STATE OF TENNESSEE

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SUBMITTED ELECTRONICALLY VIA REGULATIONS.GOV

Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, DC 20585

RE: ***Energy Conservation Program: Standards for Refrigerators, Refrigerator-Freezers, and Freezers, No. EERE-2017-BT-STD-0003***

Dear Secretary Granholm:

Tennessee and the undersigned states write regarding the Department of Energy's ("DOE") recently released direct final rule regulating refrigerators, refrigerator-freezers, and freezers.

I. Introduction

DOE's direct final rule regarding regulations on refrigerators, refrigerator-freezers, and freezers, over-regulates American kitchens. Many manufacturers disputed DOE's initial rule. After months of arm-twisting by DOE and advocacy

groups, manufacturers relented, and appliance manufacturers and advocacy organizations submitted a new proposal**.** Most disconcerting is the lack of consideration for the average consumer, who undoubtedly will be most affected by appliance price hikes due to the new regulations.

II. Background

DOE proposed new energy conservation standards for refrigerators, refrigerator-freezers, and freezers on February 27, 2023. 88 Fed. Reg. 12,452. DOE received dozens of comments, both in favor[1] and against[2] the new regulations.

After months of impasse, advocacy organizations and home appliance manufacturers sent a joint statement to DOE (the "joint statement").[3] DOE adopted the joint statement and proceeded directly as a direct final rule. 10 CFR Part 430, (EERE-2017-BT-STD-0003) RIN 1904-AF56 (Jan. 17, 2024).

III. Authority

The Energy Policy and Conservation Act grants DOE the power to regulate refrigerators and freezers for energy conservation. *See* 42 U.S.C. 6292(a)(1); 42 U.S.C. 6295. However, these regulations are not limitless. *See* 42 U.S.C. 6295(o). DOE must consider the economic burden levied upon consumers and manufacturers. *Id*. at (o)(3)(A)-(B); *see also id*. at (o)(2). Finally, DOE may issue a direct final rule regarding regulations if a joint statement is submitted by interested persons that are fairly representative of the relevant points of view and satisfies the standards of 42 U.S.C. 6295(o). *See* 42 U.S.C. 6295(p)(4).

IV. Relevant Points of View from the Joint Statement

A. The Appliance Companies

The Association of Home Appliance Manufacturers ("AHAM") is perhaps one the most important parties to this regulation outside the average consumer. AHAM represents multiple appliance companies including GE Appliances, Viking Range, Whirlpool, Samsung, and LG Electronics, among others. AHAM represents the vast

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[1] *See* Comment from Advocacy Groups Earth Justice, American Lung Association, Utah Clean Energy, Health Care Without Harm, Coastal Conservation League, *et al*., (April 28, 2023) (*Declaring their support for the proposed rule and its necessity due to climate change and climate pollution.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0076

[2] *See* Comment from Sub-Zero regarding Energy Standards for Refrigerators and Freezers (April 28, 2023) (*Expressing grave concerns with impact on consumers and manufacturers*.) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0077; Comment from Several States (April 28, 2023). (*States expressing concerns with reliance on social costs of carbon, federalism and commerce clause implications, as well as impact on low-income households.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0068; Comment from GE regarding Energy Standards for Refrigerators and Freezers, (April 28, 2023) (*Manufacturer stating Doe's failure to evaluate supply chain demands and production volume*.) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0075; Comment from NAA regarding Consumer Costs (April 27, 2023) (*Homebuilders' stating the significant costs that'll be passed to consumers.*) Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0061

[3] Comment from Joint Stakeholder Proposal on Recommended Energy Conservation Standards for Residential Refrigerator/Freezers (Oct. 9, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0105

majority of refrigerator, refrigerator-freezer, and freezer manufacturers. Many of the groups represented by AHAM in the joint statement lodged complaints prior to the release of the joint statement.

Many of those complaints are not addressed in the joint statement nor by DOE's direct final rule. For example, GE alleged DOE failed to take into consideration a supply chain analysis and the availability of required components at the production volumes necessary for the market, which is significant because nearly 12 million fridges are sold in the United States every year.[4] An analysis of the relevant economic hardship on consumers is also largely lacking.[5] AHAM's comment fervently expresses DOE's failure to evaluate economic impacts, citing a Bellomy Research Study, which, in sum, states households at or near the poverty line prefer to pay less money upfront and more in energy bills over a ten-year period.[6] AHAM also noted that households who cannot afford a new refrigerator would instead choose to repair their old one.[7] Sub-Zero, another manufacturer, had further concerns:

> "Since Federal efficiency regulation began, refrigeration products have undergone four rounds of Efficiency Standards, which has led to the current products on the market using only one-quarter of the energy their predecessors did in 1975. . . however, it now must be emphasized that there are significant limitations to further energy regulation if products are to remain reliable, affordable and designed for enabling consumers to enjoy the same level of performance. . . Every new Standards Rulemaking [*sic*] requires significant effort and cost both by industry and the Government. DOE even recognizes that several recent regulations have increased the net cost of new appliances to a sizeable percentage of users. . . when is enough, enough? It is important to recognize that many products have little or no remaining energy savings possible at reasonable cost and without affecting their utility and reliability. This is particularly true of the Built-In products. . . [which] compromise only 1.3% of total U.S. refrigerator and freezer shipments. . . Further Standards will pose a significant. . . burden on manufacturers."[8]

The joint statement, and most poignantly, the direct final rule, fails to address these concerns further. Moreover, it does little to assuage any fears of economic impact on low-income households. Consumers will bear the burden of the DOE's coercion efforts against manufacturers.

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[4] Comment from GE regarding Energy Standards for Refrigerators and Freezers, Pg. 2 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0075

[5] *See* Comment from AHAM regarding Energy Standards for Refrigerators and Freezers, Pg. 10-12 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0069

[6] *Id.*

[7] *Id.*

[8] Comment from Sub-Zero regarding Energy Standards for Refrigerators and Freezers, Pg. 1-2 April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0077

B. The Advocacy Groups

Several advocacy groups also joined the joint statement, including Alliance for Water Efficiency, Earth Justice, Northwest Energy Efficiency Alliance, Natural Resources Defense Council, and National Consumer Law Center.

The Natural Resources Defense Council ("NRDC") seems particularly tuned in to Climate Change and Equity & Justice. NRDC looks to cooperate with women-led groups in local areas to help make more energy-efficient homes. NRDC's mission is not only a pursuit of greener efficient energy use, but to lower the cost of energy for those from low-income households.[9] Yet, NRDC does not discuss the upfront costs of these programs to those from low-income households.[10] It also seems that NRDC does not run tests of its own to determine the efficiency and economic viability of refrigerators or freezers.

Earth Justice is "the premier nonprofit public interest environmental law organization. We wield the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change."[11] Yet, again, Earth Justice is not comprised of scientists or economists checking DOE's data, has no insight into expenses for consumers, and is not a producer, manufacturer, or seller of household appliances. It advocates for environmental policy divorced from the realities facing consumers.

The Alliance for Water Efficiency, however well-intentioned, does not seem to have expertise in anything dealing with the proposed rules. Perhaps Alliance for Water Efficiency is concerned with freezer and fridge water dispensation. Still, the States have not seen anything to determine the Alliance for Water Efficiency's relevant experience one way or the other.[12]

The National Consumer Law Center seems to specialize in a myriad of issues, from Criminal Justice to Climate Change to Equity & Racial Justice.[13] Yet, once again, it does not seem to have any means of evaluating refrigeration items, nor does it seem to take into account the upfront cost of more efficient appliances to low-income households.

Northwest Energy Efficiency Alliance is perhaps the closest organization to anything demonstrating a specialty in energy efficiency related to refrigeration regulation. It mobilizes experts, reads data, and has experience implementing codes

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[9] NRDC, Mission Statement, Overview, and Climate Change, (last visited May 1, 2024). Available at https://www.nrdc.org/issues/climate-change#overview

[10] NRDC, Climate Change and Renewable Energy Overview, (last visited May 1, 2024). Available at https://www.nrdc.org/issues/renewable-energy#overview

[11] Earth Justice, About Earth Justice, (last visited May 1, 2024). Available at https://earthjustice.org/about

[12] Alliance for Water Efficiency, About the Alliance and Mission Statement, (last visited May 1, 2024. Available at https://www.allianceforwaterefficiency.org/about

[13] National Consumer Law Center, Explore NCLC's Key Issues, (last visited May 1, 2024). Available at https://www.nclc.org/our-work/#TabListing-tabPanel-9

and procedures with communities.[14] Nonetheless, here again, it is unclear what insights it has on initial consumer and manufacturer costs.

Many of these advocacy groups sent in comments prior to the joint statement endorsing the original NOPR standards for fridges and freezers. They did not raise any concerns related to consumer pricing and appliance utility or functionality, discuss market implications, limits of conservation utility or anything akin. Many of these groups not only seem to be irrelevant parties but, even if relevant, appear not to consider any of the concerns raised during the NOPR. These groups are not industry leaders when it comes to household appliances, costs, or consumers.

Again, many of these political advocacy organizations failed to mention any issues with any of the standards for fridges and freezers promulgated by DOE.[15] Noticeably, another group raised concerns regarding low-income households and mass-appliance purchases, the National Apartment Association and National Multifamily Housing Council ("NAA"), which did not join the joint statement. As NAA articulated, "the price increase from regulation will be passed to consumers."[16]

As mentioned, many manufacturers lodged complaints and acknowledge the burdensome costs to consumers and manufacturers alike, yet promptly changed their tune. A phenomenon known as administrative arm-twisting has become increasingly common. *See generally* Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. Rev. 873 (1998). Informal ad-hoc bargaining is a serious concern, and federal agencies have continually engaged in such practices. *Id*. at 876. Agency arm-twisting has no judicial oversight, *id*. at 867, and "potentially arrogates undelegated power". *Id*. at 930. Bargaining for rules and regulations between certain parties and an agency invites standardless and unaccountable actions by agencies. *Id*. at 936. AHAM, and many other groups, released multiple comments critiquing DOE's regulations. Since the start, political advocacy groups like Earth Justice supported DOE's endeavors; months later, AHAM had an about-face and submitted a joint statement with the political advocacy groups. Arm-twisting isn't always noticeable, *id*. at 941, but when many manufacturers raise serious concerns only to suddenly all fall in line, it raises questions about the agency's methods of achieving its politically motivated ends.

C. Key Groups Not in the Joint Statement

Some other groups also provided comments regarding refrigerators and freezers but did not appear in the joint statement. While these groups are not

[14] Northwest Energy Efficiency Alliance, Codes and Standards Program, (last visited May 1, 2024). Available at https://neea.org/our-work/codes-standards

[15] *See* Comment from Advocacy Groups (Earth Justice, American Lung Association, Utah Clean Energy, Health Care Without Harm, Coastal Conservation League, *et al*.) agreeing with DOE's initial rule. Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0076

[16] Comment from NAA regarding Consumer Costs (April 27, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0061

manufacturing specialists, they do have a keen focus on the consumers who will bear the brunt of DOE's burdensome regulations.

The National Apartment Association and National Multifamily Housing Council ("NAA") represent home builders, renters, and property owners and are acutely aware of the economic implications upon consumers and low-income households. NAA purchases large quantities of appliances, including refrigerators and freezers.[17] NAA's analysis clearly shows that much of the increased costs will be passed onto consumers and renters.[18] Again, as stated previously in comment letters, many refrigerator and freezer appliances only have a lifespan of 14 to 15 years, and many consumers and renters do not reside in any abode for more than a few years. As such, acute upfront costs will have a significant impact on consumers, more so than DOE anticipates in its rule.

Finally, while Massachusetts, New York, and California support the changes DOE seeks to implement, numerous States expressed at least some worry about consumer welfare.[19] 42 U.S.C. § 6295(p)(4) requires a joint statement from "interested persons that are fairly representative of the relevant points of view," and it must include "representatives of . . . States." Properly construed, this text would require the concurrence of States across the ideological spectrum in order for DOE to proceed with a direct final rule. Here, DOE does not come close to meeting that standard. Some States strongly favor DOE's proposals, other States strongly oppose them. DOE cannot simply cherry pick the States that it is politically aligned with and thereby circumvent the ordinary rulemaking process. Doing so would fail the "fairly representative" requirement of § 6295(p)(4). Moreover, 42 U.S.C. 6295(p)(4)(C) states the Secretary shall withdraw the direct final rule if one or more adverse comments are received and the Secretary determines that the adverse comment provides a reasonable basis for withdrawing the rule. We believe that this letter serves as the basis for such a reasonable determination. Particularly, this letter outlines the burden outweighing the benefit of the rule as is contemplated in 42 U.S.C 6313(a)(6)(B)(ii), and 42 U.S.C 6313(a)(6)(B) is explicitly mentioned as a reason for withdrawing a rule in 42 U.S.C. 6295(p)(4)(C)(ii).

Many States raised numerous concerns with DOE's proposed rule and now find similar issues here. Those include concerns with reliance on social costs of carbon, federalism, commerce clause implications, and effects on low-income households.[20] States have a direct interest in protecting consumers, especially low-income consumers, from the increased costs associated with the implementation of this rule. States are also directly affected because many state entities are direct purchasers of these appliances and thus will directly bear the burden of increased

[17] *Id.*
[18] *Id.*
[19] Comment from Several States (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0068
[20] *Id.*

costs for appliances. DOE's direct final rule also preempts state procurement standards with less stringent energy-efficiency rules in contradiction of federal law. See 42 U.S.C. § 6297(e). States often have a better finger on the pulse of their own citizens than those in Washington. As the States previously noted, the final rule does not address whether households, especially low-income households, will be able to absorb those upfront costs while waiting for future benefits.[21] And, while manufacturers eventually joined the joint statement, there were key comments initially stating DOE's failure to grapple with costs associated with low-income households and upfronts.[22]

The States believe more voices ought to be heard prior to making this a direct final rule and deeper consideration given to the explicit upfront cost of purchases of fridge/freezer appliances. This is especially true given that States are often forced to grapple with the unprecedented use of "the whole of government" approach to implementing regulatory obligations on American consumers and manufacturers. After all, this single DOE direct final rule is merely part of a broad smattering of rulemaking targeting nearly every household appliance. States are justifiably concerned that "the future of American household appliances will include fewer choices, [and] higher prices" for every consumer.[23]

V. Direct Final Rulemaking

DOE has the power to regulate refrigerators and freezers for energy conservation. *See* 42 U.S.C. 6292(a)(1); 42 U.S.C. 6295. But, DOE must consider the economic impact of its regulations on consumers and manufacturers. *Id*. at (o)(3)(A)-(B); *see also id*. at (o)(2). DOE may issue a direct final rule regarding regulations if a joint statement is submitted by interested persons, which are fairly representative of the relevant points of view and satisfy the standards of 42 U.S.C. 6295(o). *See* 42 U.S.C. 6295(p)(4).

DOE ought to reevaluate the benefits and burdens of its rules under the factors listed in 42 U.S.C. 6295(o)(2)(B)(i)(I), (II), and (IV). The Secretary alone weighs incredibly important economic decisions, and without further notice and comment rulemaking, agencies are not accountable to anyone. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating that notice-and-comment rulemaking "reintroduc[es] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978). "Informal notice-and-comment rulemaking provides several interrelated benefits. It allows all stakeholders in a regulatory decision to be heard before a decision is made and

[21] *Id*. at 5-6.
[22] *See* Comment from AHAM regarding Energy Standards for Refrigerators and Freezers, Pg. 10-12 (April 28, 2023). Available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0003-0069
[23] Jonathan Skrmetti, Here's our plan on household appliances, (Jun. 8, 2023). Available at https://www.foxnews.com/opinion/heres-plan-sink-bidens-household-appliances

ensures that the agency responds to relevant comments." Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 Alb. L. Rev. 79, 86 (2009). The notice and comment process further ensures some level of political accountability by giving visibility to internal agency deliberations that would otherwise be hidden. *Id.* at 86-87. It also provides a record to make sure that the rule and the agency comply with the APA. *Id*. Allowing affected parties to participate may improve the perceived legitimacy of the decision-making process. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Transparency between the Secretary, DOE, manufacturers, and consumers is paramount.

Problems with direct final rulemaking further compound when one evaluates its track record and meaning. "The Administrative Conference recommended. . . direct final rulemaking where an agency *believes* that [a] rule will be noncontroversial and adverse comments will not be received." Kolber, Rulemaking without Rules: An Empirical Study of Direct Final Rulemaking, 72 Alb. L. Rev. 79, 88 (2009). First, it is unclear what an agency considers "noncontroversial and significant adverse comment" to mean. Second, agencies can rarely tell when a rule will be controversial, and blatantly seem not to care. *Id*. 106-07. The FDA, one of the largest agencies in the United States, has an atrocious track record regarding challenges to its promulgation of direct final rules. *Id*. at 82 (finding the FDA used direct final rulemaking for controversial rules and the agency withdrew forty percent of rules for which it attempted to use direct final rulemaking due to opposition). Other problems with direct final rulemaking may be succinctly stated as contrary to the APA, direct final rulemaking is not provided for by the APA, and causes confusion among interested parties. *See Id*. at 108-09; Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)); *see also* Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State. 94 Va. L. Rev. 889, 903, n. 37 ("Direct final rulemaking does not comport with the APA's requirements or with meaningful judicial review").

Direct final rulemaking "may reduce the efficiency of agency rulemaking, can cause confusion about the state of the currently effective law, and erodes public confidence in the rulemaking process." Kolber, 72 Alb. L. Rev. at 80 (2009). Pressing again into NOPR allows DOE to consider information it lacked in its adaptation of the joint statement. *See Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978) ("public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."). Here, NAA raised legitimate issues regarding costs to consumers and purchasers. Additionally, several manufacturers represented efficiency may be limited and further attempts in pursuit of efficiency may impede appliance utility. Likewise, manufacturers stated there could be supply chain issues, as well as further costs to consumers. DOE should reevaluate these issues.

Finally, the circumstances that instigated DOE's direct final rulemaking ability should be taken into consideration. The Energy Policy and Conservation Act was enacted during an international crisis and was instrumental in the regulation of gas, oil, and other energy-pertinent items during the Cold War. *See* 42 U.S.C. § 6201. DOE's direct final rulemaking power arose pursuant to the Energy Independence and Security Act, which was passed after Operation Surge. *See* George W. Bush, The President's Address to the Nation, Office of the Press Secretary (January 10, 2007). The Energy Independence and Security Act's goal was to provide for less reliance on oil from the Middle East, protect consumers, and bring the United States closer to energy independence. Pub. L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007). DOE's powers for direct final rulemaking should be used with caution. Direct final rulemaking ought to be used with caution and care and only when regulations are truly noncontroversial.

VI. A Return to Formal Rulemaking

Lastly, DOE should return to formal rulemaking. Formal procedures, and procedures in general, are certainly appropriate when an issue is scientifically complex or when the economic impact is significant. *See* Admin. Conference of the U.S., Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654 (1976).

"Because agencies 'dress up each of their guestimates about the facts . . . in enormous, multi-layered costumes of technocratic rationality' and 'courts cannot . . . be partners to technocrats in a realm in which only technocrats speak the language' mechanisms such as cross-examination that help illuminate agency sleights-of-hand should receive careful consideration." John F. Manning & Matthew C. Stephenson, Legislation and Regulation 776-77 (2010) (quoting Martin Shapiro, Who Guards the Guardians? Judicial Control of Administration 151-52 (1988); Martin Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1507 (1983)). The adversarial process and open debate are cornerstones of democracy and courts have required agencies to provide formal rulemaking procedures for safeguarding those inalienable American principles. *See Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

Furthermore, without formal rulemaking, evaluating an agency's decision-making procedures, as well as the weight given to certain comments, studies, and notes, becomes increasingly difficult. "While an agency in informal rulemaking must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning" Aaron L. Nielson, In Defense of Formal Rulemaking, 75 Ohio St. L.J. 237, 269 (2014) (internal quotation omitted). Merely issuing a comment does little to guarantee an agency takes account of rules that

seriously affect certain pertinent parties. *See Id.* On occasion, the "thrust of some rules . . . are preordained . . . especially . . . when an agency institutes a rulemaking proceeding to satisfy demands for a particular outcome from the White House or political appointees at the top of the agency . . . rulemaking does not work well when policy disputes are disguised as issues of scientific judgment." *Id.* (internal quotations omitted). As such, having a transparent process, especially one that provides for formal rulemaking, which includes live hearings, the ability to cross-examine witnesses, and establishing a clear record for decision-making, is paramount in increasing trust in our institutions and agencies.

"The American people deserve a regulatory system that works for them, not against them" 58 FR 51735, Preamble. (Executive Order 12,866). Agencies ought to find incentives to promote their desired goals, not twist industry's arm. *Id*. at (3). Perhaps, rather than pursuing a direct final rule pursuant to some arm-twisting, DOE could proceed down formal rulemaking paths scribed in the APA, thereby fomenting transparency and trust in our agencies and faith in our democracy.

VII. Conclusion

DOE has a hard job balancing the interests of so many Americans. No one contests otherwise. But the undersigned States request that DOE seriously reevaluate its direct final rule in light of this comment. DOE's regulations will cause Americans distaste toward government agencies, leaving many with increased expenses in their kitchens.

Sincerely,

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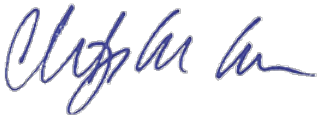

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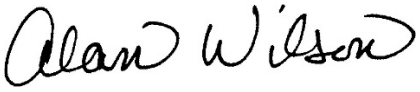

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