

Department of Energy Notice of Determination Green Building Certification System

Under the Energy Independence and Security Act of 2007 (EISA) (§433 and §436), the US Department of Energy (DoE), upon recommendation from the US General Services Administration (GSA) in consultation with the US Department of Defense, and upon consideration of other statutory criteria is directed to identify a certification system and level for green buildings that encourages a comprehensive and environmentally sound approach to certification of green buildings. This applies to federal buildings that are new or undergoing major renovations.

Viewpoint: North American Coalition on Green Building (NACGB) supports efforts to promote green building performance. Green building suppliers in the NACGB recognizes the benefit of having multiple green building certification programs (labels) available in the marketplace, *i.e.*, Green Globes, Leadership in Energy and Environmental Design (LEED), and others that:

- a. promote performance-based goals for materials (as opposed to prescriptive) and benchmarks for the building components and for the whole building;
- b. foster innovation within the building and construction sector; and
- c. Include materials performance during the important use phase in the life cycle aspect of buildings, which is known to be the most critical component affecting the building's environmental footprint, but is ignored in some existing green building certification programs.

However, we have serious concerns about DoE's plans to select a single certification system.

NACGB asks that OMB encourage DoE to recognize multiple private sector green building certification systems in the NOD.

Key Issues: In the Notice of Determination (NOD), we understand the Department of Energy plans to name a single system, US Green Building Council (USGBC), as the government's green building certification along with its label, *i.e.*, LEED silver. This raises significant consequences that should be carefully reviewed prior to finalization and publication of the NOD. When the government throws its immense weight behind certain programs (over others equally good), we urge careful considerations of a few points.

1. ***Choosing one certification system can limit competition and slow progress toward green building goals.***

Once the government picks a single green building certification label, *i.e.*, LEED silver, we expect unintended consequences of depressing the vibrant competition within the relatively new field of green buildings.

- Competition among the green building certification systems, particularly between LEED and Green Globes, has already served as an engine for stimulating improvements in energy efficiency. The competition between LEED and Green Globes has resulted in significant improvements to both systems, with USGBC frequently making changes to LEED to catch up to Green Globes.
- History has shown that free markets play an important role in catalyzing competition and in creating cost-efficient standards. Lack of competing certification systems can slow or stifle innovation and undermine movement toward America's desired energy efficiency goals.
- Governmental endorsement of a single certification system (USGBC) and a single label (LEED-silver) can create unique, market biased preferences for this system over other systems, which can lead to an artificially created cost and/or market power advantage. For example, to our knowledge, later this year the Green Building Initiatives (GBI) Green Globes certification system will be the only one to have completed the rigorous ANSI

consensus process. It should not be foreclosed out of the governmental market. Green Globes certification is much less expensive than LEED certification. The added expense of LEED certification can discourage federal agencies from pursuing certification. Moreover, the National Technology and Transfer and Advancement Act and OMB Circular A-119 generally require federal agencies to use consensus-based standards. None of the existing LEED products have been developed through an ANSI-accredited process.

- Government endorsement of a single certification system can cause designers, architects, builders, and others in the building and construction market to favor (directly or indirectly) certain suppliers and certain building and construction products over others. It is possible that the market will respond to the issuance of the NOD recognizing LEED as the *only* governmental-authorized green building certification system.
- Federal agencies are recognizing the benefits of both systems. While LEED was the only recognized system available for a number of years and had the early support of federal agencies, many agencies have begun to recognize Green Globes as well. The Departments of the Interior and Health and Human Services have stated they will use Green Globes along with LEED to meet their obligations under Executive Order 13423. In addition, EPA recognizes Green Globes along with LEED in the *Federal Green Construction Guide for Specifiers*. In addition, both the Department of Veterans Affairs and GSA have registered a number of buildings with the Green Globes system.

There are significant disadvantages for selecting a single federal contractor for green building certification, including less innovation, less third party verification, less variation within the market, slower momentum in advancing green building goals. Because of the rapid evolution of these systems, NACGB asks that this competitive environment continues and that the NOD recognize other options.

2. The government should specifically address how changes/updates to its certification system will be reviewed / addressed during the lifetime of the NOD.

- Periodically, all building certification systems are updated. Given that the NOD establishes a governmental preference for USGBC as a single certification system, it seems reasonable that the government would want to review any subsequent updates to its LEED rating systems prior to extending the NOD to them.
- This government review is particularly relevant because market preferences in services and products in both the public and private sector can be driven from changes to rating systems, especially those that are made without notice and comment opportunity in an ANSI-like consensus process.

The NACGB asks that prior to extending the NOD to any updates/modifications to existing LEED rating systems covered by the NOD, the government should retain all rights to review any update/modifications and should require that these go through a consensus process such as ANSI. DoE should then publish a modification to the NOD for public comment. The government should not apply this NOD to any new LEED rating system.

3. Under EISA, Federal agencies cannot be required to apply a certification system(s) unless it is adopted by rule as a "sustainable design principle."

- There is nothing in EISA –by implication or otherwise--which requires federal agencies to use the certification system "identified" by DOE. Section 305(a)(3)(D)(v) permits agencies to use an INTERNAL certification process in lieu of the one identified, only after DOE allows such use through rule.
- While an internal certification process is not defined, it is clear that certification systems developed by outside parties are not "internal" certification processes and are not subject to this requirement. Thus, Congress knew how to constrain agencies' use of

non-identified rating systems when it wanted to—and it did not do so for certification systems developed by outside parties.

- While DOE arguably may "identify" a certification system without rulemaking, it cannot require agencies to apply it to covered buildings unless it is adopted by rule as a "sustainable design principle."
- EISA §305(a)(3)(D) requires that Federal building energy efficiency standards be established by rule.
- Under §305(a)(3)(D), those standards include "sustainable design principles" which "shall be applied to the siting, design, and construction of such buildings." In that same subsection, DOE is required to identify a "certification system and level for green buildings" within 90 days of EISA's enactment (3/18/08).

At the very least, before an "identified" certification system can become a requirement that Agencies must apply to covered federal buildings, it must be included as part of the "sustainable design principles" which, as an element of the Federal building energy efficiency standards, clearly must be adopted by rule.

- Indeed, DOE in its draft notice says that it is developing these sustainable design principles by rule.

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