. Make logical arguments and back them up with legal rules.

Be respectful. You can disagree without being disagreeable. Focus on the strengths of your case, not the character of others.

Tell the truth. Don't misstate or exaggerate the facts or the law.

Proofread. Before you file, carefully check for misspellings, grammatical mistakes, and other errors.

Answering Brief

In response to your opening brief, opposing counsel may file an answering brief. If opposing counsel files an answer, they must send a copy to you.

The time scheduling order sets the deadline for the answering brief. Please note that the opening and answering brief due dates are not subject to the rules for additional time described in Fed. R. App. P. 26(c). In particular, if you file your opening brief early, it does not advance the due date for your opponent's answering brief. (*See* 9th Cir. R. 31-2.1.)

Reply Brief

You are invited to reply to opposing counsel's answering brief, but you are not required to do so. If you write a reply brief, do not simply restate the arguments in your opening brief. Use the reply brief to directly address the arguments in opposing counsel's answering brief.

You must file your reply brief within **21 days** of the date the government serves you with its answering brief.

How to File a Brief

Rules for filing briefs depend on whether or not you are required to file electronically.

CM/ECF. After we review your electronic submission, we will request paper copies of the brief that are identical to the electronic version. Do not submit paper copies until we direct you to do so. (*See* 9th Cir. R. 31-1.) You must also send **two copies** of the brief to any exempt or unregistered opposing counsel.

Exempt Filers Only. Please follow these steps:

- ✓ Send the original document and **six copies** of your brief to the court.
- ✓ Send **two copies** to opposing counsel.
- ✓ Attach a signed certificate of service to the original and to each copy for opposing counsel.
- ✓ Keep a copy for your records.

How to File Excerpts of Record

Submit your excerpts in PDF format using CM/ECF on the same day that you submit your brief. You must serve a paper copy of your excerpts on any unregistered party.

If the excerpts contain sealed materials, you must submit the sealed documents separately, along with a motion to file under seal. (9th Cir. R. 27-13(e).) You must serve sealed filings on all parties by mail or by email if they are registered for electronic filing, or if mutually agreed, rather than through CM/ECF.

After approving your electronic submission, the clerk will direct you to file individually bound paper copies of the excerpts of record with white covers.

To review the rules for filing excerpts, see 9th Cir. R. 30-1.

If You Need More Time to File

Usually, you may ask for one streamlined extension of up to 30 days from the brief's existing due date. (*See* 9th Cir. R. 31-2.2(a) for conditions.)

- **CM/ECF.** Electronic filers do not need to use a written motion; you may submit your request using the "File Streamlined Request to Extend Time to File Brief" event on CM/ECF on or before your brief's existing due date.
- **Paper filing.** Make your request by filing Form 13 on or before your brief's existing due date. You can find Form 13 on the court's website at www.ca9.uscourts.gov/forms.

If you need more than 30 days, or if the court has already given you a streamlined extension, you

must submit a written motion asking for more time. Your motion must show both diligence and substantial need. You must file your request at least **seven days** before your brief is due. The motion must meet the requirements of 9th Cir. R. 31-2.2(b). You may use Form 14 or write your own motion.

Usually, in response to an initial motion for more time, the court will adjust the schedule. (*See* Circuit Advisory Committee Note to Ninth Circuit Rule 31-2.2.) If you followed the correct procedures to ask for more time but the court doesn't respond by the date your brief is due, act as though the court has granted your request and take the time you asked for.

What Happens After You File

After you and opposing counsel have filed your briefs, a panel of three judges will evaluate the case. Sometimes the court decides a case before briefing is complete (9th Cir. R. 3-6); if that happens, we will let you know.

Judges conduct oral hearings in all cases unless all members of the panel agree that oral argument would not significantly aid the decision-making process. (Fed. R. App. P. 34(a)(2).)

Notification of oral hearings. We will notify you of the potential dates and location of an oral hearing approximately 14 weeks in advance. After you receive notice, you have **three calendar days** to inform the court of any conflicts. We distribute calendars about ten weeks before the hearing date.

Changes to oral hearing dates or location. The court will change the date or location of an oral hearing only if you show good cause for the change. If you wish to submit a request to continue a hearing, you must do so within 14 days of the hearing. Note, however, that the court grants such requests only if you can show exceptional circumstances. (9th Cir. R. 34-2.)

Oral arguments are live streamed to YouTube. Viewers can access them through the court's website. Go to www.ca9.uscourts.gov and choose "Live Video Streaming of Oral Arguments and Events."

Stage Three: The Court's Final Decision

After the judges decide your case, you will receive a memorandum disposition, opinion, or court order stating the result. If you are happy with the outcome, congratulations.

If you or opposing counsel didn't get the final results you want, either of you may take the case further. We explain your options in the section "After Your Case," below.

HOW TO WRITE AND FILE MOTIONS

This section provides general guidelines for writing and filing motions, including motions discussed elsewhere in this guide. The motion you want to make may have special rules—for example, a different page limit or deadline—so be sure that you also read its description, as noted below.

How to Write a Motion

If you want to file a motion with the court, follow these guidelines:

- ✓ Clearly state **what** you want the court to do.
- ✓ Give the legal reasons **why** the court should do what you are asking.
- ✓ Tell the court **when** you would like it done.
- ✓ Tell the court what the opposing party's position is. (Circuit Advisory Committee Note to Ninth Circuit Rule 27-1(5); 9th Cir. R. 31-2.2(b)(6).)
- ✓ If you are filing a response requesting affirmative relief, include your request in the caption. (Fed. R. App. P. 27(a)(3)(B)) and use the correct filing type.
- ✓ Don't write a motion that is more than 20 pages long unless you get permission from the court.

If you like, you may support your motion with an affidavit or declaration. (28 U.S.C. § 1746.)

Cases Scheduled for Argument or Submitted to a Panel

If your case has been (1) scheduled for oral argument, (2) argued, or (3) submitted to or decided by a panel, then the first page or cover of your motion must include the date of argument, submission, or decision and, if known, the names of the judges on the panel. (9th Cir. R. 25-4.)

How to File a Motion

To file your motion, you must follow the rules described in "Deliver Papers the Right Way," at the beginning of this guide. Keep the following points in mind.

- **CM/ECF.** For electronic filing, follow instructions on CM/ECF. If there are any non-registered parties, you must send a hard copy to that party.
- **Paper filing.** Send the original document to the court and send a copy to opposing counsel. Remember to attach a signed certificate of service to the original and to any copies. Always keep a copy for your own records.

Note that you should not include a notice of motion or a proposed order with your motion. (Fed. R. App. P. 27(a)(2)(C)(ii) and (iii).)

What Happens After You File

The path of a motion depends on the details of your case. Certain motions—for example, a motion to dismiss the case—may automatically stay the briefing schedule. (*See* 9th Cir. R. 27-11.) The following steps are common after filing a motion.

Opposing counsel may respond. After you file a motion, opposing counsel has ten days to file a response. (*See* Fed. R. App. P. 27(a)(3)(A); Fed. R. App. P. 26(c).) In the response, opposing counsel will tell the court why it disagrees with the arguments in your motion.

You may reply to opposing counsel's response. If opposing counsel responds, you may tell the court why you think opposing counsel's view is incorrect. If you file a reply, don't just repeat the arguments in your original motion. Instead, directly address the arguments in opposing counsel's response. You usually have **seven days** to file a reply with the court, starting on the day you are served with their response. (*See* Fed. R. App. P. 27(a)(3)(B).) Normally, a reply may not be longer than ten pages.

The court decides your motion. After you and opposing counsel file all papers related to the motion, a panel of two or three judges will decide the issue.

How to Respond to a Motion from Opposing Counsel

Your opponent may also submit motions to the court. For example, opposing counsel may file a motion to dismiss the case or to ask the court to review the case more quickly than usual. If opposing counsel files a motion, you are allowed to respond with your arguments against it. Your response may not be longer than 20 pages.

Usually, you must file your response with the court no more than **ten days** from the day opposing counsel serves its motion on you.

Read More About These Motions

If you are making one of the following motions, read the section noted here:

Motion to proceed in forma pauperis in "Filing Opening Motions," above.

Motion for injunctive relief pending appeal in "Filing Opening Motions," above.

Motion for extension of time to file a brief in "If You Need More Time to File," above.

Motion for reconsideration in "If You Don't Agree With a Court Decision," below.

Emergency Motions

An emergency motion asks the court to act within 21 days to avoid irreparable harm. Your emergency motion must meet the requirements of 9th Cir. R. 27-3.

If you need emergency relief, you must notify the Emergency Motions department in San Francisco before you file the motion. Call them at 415-355-8020 or e-mail emergency@ca9.uscourts.gov. Please note that a request for more time to file a document with the court or any other type of procedural relief does *not* qualify as an emergency motion. (*See* Circuit Court Advisory Committee Note to 27-3(3).)

Finally, if you absolutely must notify the court of an emergency outside of standard office hours, call 415-355-8000. This line is for true emergencies that cannot wait until the next business day—for example, imminent removal from the United States.

IF YOU DON'T AGREE WITH A COURT DECISION

If you think the court of appeals made an incorrect decision about important issues in your case, you can ask the court to take a second look. You may do this during your case—for example, if you disagree with the court's ruling on a motion. Or you may ask the court to review its final decision at the end of your case.

During Your Case: Motion for Reconsideration

If you disagree with a court order or ruling during your case, you may file a motion for reconsideration stating the reasons why you think the court's ruling was wrong. Your motion may not be longer than 15 pages.

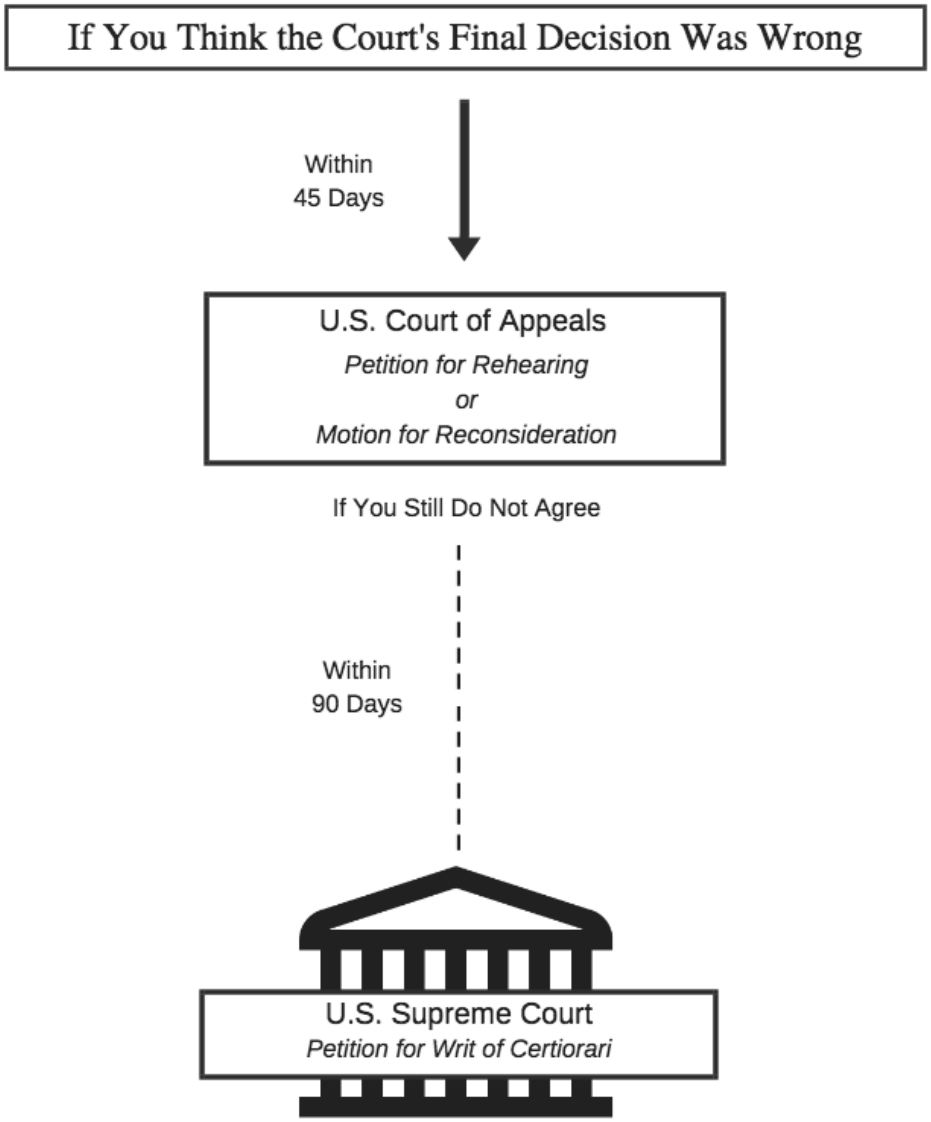
A motion for reconsideration of an order that does not end the case—that is, a non-dispositive order—is due **within 14 days** of the date stamped on the court order. (9th Cir. R. 27-10(a).) In addition to these rules, please follow the general guidelines in "How to Write and File Motions," above.

After Your Case: Motions and Petitions

If you think the court's final decision in your case was wrong and you want to take further action, you have two options:

- File a motion for reconsideration or petition for rehearing in this court.
  - If the court decided your case in an order, then you would file a motion for reconsideration, as discussed just above. You have **45 days** (instead of 14 days) to file a motion for reconsideration of a court order that ends your case. (9th Cir. R. 27-10(a).)
  - If the court decided your case in a memorandum disposition or opinion, then you would file a petition for rehearing, discussed below.
- File a petition for writ of certiorari with the U.S. Supreme Court.

It is most common to do these things one after the other—that is, to file a petition for rehearing or motion for reconsideration in this court and then, if that doesn't succeed, petition the Supreme Court. It is technically possible to file both petitions at the same time but that is not the typical approach. Our discussion focuses on the common path.



Court of Appeals: Petition for Rehearing

To ask the court of appeals to review its final decision in your case, you must file a petition for rehearing. Before starting a petition, remember that you must have a legal reason for believing that this court's decision was incorrect; it is not enough to simply dislike the outcome. You will not be allowed to present any new facts or legal arguments in your petition for rehearing. Your document should focus on how you think the court overlooked existing arguments or misunderstood the facts of your case.

A petition for rehearing may not be longer than 15 pages. Your petition is due **within 45 days** of the date stamped on the court's opinion or memorandum disposition. To learn more about petitions for rehearing, see Fed. R. App. P. 40 and 40-1.

Most petitions for rehearing go to the same three judges who heard your original petition. It is also possible to file a petition for rehearing en banc. This type of petition asks 11 judges to review your case instead of three. The court grants petitions for rehearing en banc only in rare, exceptional cases. To learn more about petitions for rehearing en banc, see Fed. R. App. P. 35.

U.S. Supreme Court: Petition for Writ of Certiorari

If the court of appeals denies your petition for rehearing—or if it rehears your case and issues a new judgment you don't agree with—you have 90 days from the denial order or the new decision to petition the U.S. Supreme Court to hear your case. You do this by asking the Supreme Court to grant a writ of certiorari. You must file the petition with the Supreme Court directly. A writ of certiorari directs the appellate court to send the record of your case to the Supreme Court for review.

The Supreme Court is under no obligation to hear your case. It usually reviews only cases that have clear legal or national significance—a tiny fraction of the cases people ask it to hear each year. Learn the Supreme Court's Rules before starting a petition for writ of certiorari. (You can find the rules and more information about the Supreme Court at www.supremecourt.gov.)

HOW TO CONTACT THE COURT

Court Addresses: San Francisco Headquarters

Mailing Address for U.S. Postal Service	*Mailing Address for Overnight Delivery (FedEx, UPS, etc.)*	*Street Address*
Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939	Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94103-1526	95 Seventh Street San Francisco, CA 94103

Court Addresses: Divisional Courthouses

Pasadena	*Portland*	*Seattle*
Richard H. Chambers Courthouse 125 South Grand Avenue Pasadena, CA 91105	The Pioneer Courthouse 700 SW 6th Ave, Ste 110 Portland, OR 97204	William K. Nakamura Courthouse 1010 Fifth Avenue Seattle, WA 98104

Court Website

www.ca9.uscourts.gov

The court's website contains the court's rules, forms, and general orders, public phone directory, information about electronic filing, answers to frequently asked questions, directions to the courthouses, bar admission forms, opinions and memoranda, live streaming of oral arguments, links to practice manuals, an invitation to join our pro bono program, and more.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

ATTENTION ALL PARTIES AND COUNSEL
PLEASE REVIEW PARTIES AND COUNSEL LISTING

We have opened this appeal/petition based on the information provided to us by the appellant/petitioner and/or the lower court or agency. EVERY attorney and unrepresented litigant receiving this notice MUST immediately review the caption and service list for this case and notify the Court of any corrections.

Failure to ensure that all parties and counsel are accurately listed on our docket, and that counsel are registered and admitted, may result in your inability to participate in and/or receive notice of filings in this case, and may also result in the waiver of claims or defenses.

PARTY LISTING:
Notify the Clerk immediately if you (as an unrepresented litigant) or your client(s) are not properly and accurately listed or identified as a party to the appeal/petition. To report an inaccurate identification of a party (including company names, substitution of government officials appearing only in their official capacity, or spelling errors), or to request that a party who is listed only by their lower court role (such as plaintiff/defendant/movant) be listed as a party to the appeal/petition as an appellee or respondent so that the party can appear in this Court and submit filings, contact the Help Desk at http://www.ca9.uscourts.gov/cmecf/feedback/ or send a letter to the Clerk. If you or your client were identified as a party to the appeal/petition in the notice of appeal/petition for review or representation statement and you believe this is in error, file a motion to dismiss as to those parties.

COUNSEL LISTING:
In addition to reviewing the caption with respect to your client(s) as discussed above, all counsel receiving this notice must also review the electronic notice of docket activity or the service list for the case to ensure that the correct counsel are

listed for your clients. If appellate counsel are not on the service list, they must file a notice of appearance or substitution immediately or contact the Clerk's office.

NOTE that in criminal and habeas corpus appeals, trial counsel WILL remain as counsel of record on appeal until or unless they are relieved or replaced by Court order. *See* Ninth Circuit Rule 4-1.

REGISTRATION AND ADMISSION TO PRACTICE:
Every counsel listed on the docket must be admitted to practice before the Ninth Circuit AND registered for electronic filing in the Ninth Circuit in order to remain or appear on the docket as counsel of record. *See* Ninth Circuit Rules 25-5(a) and 46-1.2. These are two separate and independent requirements and doing one does not satisfy the other. If you are not registered and/or admitted, you MUST, within 7 days from receipt of this notice, register for electronic filing AND apply for admission, or be replaced by substitute counsel or otherwise withdraw from the case.

If you are not registered for electronic filing, you will not receive further notices of filings from the Court in this case, including important scheduling orders and orders requiring a response. Failure to respond to a Court order or otherwise meet an established deadline can result in the dismissal of the appeal/petition for failure to prosecute by the Clerk pursuant to Ninth Circuit Rule 42-1, or other action adverse to your client.

If you will be replaced by substitute counsel, new counsel should file a notice of appearance/substitution (no form or other attachment is required) and should note that they are replacing existing counsel. To withdraw without replacement, you must electronically file a notice or motion to withdraw as counsel from this appeal/petition and include your client's contact information.

To register for electronic filing, and for more information about Ninth Circuit CM/ECF, visit our website at http://www.ca9.uscourts.gov/cmecf/#section-registration.

To apply for admission, see the instructions and form application available on our website at https://www.ca9.uscourts.gov/attorneys/.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSTRUCTIONS for Form 7. Mediation Questionnaire

Form 7 must be filed by counsel for appellants/petitioners in civil cases within 7 days after filing the notice of appeal or petition for review. Filing Form 7 is optional for appellees/respondents in those cases.

- The purpose of Form 7 is to help the court's mediators provide the best possible mediation services; it serves no other function.
- It is not necessary to list every issue you might raise on appeal or review. Omission will not constitute waiver of an issue.
- Form 7 is filed on the public docket. It is **not confidential.**
- When Form 7 is filed, all counsel will receive a link in the Notice of Docket Activity that will allow them to separately submit relevant **confidential** information directly to the circuit mediators.

File Form 7 using the electronic document filing type "Mediation Questionnaire."

How to prepare fill-in forms for filing:

- If you have Adobe Acrobat or another tool that lets you save completed forms:
  1. Complete the form.
  2. Print the completed form to your PDF printer (File > Print > select Adobe PDF or another PDF printer listed in the drop-down list).
- If you do not have Adobe Acrobat or another tool that lets you save completed forms:
  1. Complete the form.
  2. Print the completed form to your printer.
  3. Scan the completed form to a PDF file.

Note: The fill-in PDF version of the form is available on the court's website at http://www.ca9.uscourts.gov/forms/.

Do not file this instruction page

United States Court of Appeals
for the Ninth Circuit

P.O. Box 31478
Billings, Montana 59107-1478

CHAMBERS OF
SIDNEY R. THOMAS
CHIEF JUDGE

TEL: (406) 373-3200
FAX: (406) 373-3250

Dear Counsel:

I write to introduce you to the court's mediation program. The court offers you and your clients professional mediation services, at no cost, to help resolve disputes quickly and efficiently and to explore the development of more satisfactory results than can be achieved from continued litigation. Each year the mediators facilitate the resolution of hundreds of cases, from the most basic contract and tort actions to the most complex cases involving multiple parties, numerous pieces of litigation and important issues of public policy.

The eight circuit mediators, all of whom work exclusively for the court, are highly experienced attorneys from a variety of practices; all have extensive training and experience in negotiation, appellate mediation, and Ninth Circuit practice and procedure. Although the mediators are court employees, the court has adopted strict confidentiality rules and practices to ensure that what goes on in mediation stays in mediation. See Circuit Rule 33-1.

The first step in the mediation process is case selection. To assist the mediators in the case selection process, appellants/petitioners must file a completed Mediation Questionnaire within 7 days of the docketing of the case. See Circuit Rules 3-4, and 15-2. Appellees may also fill out and file a questionnaire. The questionnaire with filing instructions is available here. Once the Mediation Questionnaire is submitted, the parties will receive via NDA a link to a separate form that will allow them to submit **confidential** information directly to the Circuit Mediators. Counsel may also submit confidential information at any time to ca09_mediation@ca9.uscourts.gov.

In most cases, the mediator will schedule a settlement assessment conference, with counsel only, to determine whether the case is suitable for mediation. Be assured that participation in the mediation program will not slow down disposition of your appeal. Mediation discussions are not limited to the issues on appeal. The discussions can involve other cases and may include individuals who are not parties to the litigation, if doing so enables the parties to reach a global settlement.

Further information about the mediation program may be found on the court's website: www.ca9.uscourts.gov/mediation/. Please address questions directly to the Mediation Program at 415-355-7900 or ca09mediation@ca9.uscourts.gov.

Sincerely,

Sidney R Thomas

Sidney Thomas

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 7. Mediation Questionnaire

Instructions for this form: http://www.ca9.uscourts.gov/forms/form07instructions.pdf

9th Cir. Case Number(s)	
Case Name	
Counsel submitting this form	
Represented party/ parties	

Briefly describe the dispute that gave rise to this lawsuit.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Briefly describe the result below and the main issues on appeal.

Describe any proceedings remaining below or any related proceedings in other tribunals.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*