



## International Energy Conservation Code Consensus Committee-Commercial

### Meeting Agenda

February 14, 2024  
2 PM Eastern to 5 PM Eastern (3 hours)

[Webex Link](#)

**Committee Chair:** Duane Jonlin  
**Committee Vice Chair:** Emily Hoffman

1. Call to order.
2. Meeting Conduct. Staff
  - a. Identification of Representation/Conflict of Interest
  - b. ICC [Council Policy 7](#) Committees: Section 5.1.10 Representation of Interests
  - c. ICC [Code of Ethics](#): ICC advocates commitment to a standard of professional behavior that exemplifies the highest ideals and principles of ethical conduct which include integrity, honesty, and fairness. As part of this commitment it is expected that participants shall act with courtesy, competence and respect for others.
  - d. ICC [Antitrust Compliance Guideline](#)
3. Roll Call – Hoffman
4. Approval of Agenda
5. Approval of Minutes from September 13, 2023
6. Action Items.
  - a) Response to questions in ICC Board of Directors letter
    - 1) Provide documentation regarding whether it is possible to comply with Sections C502.3.7.1 and C406.1.1.1 and Appendix CD (the 2030 Glide Path) for all building types using minimum efficiency equipment. Clarify whether compliance for the referenced occupancy types(restaurants & hotels)/climate zones requires the use of residential equipment. If residential equipment can be used to comply, is it readily available and are there any reasons why residential equipment should not be used, such as equipment listing limitations?
    - 2) If further discussion clarifies that it is not possible for certain building types (restaurant & hotel) to comply with the credit thresholds in Sections C502.3.7.1 and C406.1.1.1, recommend changes to the code to make it possible for all building types to comply.
    - 3) Address the assertion that it is not possible for all building types to comply with the 2030 Glide Path thresholds listed in Appendix CD using minimum efficiency equipment. If that assertion is correct, provide feedback on how the Board should

- alert jurisdictions considering adopting these provisions about the advisability of adding trade-offs to mitigate the risk of preemption.
- 4) Provide feedback on how the Board should alert jurisdictions considering adopting the provisions within Appendix CG about the risk that an all-electric solution could face a preemption challenge.

b) Review of potential errata items

8. Next meeting TBD

9. Adjourn.

FOR FURTHER INFORMATION BE SURE TO VISIT THE ICC WEBSITE:

IECC Commercial Consensus Committee Webpage

<https://www.iccsafe.org/products-and-services/i-codes/code-development/cs/iecc-commercial-consensus-committee/>

ICC Energy webpage

<https://www.iccsafe.org/products-and-services/codes-standards/energy/>

FOR ADDITIONAL INFORMATION, PLEASE CONTACT:

Kristopher Stenger, AIA, Director of Energy Programs

International Code Council

[kstenger@iccsafe.org](mailto:kstenger@iccsafe.org)

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Suggested User Note from Chair Jonlin:

User note. In considering whether to adopt this Glide Path, please note that federal law might be found to preempt the provisions it prescribes. See for example subsection (c) in 42 USC 6297: Effect on other law ([house.gov](http://house.gov)). The risk of preemption may be mitigated by the addition of trade-off options or through other strategies. Whether this Glide Path or a modification thereof is subject to preemption may depend on court decisions or whether a waiver has been issued by the Department of Energy pursuant to subsection (d) of 42 USC 6297.



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Upland, CA

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Director/Building Official  
Chesterfield Country Department of  
Building Inspection  
Chesterfield, VA

**SHIRLEY ELLIS, CBO**  
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Dvlp Commission, Gray LA  
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**ANGIE WIESE, PE, CBO**  
Director of Safety & Inspections  
City of St. Paul  
St. Paul, MN

**Chief Executive Officer**  
**DOMINIC SIMS, CBO**

December 18, 2023

Duane Jonlin  
Chair of the Commercial Energy Code Consensus Committee  
Energy Code & Conservation Advisor  
Seattle, WA

Dear Committee Chair,

The Code Council received the attached letters from the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI") regarding concerns related to specific sections of the IECC Commercial that may potentially be preempted by the Energy Policy and Conservation Act ("EPCA"). These letters were submitted in accordance with CP-49 (Conforming Codes and Standards to United States Federal Law and International Law).

The goal of CP-49 is for the Board to address potential legal issues regarding preemption based on the advice of legal counsel as early in the process as possible to allow the relevant committee to focus its attention on technical matters. Whereas most issues regarding the contents of each code are decided through committee votes, the question of whether certain content is likely to be preempted by federal law is a strictly legal determination. The Code Council must act judiciously when considering preemption issues and provide appropriate warnings to jurisdictions that may adopt its codes about potential preemption challenges.

In its letters, AHRI first argued that Sections C502.3.7.1 and C406.1.1.1 of the IECC Commercial impermissibly disfavor minimum efficiency equipment because two building types – hotels and restaurants – cannot meet both the energy efficiency credits threshold (Table 406.1.1(1)) and the load management/renewable credit threshold (Table 406.1.1(3)), even using the available extra load management credits if they use heat pump water heating. AHRI also asserted that it would be impossible for additional building types to meet the thresholds in Appendix CD (the 2030 Glide Path) with minimum efficiency equipment.

Second, AHRI argued that Appendix CG (all-electric commercial buildings) is preempted by EPCA. The 9th Circuit recently held in *California Restaurant Association v. City of Berkeley* that EPCA preemption extends to regulations that address the products themselves, as well as the on-site infrastructure for the use of natural gas. AHRI asserted that Appendix CG is preempted based on this reasoning because by banning natural gas hookups, it effectively bans products that are covered under EPCA.

The Code Council's Board of Directors reviewed the preemption claims and identified a significant risk that Appendix CD (the 2030 Glide Path) and Appendix CG (all-electric commercial buildings) could be found preempted by EPCA. The Board

needs further input from the IECC Commercial committee before it can make a final determination regarding whether Sections C502.3.7.1 and C406.1.1.1 are likely to be preempted with respect to hotels and restaurants.

**Committee Action Requested:**

The Board requests that the IECC Commercial committee take the following actions in accordance with the committee consensus procedures and provide responses to the Board no later than January 30, 2024 to assist the Board in assessing the preemption claims and making any necessary changes to the code if it determines preemption is likely.

1. Please engage the committee in discussion regarding the following questions:
  - a. Provide documentation regarding whether it is possible to comply with Sections C502.3.7.1 and C406.1.1.1 and Appendix CD (the 2030 Glide Path) for all building types using minimum efficiency equipment.
  - b. Clarify whether compliance for the referenced occupancy types/climate zones requires the use of residential equipment. If residential equipment can be used to comply, is it readily available and are there any reasons why residential equipment should not be used, such as equipment listing limitations?
2. If further discussion clarifies that it is not possible for certain building types to comply with the credit thresholds in Sections C502.3.7.1 and C406.1.1.1, recommend changes to the code to make it possible for all building types to comply.
3. Address the assertion that it is not possible for all building types to comply with the 2030 Glide Path thresholds listed in Appendix CD using minimum efficiency equipment. If that assertion is correct, provide feedback on how the Board should alert jurisdictions considering adopting these provisions about the advisability of adding trade-offs to mitigate the risk of preemption.
4. Provide feedback on how the Board should alert jurisdictions considering adopting the provisions within Appendix CG about the risk that an all-electric solution could face a preemption challenge.

Please keep in mind as you direct the committee to provide feedback about how best to alert adopting jurisdictions about potential preemption challenges that the IECC will be revised under continuous maintenance. Any notation included with the relevant provisions regarding the risk of preemption will be subject to change as the legal landscape evolves.

I want to thank you on behalf of the Code Council Board of Directors for your leadership of the IECC Commercial Committee. If you have any questions regarding the above, please contact me through the assigned committee secretariat, Kris Stenger, [kstenger@iccsafe.org](mailto:kstenger@iccsafe.org).

Sincerely,

Stuart Tom  
ICC Board President

Attachments:

AHRI Letters

cc:

Committee Vice Chair

Dominic Sims, ICC CEO

Jordana Rubel, ICC General Counsel

ICC Board of Directors

AHRI



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October 6, 2023

Dominic Sims, CBO  
Chief Executive Officer  
International Code Council  
200 Massachusetts Ave, NW  
Suite 250  
Washington, DC 20001

**Re: Notification of Proposed 2024 International Energy Conservation Code-Commercial (IECC-C) Provisions in Conflict with U.S. Federal Law**

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Dear Mr. Sims:

The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) respectfully submits this letter to notify you and the International Code Council (ICC) Board of Directors of provisions of the draft 2024 International Energy Conservation Code-Commercial (IECC-C) that, if adopted by states, would be preempted by U.S. federal law. The Energy Policy and Conservation Act (EPCA) explicitly prohibits states and localities, from setting minimum efficiency requirements for covered products that conflict with the federal energy conservation standards set by the Department of Energy (DOE), including building codes. AHRI submits this letter, pursuant to ICC's [Council Policy 49-21](#), Section 3.1.1, for two IECC-C Consensus Committee actions that were scheduled for discussion and vote on September 6, 2023 – the disapproval of proposal CE2D-54-23 (Buildings/additions not served by heat pumps) and the disapproval of proposal CE2D-80-23 (Remove Appendix CG).

AHRI respectfully requests that the ICC Board of Directors strike Sections C406.1.1.1, C502.3.7.2, and Appendix CG from 2024 IECC-C. If adopted by state or local jurisdictions, these provisions would be facially preempted, would violate federal law, and would subject the enacting jurisdiction to litigation.



## **International Code Council's (ICC) Bylaws Dictate Adherence to Federal Law**

AHRI appreciates the good work of the ICC in developing and maintaining model statutes and standards. The highest purpose of the ICC is prominently set forth in its [Bylaws](#): “With respect to buildings and structures: (a) the lessening of burdens of government through the development, maintenance and publication of model statutes and standards for the use by federal, state and local governments in connection with the administration of building laws and regulations, and (b) the lessening of the burdens of government through the performance of certain services for the benefit of federal, state, and local governments in connection with the administration of building law and regulation.”<sup>1</sup>

The ICC’s primary beneficiary is clear: government code bodies. The understood intent of developing the model code is to lessen the burden on code development agencies. However, the adoption of legally preempted provisions achieves the opposite effect and undermines the value and purpose of the ICC to government agencies.

Federally preempted provisions are de facto out of scope of the International Energy Conservation Code (IECC) and should be stricken. The user note in Chapter 1 of the 2021 IECC, “Scope and Administration,” specifies that “[t]his code is **intended to be adopted as a legally enforceable document** and it cannot be effective without adequate provisions or administration and enforcement.”<sup>2</sup> However, provisions in Sections C406.1.1.1, C502.3.7.2, and Appendix CG cause IECC-C to fail several of the seven conditions codified in [42 U.S.C. § 6297\(f\)\(3\)](#) that must be satisfied for a state or locality’s building code to escape preemption issues. In addition, Appendix CD has similar preemption concerns and will be affected if the above sections are not removed.

## **EPCA’s Federal Preemption Exception for Building Codes**

In 1975, Congress first adopted the original form of EPCA. EPCA is designed to eliminate “the problem of a growing patchwork of differing state regulations which would increasingly complicate design, production and marketing plans.”<sup>3</sup> As EPCA evolved, in 1987, Congress passed the National Appliance Energy Conservation Act (NAECA). The NAECA contained “two basic provisions.” “[t]he establishment of Federal standards and the preemption of State standards.” “In general, these national standards would preempt all State standards.”<sup>4</sup>

Rather than allowing joint regulation by states and the federal government, Congress has adopted a framework for EPCA in which the federal government sets

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<sup>1</sup> ICC Bylaws Section 1.2 “General Purposes.” Bylaws for the International Code Council, Inc. A Delaware Nonprofit Nonstock Corporation Effective December 10, 2021. <https://www.iccsafe.org/wp-content/uploads/ICC-Bylaws-December-10-2021-Certified.pdf>

<sup>2</sup> 2021 International Energy Conservation Code. International Code Council. (2021).

<sup>3</sup> S. Rep. No. 100-6, at 4 (1987).

<sup>4</sup> S. Rep. No. 100-6, at 2 (1987).

nationwide standards for the national markets for appliances, with only a very limited role for states. In fact, EPCA expressly preempts state regulation of appliance energy use and efficiency, with only narrow exceptions. The statute sets out specific requirements that must be met to qualify for one of these narrow exceptions.

One such narrow exception is for building codes that meet seven specified requirements.<sup>5</sup> Two of these requirements stated below fail the building code exception under EPCA which is the purpose of AHRI's concern in this letter. 42 U.S.C. § 6297(f)(3)(B) states that the code does not require any covered products to exceed federal standards for energy efficiency (unless granted a waiver from the Secretary of Energy). However, as shown in the table below, there are buildings which are unable to meet energy efficiency (Table C406.1.1(1)) available credits and require increased efficiency above EPACT minimums, even with surplus carryover credits (Table C406.1.1(2)) applied.<sup>6</sup>

42 U.S.C. § 6297(f)(3)(C) requires that the credits be awarded for compliance on a "one-for-one equivalent energy use or equivalent cost basis." This issue was discussed in *Buildings Industry Ass'n of Washington v. Washington State*<sup>7</sup> where the court held that EPCA recognized that a perfect 1:1 credit ratio is impossible given the different types of technologies, building types, and climate zones at play, but EPCA requires that credit ratios not be so skewed that they effectively discriminate against certain building materials or building methods. The Washington State code did not fail the preemption test because that code assigned credits that are even-handed and not unfairly weighted. The court found that, "codes must give credit in proportion to energy savings use, without favoring certain options over others."<sup>8</sup>

AHRI has expressed concern regarding federal preemption issues with energy credits for the duration of the 2024 development code cycle. Specifically, these sections fail to satisfy all necessary elements of the building code exception of EPCA (42 U.S.C. § 6297(f)(3)(B) and (C)).

### **Sections C406.1.1.1 and C502.3.7.2 Violates EPCA's Federal Preemption**

The proposed 2024 IECC-C Section C406.1.1.1 explicitly and directly disfavors equipment not using renewable biomass fuels, fossil fuels, or electric resistance.

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<sup>5</sup> 42 U.S.C.A. § 6297(f). (West)

<sup>6</sup> Table C406.1.1(2) was increased in CE2D-51-23. While AHRI was the original proponent, the proposal was modified substantially, and AHRI voted against the final proposal. If the E4C would have reconsidered CE2D-54-23 at the September 23<sup>rd</sup> meeting, the committee would have understood that modifications proposed were ultimately insufficient to escape preemption.

<sup>7</sup> *Buildings Industry Ass'n of Washington v. Washington State*, 683 F.3d 1144, (Cal. 2012).

<sup>8</sup> *Id.* at 1154.

Proposed changes in Public Draft 2<sup>9</sup> added a new Section C406.1.1.1 that will require new buildings using renewable biomass fuels,<sup>10</sup> fossil fuels, or electric resistance for space or service water heating equipment<sup>11</sup> to increase the total energy efficiency credit threshold (Table 406.1.1(1)) by 1.25 for Climates Zones 3-8. It applies parallel requirements in Section C502.3.7.2 for additions and alterations. These provisions disadvantage fossil fuel space and water heating equipment, electric resistance space and water heating equipment, and certain commercial heat pump water heater systems by imposing a “penalty” of requiring more credits be achieved with their use.

Commercial buildings constructed to 2024 IECC must meet both energy efficiency credits threshold in Table 406.1.1(1) and the load management/renewable credit threshold in Table 406.1.1(3). In cases where the energy efficiency credits threshold in Table 406.1.1(1) cannot be met using federal minimum efficiency covered equipment, extra load management credits are permitted to offset the deficit in energy efficiency credits required. The maximum surplus load management/renewable credits that may be used to offset the deficit is specified in Table 406.1.1(2).

Based on analysis by Pacific Northwest National Lab (PNNL), the Table 406.1.1(2) surplus carry over credits were corrected to allow additional offsets to cover the base credit increase in Section C406.1.1.1, but because the heat pump water heating credit (W02) has significant limitations for commercial HPWHs, no commercial HPWHs that comply with Section C406.1.1.1 would earn W02 credits. The W02 credit was created with the intent of moving the market in the direction of HPWHs by giving full credit, with ample points, to systems that could offset 30% of the service water load with HPWHs. Commercial applications are more challenging than consumer applications but are advancing.<sup>12</sup> Systems requiring piping temperature maintenance will need HPWHs to be coupled with an electric resistance storage tank – which would comply with W02 but would still incur the C406.1.1.1 energy credit penalty. Because only one of the two

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<sup>9</sup> Originally introduced in CED1-191-22. The Modeling subcommittee (SC) approved CED1-191 as modified (7-5-2). CECD1-18-22 was discussed at the 3/27/23 Modeling SC approved as modified (3-1-6). CECD1-18 was voted on by the IECC-C Consensus Committee (E4C) on 4/12/23 and approved (22-10-3.) AHRI staff was unable to participate in the 4/12/23 vote due to a conflict.

<sup>10</sup> The Federal government gives grants to install biomass boilers where the US Forest Service deems a need for local better forest management. Several recent examples of USDA grants used for renewable biomass boilers are cited, here: <https://www.rd.usda.gov/newsroom/news-release/usda-invests-critical-infrastructure-lower-costs-create-jobs-and-combat-climate-change-across-rural-0>

<sup>11</sup> There are limited exemptions for electric resistance space heating for buildings but not exceptions for water heating.

<sup>12</sup> In DOE’s [Energy Conservation Standards Final Rule for Commercial Water Heating Equipment](#) (Pre-published 7/18/23), DOE notes that “[it] did not consider commercial integrated heat pump water heaters in this final rule. DOE found only one such model on the market, at a single storage volume and heating capacity. Given the wide range of capacities and stored water volumes in products currently on the market, which are required to meet hot water loads in commercial buildings, it is unclear based on this single model whether heat pump water heater technology would be suitable to meet the range of load demands on the market. Similarly, based on the information currently available and comments regarding the performance of heat pump water heaters as compared to electric resistance water heaters in commercial settings, it is uncertain if split-system heat pump water heaters can serve all the applications currently filled by electric instantaneous water heaters.” (p.53)

standard rating points is referenced, only single-pass split-system commercial HPWH would be able to comply with W02. The complex requirements mean that integrated commercial HPWHs and multi-pass split system HPWHs will not earn W02 credits, but those would be the only commercial system types that would escape C406.1.1.1 energy credit penalties. The conflict between C406.1.1.1 and W02 creates a no-win situation for parties who relying on these provisions. One can earn W02 credits for installing HPWHs, but still be penalized with the C406.1.1.1 energy credit increase, or one can attempt to meet 100% of the service hot water load with commercial HPWHs and get no W02 credits.

Two building types, hotels (R-1) and restaurants (A-2), rely on W02 credits for the *alternate reasonable measure selections without improvements above minimum regulated equipment efficiency*.<sup>13</sup> Removing W02 credits from the preemption package means that these building types cannot comply with the code without improving efficiency of federally regulated equipment, a violation of Federal preemption restrictions. Using the PNNL worksheet, AHRI found that even modified surplus credit carryover Table C406.1.1(2) is insufficient if W02 is not used for R-1 and A-2. The credit deficit, shown in the table below, is substantial. To overcome this deficit, a significant improvement in HVAC performance (H01) and efficient gas water heaters (W03) would be needed.

Table 1: Buildings which relied on W02 to meet PNNL’s “alternate reasonable measure selections without improvements above minimum regulated equipment efficiency package” can no longer meet energy credits with minimum efficiency equipment.

Use group and building	3A	3B	3C	4A	4B	4C	5A	5B	5C	6A	6B	7	8
R-1 Hotel/Motel	23	23	25	25	27	30	20	29	32	6	27	17	23
A-2 Restaurant B	12	22	27	3	25	27	-8	19	29	-21	-4	-13	0

Note: Positive number indicates federal preemption concern.

As noted in CE2D-54, the same federal preemption issues also exist in Section C502.3.7.1 for additions/alterations. AHRI attempted to raise these concerns to the E4C and modeling subcommittee on September 13, 2023, to no avail. Additionally, the E4C and modeling subcommittee were unwilling to reconsider the vote for CE2D-54 when AHRI attempted to bring additional information on this topic.

Lastly, AHRI is concerned that Appendix CD (2030 Glide Path) may also suffer from similar preemption issues. The energy efficiency credit table in this appendix requires an increase of nearly two times the number of efficiency credits required in C406.1.1(1). Unlike the corrections made to Table 406.1.1(2), the stand-alone Surplus Carryover Renewable/Load Management table in Appendix CD was not adjusted to offset the 1.25x credit increase. When Appendix CD is overlaid with the requirements of Section C406.1.1.1, including the commercial HPWH conflict, nearly 75% of all building types in climate zones cannot meet the threshold with minimum efficiency equipment. Thus, attempting to meet the efficiency credit will require higher efficiency equipment potentially violating EPCA’s federal preemption provision.

<sup>13</sup> Refer to CED1-190-22 Reason Statement where proponents from PNNL based packages “on a reasonable or advanced approach, what are the selected measures for each building type, *excluding measures that require increased efficiency above EPACT minimums.*”

Striking Sections C406.1.1.1 and C502.3.2.7, including all references to these sections would resolve the issue for Appendix CD. If Sections C406.1.1.1 are deleted, Table 406.1.1(2) can revert to the lower credit offset levels, shown prior to CE2D-51-23. AHRI recommends the ICC Board of Directors strike Sections C406.1.1.1 and C502.3.7.2 per CE2D-54-23.

## **Appendix CG (All-electric Commercial Buildings) Violates EPCA’s Federal Preemption**

As proposed in 2024 IECC-C, Appendix CG (all-electric commercial buildings), an optional pathway for jurisdictions to adopt, will prevent installation of EPCA covered appliances from using natural gas as an energy source in commercial buildings.

The Ninth Circuit Court of Appeals recently decided in *California Restaurant Association v. City of Berkeley*,<sup>14</sup> that the EPCA expressly preempts the City of Berkeley’s 2019 ordinance banning the installation of natural gas piping in newly constructed buildings. EPCA’s preemption provision provides that after a federal energy conservation standard becomes effective for a “covered product,” “no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product.”<sup>15</sup> The Ninth Circuit concluded that Berkeley’s ordinance was a “regulation concerning the ... energy use” of a covered product because the plain text and structure of EPCA’s preemption provision “encompasses building codes that regulate natural gas use by covered products,” including eliminating the use of natural gas. “EPCA preemption extends to regulations that address the products themselves and the on-site infrastructure for their use of natural gas.”<sup>16</sup>

As AHRI has raised with the Committee multiple times, most recently in CE2D-80-23, banning covered products by banning natural gas hook-ups is preempted by EPCA. We asked the Committee to review this Appendix considering the *Berkeley* decision. However, Appendix CG is proposed in the 2024 IECC code. Therefore, AHRI recommends the ICC Board of Directors consider the potential liability it will pass on to adopting government agencies and strike Appendix CG from the 2024 IECC code.

## **Summary**

These codes, as written, impermissibly regulate energy use, which is an area that Congress directed the U.S. Department of Energy to regulate for covered products unless exempted through the building code exception. However, as discussed in the

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<sup>14</sup> *California Restaurant Association v. City of Berkeley*, 65 F.4th 1045 (9<sup>th</sup> Cir. 2023).

<sup>15</sup> *Id.* at 1050.

<sup>16</sup> *Id.* at 1052.

letter, the proposed 2024 IECC-C failed the test under the building code exception in EPCA.

AHRI respectfully requests that the Board of Directors strike Sections C406.1.1.1, C502.3.7.2, and Appendix CG from 2024 IECC-C because the adoption of facially preempted energy conservation requirements violates the ICC's purpose, scope, bylaws, and procedures.

Sincerely,

A handwritten signature in black ink, appearing to read 'LPG', with a long horizontal flourish extending to the right.

Laura Petrillo-Groh  
Senior Director of Regulatory Affairs