



COMPETITIVE ENTERPRISE INSTITUTE

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE REGARDING THE DEPARTMENT OF ENERGY'S FISCAL YEAR 2004 PRIORITIES FOR THE APPLIANCE STANDARDS RULEMAKING PROCESS

August 14, 2003

U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585-0121
Attn: Brian Card, EE-2J.

I. INTRODUCTION

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization committed to advancing the principles of free markets and limited government. CEI has a longstanding interest in bringing to light the potentially deleterious consequences of regulations, which are often neglected by federal agencies in their attempts to adopt a regulatory agenda. CEI has previously participated in appliance conservation standards rulemakings, with a particular emphasis on ensuring that the interests of consumers are represented.

Since its enactment in 1987, the National Appliance Energy Conservation Act (NAECA) has been aggressively implemented by DOE. By now, most major energy-using home appliances have been subjected to multiple rounds of successively tighter standards. Furthermore, given the wave of stringent new standards promulgated in the

final months of the Clinton administration and scheduled to be implemented in the coming years, this fast regulatory pace will continue for some time.

The goal of providing technologically feasible and economically justified energy conservation standards for major energy-using home appliances has largely been accomplished, if not exceeded. The fact that there is relatively little left to do is reflected in DOE's proposed 2004 priorities, which shift the emphasis away from home appliances and towards commercial appliances, which have not yet been as heavily regulated. Nonetheless, DOE's proposal does place a few residential appliance standards in the high priority category, including ceiling fans, torchieres, furnaces and boilers, as well as certain niche air conditioners and heat pumps not covered under the 2002 rule.

As the comments below elucidate, CEI believes that additional residential appliance standards are likely to be adverse to the interests of American consumers, and that any further rulemakings should be undertaken with great caution.

II. DOE Must Fully Consider NAECA's Consumer Protections In Future Rulemakings

NAECA contains a number of provisions designed to protect consumers from detrimental energy conservation standards. Under the statute, the weight given these consumer protections is left to the discretion of DOE. Unfortunately, this discretion has occasionally been abused, leading to a number of problematic rulemakings at odds with the pro-consumer thrust of NAECA.

The most direct adverse impact of any new federal appliance standard is on the purchase price, and DOE is required to take potential first cost increases into account.¹ However, NAECA contains no bright-line rule under which such a price increase

¹ 42 U.S.C. § 6295(o)(2)(B)(i)(II).

precludes imposition of a new standard. For example, DOE's analysis of the new clothes washer rule estimated that the 2007 standard would increase the initial cost by \$249, an astonishing 59 percent jump.² Despite this unprecedented consumer burden, the agency went ahead with the final rule in January of 2001.

Similarly, the agency is required to calculate the life cycle cost in order to determine whether or not the higher initial cost of an appliance meeting a new standard is earned back over time in the form of energy savings.³ Once again, there are no numerical limits beyond which a standard cannot be promulgated. In the case of the new central air conditioner rule, DOE's analysis found that more consumers will suffer net life cycle costs than benefits if the standard is raised to SEER 13.⁴ Despite such clear evidence of widespread consumer harm, the Clinton DOE promulgated this standard in January of 2001.⁵ Fortunately, DOE subsequently reconsidered this rule and set the standard at a more consumer-friendly SEER 12.⁶

In addition to cost concerns, NAECA contains two provisions protecting consumers from conservation standards that diminish product choice, features, and performance.⁷ However, the agency has at times given insufficient weight to these provisions. For example, well-documented concerns about potential adverse impacts of

² 66 Fed. Reg. 3,314, 3,315 (January 12, 2001).

³ 42 U.S.C. § 6295(o)(2)(B)(i)(II).

⁴ 66 Fed. Reg. 7,170, 7,188 (January 22, 2001).

⁵ *Id.*

⁶ 67 Fed. Reg. 36,368 (May 23, 2002).

⁷ 42 U.S.C. § 6295(o)(2)(B)(i)(IV); 42 U.S.C. § 6295(o)(4).

the new clothes washer and water heater standards were essentially ignored by the agency.⁸

NAECA also requires DOE to consider any increase in maintenance and repair costs resulting from a new standard.⁹ Strict energy conservation standards frequently reduce product reliability, raising such ongoing costs (or raising warranty costs) for consumers.¹⁰ In the case of the clothes washer rule, initial reports had already emerged that some compliant models were less reliable than their non-compliant counterparts.¹¹ Nonetheless, DOE simply ignored such concerns, claiming a lack of clear evidence.¹²

Given this recent history, CEI is concerned that additional standards harmful to consumers may be implemented. If past is prologue, NAECA's consumer protections will not receive adequate consideration during the standards-setting process, and the impact on product cost, features, performance, and reliability will again be downplayed or ignored by DOE.

CEI urges DOE to fully and fairly incorporate NAECA's consumer protections into all future energy conservation standards rulemakings, and to decline to promulgate any standards not in the best interests of consumers.

⁸ Competitive Enterprise Institute, *Petition for Reconsideration of the Energy Conservation Standard for Clothes Washers*, March 13, 2001; Gas Appliance Manufacturers Association, *Petition for Reconsideration of the Energy Conservation Standard for Water Heaters*, February 15, 2001.

⁹ 42 U.S.C. § 6295(o)(2)(B)(i)(II); 42 U.S.C. §6295(o)(4).

¹⁰ *See Consumer Reports*, "Spin City: Ratings of Washing Machines and Clothes Dryers," July 1999, pp. 30-33; *Consumer Reports*, "Way Cool: A Guide to Buying Air Conditioning," June 1998, p. 37 (Mid-efficiency models ... may be the least expensive to own overall because they're cheaper to buy and less likely to need repair.").

¹¹ *Consumer Reports*, "Product Updates," January 2001, p. 46 ("Maytag front loaders [which meet the new standard] were among the less reliable brands and less reliable than Maytag top-loaders [which do not meet the new standard]."); *Consumer Reports*, "Sears Recalls Some Calypso Washers" March 2001, p. 55.

¹² *See* 65 Fed. Reg. 59,562.

III. The Success Of Non-Regulatory Approaches Reduces The Need For Additional Standards

One of the main justifications for federal energy conservation standards was the assumption that they would be necessary to force manufacturers to make products with improved energy efficiency. Whether or not this assumption was true in 1987 when NAECA was enacted, it certainly is not true today.

Manufacturers have gone beyond the minimum statutory and regulatory requirements for nearly all energy-using products. Indeed, for almost every category of regulated appliance, there are several models that use significantly less energy than that allowed by federal standards. In addition, makers of as-yet-unregulated appliances, such as ceiling fans and torchieres, offer models that use less energy than the industry average. Over time, manufacturers have continually improved upon energy efficiency, with or without federal standards.¹³ Further, the Energy Star program, as well as non-governmental sources of information such as *Consumer Reports*, help consumers to easily identify energy-efficient models.

Thus, appliances exceeding existing standards (or in the case of unregulated appliances, models exceeding the industry average) are readily available for consumers who want them. Some consumers choose these models, believing the energy savings make up for the higher price (or other potential drawbacks), while others do not. Under

¹³ Manufacturers have also set their own efficiency standards, particularly for commercial appliances. Many of these appliances are now under consideration by DOE despite being covered by recent ASHRAE standards. The industry standards represent a substantial reduction in energy consumption as compared to models currently in use. DOE should proceed with its own commercial appliance standards only if it can demonstrate inadequacies with ASHRAE's standards.

such circumstances, new standards are unwarranted because they do not improve product choice, but merely restrict it.

Federal agencies are required to consider non-regulatory alternatives to major rules.¹⁴ Furthermore, DOE has promised to consider non-regulatory approaches, especially in cases where strict new energy conservation standards may work to the detriment of some consumers.¹⁵ However, the agency has not set out reasonable parameters under which it would decline to set a new standard based on the success of such approaches. Instead, DOE has dismissed non-regulatory alternatives with little more than projections showing they won't save as much energy as a standard - not surprising, given that no voluntary approach will achieve 100 percent market share as with a standard.¹⁶ This is far too high a metric by which to judge non-regulatory approaches.

In recent rulemakings, DOE has noted the availability of models that already meet the proposed standard.¹⁷ The agency has used this fact to underscore the technological feasibility of the standard. But there is another side to the availability of such appliances - it is strong evidence that a standard is unnecessary to serve the interests of consumers, and may actually be counterproductive.

NAECA was not designed to reduce product choice, nor to force upon consumers ultra-efficient appliances they do not want. The benefits of non-regulatory approaches, and the market availability of efficient appliances in the absence of a standard, should be given more weight in future rulemakings.

¹⁴ Executive Order 12866, 58 Fed. Reg. 51,735 (October 4, 1993).

¹⁵ 10 CFR, Part 430, Subpart C, Appendix A, § 12 (Interpretive Rule).

¹⁶ See 65 Fed. Reg. 59,550, 59,582-3 (October 5, 2000).

¹⁷ See 65 Fed. Reg. 59,551.

IV. The Risks Of Setting Standards For Relatively New Technologies Must Be Taken Into Consideration

Among past lists of potential new targets for regulation were desktop personal computers and peripheral devices. However, these appliances differ from those currently regulated by DOE in that they are still relatively new to the market. Personal computing is likely to continue undergoing substantial technological advances in the years ahead, and the resultant changes in energy use requirements cannot be determined in advance. Indeed, the very definition of what constitutes a desktop computer is becoming hazier with the development and introduction of new products and applications. Energy conservation standards imposed at this time and based on present knowledge could pose unforeseen problems, perhaps jeopardizing the path of further innovation. For this reason, DOE is correct to delete such appliances from its 2004 prioritization.

By way of contrast, the primary focus of NAECA thus far has been on much older products, such as refrigerators, air conditioners, water heaters, and clothes washers. Most of these appliances had been on the market for several decades before becoming the subject of regulations. This afforded manufacturers a long period for product development – adding new features, improving performance and reliability, reducing costs – before they had to deal with energy conservation standards.

The decision not to initially regulate energy use for these products was not a conscious one by DOE – the agency and NAECA simply did not exist when most home appliances were introduced in the early and middle parts of the 20th century. Nonetheless, consumers greatly benefited from an extended period during which these products were allowed to mature, free from the constraints of conservation standards.

For these reasons, we concur with DOE's decision to delete from its 2004 priorities standards for personal computers and peripherals as well as other high tech electronic devices.

V. DOE Is Statutorily Precluded From Promulgating Any Standard That Does Not Save A Significant Amount Of Energy

Some of the new standards under discussion are for appliances that are relatively minor energy users, thus the potential energy savings are quite small. NAECA contains several provisions that serve to preclude the agency from setting appliance conservation standards that fail to save a substantial amount of energy.

The first of these provisions is the requirement that all energy conservation standards be "economically justified."¹⁸ This requirement involves a balancing of the benefits to consumers, largely in the form of energy savings from a standard, against the costs, largely in the form of a higher purchase price and/or any adverse impacts on product choice, features, performance, and reliability.

Here, it appears that the statutory scheme is reaching the limits of economic justification. Several previously enacted standards were estimated to save consumers between \$20 to \$50 per year. For example, the most recent standard in effect for refrigerators is estimated by DOE to save consumers \$20 per year, and the clothes washer standard scheduled to take effect in 2007 is predicted to save \$48 per year.¹⁹ In contrast, rather than save \$20 to \$50 per year, a typical residential ceiling fan or torchiere may not even *use* that much energy, thus the potential savings from new standards are far less. With such small consumer benefits, virtually any non-trivial impact on product

¹⁸ 42 U.S.C. § 6295(o)(2)(a).

¹⁹ DOE Press Release, "Fridge for the 21st Century Saves Money, Fights Pollution," April 23, 1997; 66 Federal Register 3,314, 3,315 (January 12, 2001).

affordability or quality would make a standard economically unjustified.²⁰ Clearly, economic justification should become more of a hurdle if DOE pursues regulations for appliances that use relatively little energy in the first place.

In addition to economic justification, NAECA contains a separate provision that precludes DOE from setting a standard that “will not result in significant conservation of energy....”²¹ In past rulemakings, this provision was interpreted so as to be almost meaningless, to the point where virtually any non-zero estimate of energy savings was deemed “significant.” However, the provision should be given a more rational interpretation and applied as such. If this is done, it may well preclude some proposed standards from being promulgated.

The third relevant provision is the requirement that newly classified covered products use more than 100 kilowatt-hours per year for an average household.²² In other words, DOE’s regulatory authority extends only to those appliances specifically listed in the law, plus any others found to meet the 100 kilowatt-hour per year minimum.

Clearly, NAECA contains a redundancy of provisions designed to protect consumers from energy conservation standards likely to be more trouble than they are worth. DOE must give full consideration to these provisions as it contemplates promulgating new standards for minor energy using appliances.

²⁰ In addition, given that ceiling fans can reduce overall energy use by lowering the reliance on air-conditioning (i.e. the improved air circulation creates acceptable comfort levels at a somewhat higher thermostat setting, and in some cases completely eliminates the need for air-conditioning), any standard that raises the price or in any other way reduces the desirability of ceiling fans is likely to be counterproductive.

²¹ 42 U.S.C. § 6295(o)(3)(B).

²² 42 U.S.C. § 6292(b)(1)(B).

VI. CONCLUSION

As DOE continues to implement NAECA, the agency should strive to create a policy that best serves the interests of the appliance-using public. Simply promulgating additional standards should not become a goal in itself. Recent rulemakings have demonstrated that appliance standards can harm consumers, particularly when NAECA's consumer protections are not given full force. The success of non-regulatory approaches further obviates the necessity of additional rules. Standards for personal computers or any other high tech appliances are particularly troublesome and should be avoided. Standards that save little energy are not allowed under existing law. Overall, a far more cautious approach is warranted as DOE sets priorities for residential appliances in the coming year.

Ben Lieberman
Senior Policy Analyst
Competitive Enterprise Institute
1001 Connecticut Ave. NW, Suite 1250
Washington, DC 20036
(202) 331-1010