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GREEN PRODUCTS UPDATE**Beware of “Green” Penalties: DOE Aggressively Enforcing Energy Efficiency Certification Requirements**

The U.S. Department of Energy (DOE) announced on September 13 that it had issued penalties against consumer product manufacturers and private labelers for violating its energy efficiency and water conservation certification standards. Although these standards were created in 1975 and are regularly updated, they have never been enforced by DOE until this month. Yet, in light of the new attention on all things green, DOE is taking the lead in assuring compliance with mandates that are intended to conserve both energy and water and to avoid “green washing” in the marketplace.

DOE’s new aggressive stance has resulted in the issuance of proposed penalties to 27 appliance manufacturers, importers and private labelers for failure to certify that their products met the applicable energy and conservation standards, and to submit the required documentation to DOE. Specifically, the Energy Policy and Conservation Act (EPCA) (42 U.S.C. 6201 *et seq.*) and enforcement regulations (10 CFR 430) set forth such standards for manufacturers and/or private labelers with regard to “covered products,” which are defined under EPCA to include refrigerator-freezers, air conditioners, water heaters, furnaces, washers and dryers, ovens, pool heaters, television sets, fluorescent and incandescent lamps, showerheads, faucets, urinals and certain other consumer products using energy and/or water. Notably, all of the products are used in buildings that are emerging as transformative in the product marketplace for green attributes awareness.

Such manufacturers and private labelers are required to certify that their covered products meet the EPCA energy and water conservation standards by submitting a compliance statement and a certification report to DOE prior to distributing the product model in commerce in the U.S. DOE establishes the EPCA energy and water conservation standards to provide consistent, national energy efficiency requirements for covered products. DOE regularly upgrades these standards to the maximum level of energy efficiency that is technically feasible and economically justified. These standards are different from DOE/USEPA ENERGY STAR program, which is a voluntary program awarding ENERGY STAR certifications to energy efficient products. Thus, ENERGY STAR participants are still required to comply with the EPCA certification requirements as discussed above.

The amounts of the penalties assessed by DOE against the 27 companies ranged from \$14,600 to \$316,333, depending on the number of violations. Each company has the opportunity to obtain a reduction in the total penalties assessed by paying a reduced fine and agreeing to comply with the certification requirements within 60 days. If a company refuses to settle with DOE, the agency may pursue a much larger “maximum possible assessment” based on the number of days and number of models in commerce prior to a company’s submission of a certification report and compliance statement.

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DOE also takes the position that it is not required to test an improperly certified product (or product lacking a certification) before seeking an injunction or assessing a civil penalty for certification violations. This means that DOE might initiate a separate enforcement action against a company if it subsequently confirms that the company in fact failed to meet the applicable energy conservation standards.

The agency first announced its intent to more rigorously exercise its enforcement authority over energy efficiency certification standards in its October 2009 Federal Register publication titled *Guidance on Energy-Efficiency Enforcement Regulations*. In imposing such extensive penalties, DOE is the first federal agency to take significant steps to enforce such standards. This comes as a surprise to many manufacturers and consumers, who have been anxiously awaiting enforcement from other federal agencies that have been more directly involved in regulating the various aspects of “green,” such as the Federal Trade Commission, which is slated to issue its updated “Green Guides” at any time.

DOE’s latest round of penalty assessments makes clear that it is committed to aggressively enforcing the energy efficiency and water conservation certification standards, which may lead other governmental agencies to more rigorously police their own standards to protect consumers in the new green marketplace. Thus, DOE’s actions should serve as a reminder to manufacturers, importers and private labelers that complying with applicable standards is critical, and failure to do so can be costly and harm branding and reputational goals in the marketplace.

FOR MORE INFORMATION

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