

DOE CONSIDERS MARKET-BASED APPROACH TO ENERGY EFFICIENCY

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The U.S. Department of Energy (DOE) is considering an initiative that could be a seismic shift in its energy efficiency program – a change to a market-based approach. Industry has an opportunity to weigh in on this important effort.

DOE Request for Information on Market-based Approach

For decades federal law has mandated the imposition of energy efficiency standards on both consumer products and industrial equipment. DOE has announced that it is evaluating whether some form of market-based approach to the energy efficiency could or should be used for the efficiency standards program. It intends to issue a request for information (RFI) inviting interested parties to submit their views on a market-based approach. DOE's says that it is considering averaging, trading, fee-base or other type of market-based policy mechanism. 82 Fed. Reg. 40270, 40271.

Market-based Approach Reflects Change in Administrations

That a market-based approach is now being considered is not surprising in light of the change in Administrations. Certainly, such an approach would be a major break with the energy efficiency program's longstanding principles. For many years, as required by the Energy Policy and Conservation Act (EPCA), DOE has issued the strictest mandatory efficiency standards that are technologically feasible and economically justified. After multiple rounds of rulemakings and the prospect of more to come, many feel a fresh look is warranted.

Market-based Approaches to Energy Efficiency Currently Exist

There are already some market-based approaches to energy efficiency, which might be drawn on for inspiration.

Energy Star. The voluntary Energy Star program is a joint initiative of DOE and the Environmental Protection Agency (EPA) in existence since 1992. Manufacturers enter into agreements with the program to allow high-efficiency products to be listed as Energy Star-qualified and to use the Energy Star logo. This is a valuable marketing tool. Periodically, the program ratchets up the qualifying levels. It has spurred companies to achieve progressively higher efficiency levels so that they can continue to claim Energy Star qualification – often a must in the marketplace. Ironically, the new Administration has also indicated it could terminate the Energy Star program.

Trade association programs. There are numerous voluntary third-party energy efficiency testing and certification programs run by industry trade associations. These have been driven substantially by industry's desire to assure that competitors are on a level playing

field in making representations of energy efficiency in the marketplace.

Examples are programs for central air-conditioning and heating products managed by the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) and for refrigerators and freezers, room air conditioners, room air cleaners, and dehumidifiers managed by the Association of Home Appliance Manufacturers (AHAM).

Voluntary agreements. There have also been a variety of voluntary agreements between industry and energy efficiency advocacy groups to achieve agreed-upon efficiency objectives. Industry has argued that such agreements can result in more rapid innovation and timely introduction of new features in the marketplace than would be the case under lengthy periodic DOE rulemaking procedures. (The prospect of regulation may have spurred some such agreements.)

Examples are voluntary agreements for ongoing improvements in the energy efficiency of set-top boxes and small network equipment.

Industry Responses to RFI Need to Be Carefully Thought Through

Industry members need to consider carefully the ramifications of their recommendations to DOE in comments pursuant to the forthcoming RFI.

Assuring federal preemption of state requirements should be high on the list of industry considerations. In the mid-1980s DOE was doing little to impose energy efficiency standards. With this lack of federal action, individual states began to fill the void with their own regulations, creating uncertainty and complicating industry's long-term planning. As a result, legislative amendments in 1987 filled the regulatory vacuum and (with narrow exceptions, e.g., state procurement and some building code requirements) provided strong federal preemption of state energy efficiency requirements for "covered products." Products that are not "covered" are at substantially greater risk of state regulation. And states eager to regulate could be on the lookout for grounds to argue that covered products subject to market-based approaches are somehow vulnerable to state regulation. Industry should assure that a market-based approach at DOE would not leave the door open for a new proliferation of state requirements, stemming from a claim that the new approach left a regulatory vacuum that states could fill.

Another consideration is the interrelationship of a market-based approach and provisions of EPCA. Much may turn on the details of the particular measures being considered and also the products involved. For example, EPCA provides some distinction between products it defines as "covered products" and other products that DOE itself defines as covered products ("other covered products"). See 42 U.S.C. § 6295(l)(1)(D) (DOE required to determine whether labeling alone, rather than a mandatory standard, would be sufficient for "other covered products").

In any event, the market-based approach being considered by DOE could have a significant impact on industry. Industry should make its views known in these important deliberations.

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