

DOUGLAS F. GANSLER
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General



ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 9, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 674

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 674, "Maryland Energy Efficiency Standards Act of 2007." We write to address the issue of whether the bill is preempted by federal law.

SB 674 adds new products to the Maryland Energy Efficiency Standards Act. State Government Article (SG), §9-2006. It requires both the Public Service Commission (PSC) and the Maryland Energy Administration (MEA) to adopt regulations that implement specified energy efficiency standards for certain products and equipment. After a specified date, listed products that do not meet those standards may not be sold or installed in Maryland. The products include liquid immersed distribution transformers installed by electric companies; bottle type water dispensers; commercial hot food holding cabinets; metal halide lamp fixtures; single-voltage external AC to DC power supplies; walk-in refrigerators and freezers; certain incandescent reflector lamps; and, with certain exceptions for replacements, residential furnaces.

Although the PSC and MEA are required by SB 674 to enact specified standards as regulations, energy efficiency standards are also governed by federal legislation. *See* the Energy Policy and Conservation Act (EPCA) as amended by the National Appliance Conservation Act of 1987 (NAECA), Pub. L. No. 100-12, 101 Stat. 103, (see 42 U.S.C. §6291, *et seq.*); and (2) the Energy Policy Act of 1992 (EPACT), Pub. L. No.102-486, 106 Stat. 2776 (see 42 USC §6311 *et seq.*) NAECA contains efficiency standards, testing

procedures, and labeling requirements for certain residential appliances. These are referred to as “covered products.” EPACT contains similar regulations for certain types of industrial equipment (referred to as “covered equipment”). “Covered products” are defined in 42 U.S.C. §6292(a) and covered equipment are defined in 42 U.S.C. §6311(1). Together, NAECA and EPACT provide the statutory framework for the Department of Energy (DOE) and the Federal Trade Commission (FTC) to regulate the manufacturing and marketing of appliances and equipment. In addition, both statutes were amended by the Energy Policy Act of 2005 (P.L. 109-58, August 8, 2005) and both contain preemption provisions.

The preemption provisions cover energy efficiency standards, testing, and labeling requirements. In NAECA, the general preemption provision for energy efficiency standards is found at 42 U.S.C. §6297. Subsection (c) states that, with certain exceptions not relevant here, once a federal standard has become effective “no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product...” EPACT incorporates all the preemption provisions of 42 U.S.C. §6297 and makes them applicable to “covered equipment.” 42 U.S.C. §6316

Although there is the potential for a federal preemption of State energy standards, testing and labeling requirements for some of the items listed covered by SB 674, federal law provides for waivers from federal preemption.¹ SB 674 recognizes the potential conflict between the proposed state and existing federal standards in two ways. With regard to certain furnace standards, the bill requires the MEA, in consultation with the Attorney General, to determine whether federal law preempts State implementation of the residential furnace standards, and, if so, requires MEA to apply for a waiver from federal preemption. For other products and equipment regulated by the federal government, the bill further authorizes MEA to apply for a waiver subject to certain procedures.

Very truly yours,

/s/

Douglas F. Gansler

Attorney General

DFG:BAK:as

sb0674.wpd

cc: Joseph Bryce

¹ “Any State or...with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use for any type (or class) of covered product for which there is a Federal energy conservation standard under section 6295 of this title may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.” 42 U.S.C. § 6297(d)(1)(A).

Secretary of State

Karl Aro