Energy Efficiency

• Obama to Issue Executive Orders on Retrofits While Backing Climate Change Legislation

By Richard Cowden

Federal policy observers say 2013 could be the year when lawmakers and President Obama come together on pragmatic energy efficiency programs, but even if they become deadlocked the administration plans executive orders and other initiatives to advance climate change goals. Many of the legislative and administrative proposals deal with ways to cut energy consumption by commercial and government buildings by setting new government facilities standards, by reaching an accord on tax incentives to encourage retrofits of existing structures, or both. According to real estate industry and environmental policy experts, a new emphasis on promoting such goals is one area where bipartisanship could prevail, leading to a breakthrough on proposals that so far have taken a back seat to conflicting political agendas.

By all accounts office buildings and other commercial structures, which account for about 35 percent of all U.S. energy consumption, represent a potential gusher of cost savings and greenhouse gas reductions. In his second inaugural address, Obama signaled his intent to push harder over the coming four years on global warming policy matters. Based on his success in advancing his immigration policy agenda through an executive order that will ease deportations of undocumented college students, the president may adopt a similar strategy in moving environmental policies.

Michael Zimmer, senior counsel with Thompson Hine LLP and an adviser to the U.S. Green Building Council, told BNA Jan. 25, "We are likely to see in these areas of focus in the next four years a marked shift to use of executive orders and the regulatory processes of agencies and departments to advance [energy efficiency]."

Zimmer said over its first four years, the Obama administration's Department of Energy (DOE) conducted a good deal of research on green building techniques. Further, the Department of Defense (DOD) has engaged in reviews of sustainability characteristics of military facilities. Part of DOD's motivation has been simply to produce improved economies at a time of constrained budgets.

EPA Research on Sustainability

Also, the Environmental Protection Agency (EPA) commissioned a 2011 analysis by the National Research Council of the National Academy of Sciences that offered recommendations on promoting sustainability. Zimmer said that report “goes far beyond what the agency has done in the past in managing the risks that are created by pollutants.” In a related matter, the president issued an executive order during his first term to incorporate sustainability principles in the planning, execution, and procurement operations of federal agencies. That has led to the beginnings of a policy to incorporate a life cycle analysis and environmental considerations into federal procurement programs, according to Zimmer. That will have downstream effects on purchases, including buildings, by the General Services Administration (GSA) and the Defense Logistics Supply Agency.

Zimmer noted that the federal government purchases 25 percent of all products, including structures, in the United States and if sustainability principles are built into all of these goods, it would create a "demand pull" that would affect the decisions of private-sector suppliers. He added that if the same principles were woven into state and local procurement policies, they would affect 40 percent of all U.S. goods.

Bracken Hendricks, senior fellow at the Center for American Progress (CAP), generally agreed with Zimmer's view of the administration's energy strategy. "The administration is very committed to energy efficiency and to deploying clean tech, clean energy solutions, building retrofits, and trying to enable private institutions to more effectively finance retrofits," Hendricks said, adding, "The impulse has been to look at non-legislative opportunities and I think there will be a big effort to mine what can be done outside the legislative arena."

Better Buildings Initiative

Among priority energy conservation programs is the Better Buildings Initiative (BBI), which the Obama administration kicked off in 2011. Its goal is to improve commercial and industrial building energy efficiency by 20 percent by 2020. The administration has engaged 110 businesses and organizations in the BBI challenge program.
Part of the BBI involves a federal commitment to support Energy-Saving Performance Contracts (ESPCs); under this program energy service companies receive federal contracts to retrofit federal buildings to improve energy efficiency. The policy was authorized by the Energy Policy Act of 1992 and has resulted in significant energy cost savings for federal agencies.

Hendricks said President George W. Bush expanded the program during his tenure and Obama has accelerated it even further. “The Obama administration put a specific number on it and put a directive out there for $2 billion for retrofits on public buildings,” he said.

Another federal initiative mandates that 5 percent of all energy used by federal agencies come from renewable sources. That level rises to 7.5 percent this year. Hendricks said CAP has recommended increasing that level substantially to 35 percent by 2035.

Smart Grids

Like Zimmer, Hendricks said the federal government can play an important leadership role in encouraging development of “smart grids” that help distribute energy more efficiently. “You will definitely see the executive branch leading smart grid and micro grid and grid security,” he said.

“I think you will see the executive branch doubling down on some of these existing mechanisms through executive orders that they have out there for zero-net buildings in defense plants,” Hendricks said. “Zero-net” refers to buildings that on an annual basis consume no net levels of energy and produce zero carbon emissions.

Innovations in Finance

Another potentially significant advance in financing energy-efficient buildings could come in the form of an Internal Revenue Service (IRS) decision to broaden the definition of real estate investment trusts (REITs) to permit them to purchase not only portfolios of buildings but to classify building retrofits in a way that brings them under the definition of a REIT. Until now REITs have had difficulty in this regard because “it is hard for them to hold portfolios of retrofits because those seem to be mechanical improvements rather than physical capital improvements,” Hendricks said, adding that by executive action, the administration could certify that REITs cover building retrofits and even renewable energy projects (5 REAL 855, 11/27/12).

Federal Energy Legislation

Despite the administration’s increasingly deliberate administrative initiatives, it also plans to pursue energy and environmental policies on a second, legislative track. The broad set of policies that fall under the “climate change” rubric have become controversial, but lawmakers have been able to agree on specific, limited proposals even during the politically heated 112th Congress, and prospects for some other legislative items could win approval, depending on how the House and Senate agendas shape up later this year.

One example is the American Energy Manufacturing Technical Corrections Act (H.R. 6582), which was enacted late in 2012. It was formulated to enable innovative and alternative technologies “that meet or exceed desired energy efficiency goals.” Zimmer said the legislation combined features of several earlier proposals into an amalgam of clean energy provisions, including equipment technology standards, research and development measures, and best practices.

Although the legislation itself was limited in scope, Zimmer said it was notable in that it “shows bipartisan support for the efficiency issue, at least legislatively.” It also demonstrates that energy management is a high priority for commercial and industrial sectors.

Finally, broad-based backing of the legislation provides “further support to the private sector momentum for sustainability that is building as a pure corporate matter,” Zimmer said.

Although tax legislation may be the primary vehicle for prospective incentives to stimulate commercial real estate energy efficiency programs, the budget process itself also may present some opportunities. “That’s going to be an action forum to provide funding for research, government technology development, or programmatic activity to support a wide variety of things, whether that is energy audits in manufacturing companies or loans or access to capital on a smarter basis.

“During the next Congress, there will be opportunities, not for comprehensive climate legislation necessarily, but for narrow sectors where there can be bipartisan agreement, on grid security, on certain pieces of renewable energy finance, and certainly on energy efficiency in building retrofits. I think all three of those are where you could have bipartisan legislation,” Hendricks said.
Some possible legislative steps could facilitate formation of master limited partnerships (MLPs), which generally are used for financing pipelines and power grids, to attract more private investors into renewable energy projects, Hendricks said.

Even at a time when the major political parties find little common ground on most tax and budget issues, one of the best opportunities to encourage private investment in energy efficiency retrofits of commercial buildings could be in a “retrofit” of sorts of legislation introduced in the 112th Congress. The Energy Savings and Industrial Competitiveness Act (ESIC Act) (S. 1000) was introduced by Sen. Jeanne Shaheen (D-N.H.) and co-sponsored by Sen. Rob Portman (R-Ohio). It won bipartisan backing and cleared the Senate Energy and Natural Resources Committee by an 18-3 vote in July 2011. However, it was not incorporated into tax legislation that passed late in 2012. The proposal was crafted to serve as a companion bill to the Smart Energy Act (H.R. 4017).

A spokesman for Shaheen told BNA Feb. 1 the senator, along with Portman, plan to reintroduce the bill sometime during the first quarter of this year.

The Real Estate Roundtable was part of a wide range of business and environmental groups that generally supported the bill, but in discussions with other bill supporters last year industry groups won an agreement to drop a feature that would have created a federal energy code “backstop” that would be administered by DOE.

“The ESIC Act improves the process and standards by which DOE may offer building efficiency targets, as part of the IECC [International Energy Conservation Code] and ASHRAE [American Society of Heating, Refrigerating and Air-Conditioning Engineers] codes processes … “ the Roundtable said in a statement.

S. 1000 and H.R. 4017 also would provide loan guarantees to help finance existing building energy efficiency retrofits.

Changes to Section 179D

Another proposal that has attracted broad, bipartisan interest would amend an existing tax benefit for building retrofits. The Section 179D incentive has gone virtually unused because it set inappropriate qualification thresholds. In September 2012 Sens. Olympia Snowe (R-Maine), Jeff Bingaman (D-N.M.), Dianne Feinstein (D-Calif.), and Benjamin Cardin (D-Md.) introduced the Commercial Buildings Modernization Act (S. 3591), which is designed to offer more realistic criteria to qualify for Section 179D benefits.

The Roundtable said the new proposal would “incentivize actual, verifiable, and quantifiable reductions in energy consumption; offer a ‘sliding scale’ of incentives; allow its use by real estate investment trusts, limited liability partnerships and other corporate structures that cannot currently use the deduction; and reflect the unique challenges faced by regional retail malls in improving whole-building energy consumption.”

Hendricks said a reworking of the Section 179D incentives could become a breakthrough in adopting a widely supported retrofit policy. “It had a big head of steam in the last Congress and it got caught up in the general acrimony that was out there, but I think the Obama administration would look hard at [Section 179D],” Hendricks said.

“The only things that are really going to move efficiently and consistently are going to be tax and budget policy, and budget policy is not going to include a lot of new spending,” Hendricks said.

Hendricks said the Obama administration would be likely to spend political capital regarding clear energy initiatives in three specific areas:

- ensuring that renewables and efficiency are included in any House-Senate compromise;
- aggressive procurement policies; and
- use of federal leadership to drive partnerships, including those with states, that promote energy efficiency in commercial structures.

“I do think that there is an opportunity for legislation if it’s narrow, if it’s targeted, and if it’s either connected to the budget fight or if it’s very specifically around more efficient strategies for infrastructure reconstruction,” Hendricks said.