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Energy Efficiency**Enforcement**

The California Energy Commission is a key player in the energy efficiency arena, and it has issued a new regulation that includes a dramatic, per-unit penalty of \$2,500 for violations of state appliance efficiency rules. That is substantially higher than the \$200 per-unit penalty the Energy Department may impose for violating federal appliance energy efficiency standards. The new enforcement regulation, which took effect July 1, raises preemption issues and could have implications for the supply chain as companies review arrangements to account for new risks. And while the commission has said it plans to be reasonable and consider mitigating factors when imposing penalties, industry remains concerned.

Upping the Ante: California's Draconian New Efficiency Enforcement Rule

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The California Energy Commission (CEC) continues to flex its muscles on energy efficiency, this time with a new rule to enforce its efficiency requirements with severe civil penalties. Industry should pay heed. The rule has important implications in California and beyond.

CEC's Appliance Efficiency Program

The CEC has an extensive set of appliance efficiency regulations (Cal. Code Regs. tit. 20, §§ 1601-1609 (2015)) which is by far the most ambitious state appliance efficiency program. The CEC's July 2015 regulations include 23 product categories, many with multiple subcategories covering a broad range of products including refrigerators, air conditioners, heaters, plumbing equipment, lighting, laundry equipment, cooking products, electric motors, transformers, power supplies, televisions and consumer audio and video equipment, and battery charger systems.

The CEC program includes standards not only for nonfederally regulated appliances but also for federally regulated appliances. That is because the CEC incorporates federal standards into its regulations—despite federal preemption of state requirements in certain circumstances, for example, where a federal standard has

been established (see Energy Policy and Conservation Act, 42 U.S.C. § 6297).

Appliances also are required to be tested pursuant to CEC-specified test procedures and to comply with CEC marking requirements.

With narrow exceptions, the standards apply to appliances sold or offered for sale in California. Products subject to the regulations cannot be sold or offered for sale in California unless listed in an Appliance Efficiency Database, submissions to which are backed by certifications under penalty of perjury. The database includes extensive information on the listed products.

New Enforcement Rule

On July 1, the CEC regulation on administrative civil penalties to enforce its appliance efficiency requirements (Cal. Code Regs. tit. 20, § 1609 (2015)) went into effect. The regulation is pursuant to California Senate Bill 454, which gave the CEC additional enforcement authority to assure compliance with CEC efficiency requirements. Previously, the CEC was confined to such remedies as removing an appliance from its Appliance Efficiency Database, thereby banning the product from the California market, and seeking injunctive relief. The new regulation greatly increases the CEC's clout by enabling the agency to impose administrative civil penalties of \$2,500 per unit. In comparison, the U.S. Department of Energy's tough appliance efficiency program has civil penalties of \$200 per unit.

The dramatic difference between the penalty provisions is illustrated by the following example. Whirlpool was ordered to pay a DOE civil penalty of \$5,329,800 for 26,649 noncompliant refrigerator-freezers (In re Whirlpool Corp., DOE, Case No. 2013-SE-1420, 4/25/14). Had a per-unit penalty of \$2,500 been applied, the amount could have reached \$66,622,500.

During proceedings on adoption of the CEC regulation, industry expressed concern about the potentially crushing nature of the penalties. Taking a strong stance on its new rule, the agency rejected requests to adopt a regulation based on a per-occurrence approach or to include a cap on penalties, despite testimony that the CEC penalties could be overwhelming and devastating. The CEC also rejected providing advance warning and opportunity to cure before issuing a notice of violation. Not surprisingly, energy efficiency advocacy representatives supported the regulations, including the CEC's discretion in determining penalty amounts without a cap. The CEC expressed the intent to be reasonable and consider potentially mitigating factors; however, industry worries persist.

Violations

Under the new CEC regulation, selling or offering for sale an appliance that is not listed in the CEC Appliance Efficiency Database may be subject to a civil penalty for each unit that was sold or offered for sale. This applies to "any person," including a retailer, manufacturer, contractor, importer or distributor.

Such a penalty also may apply where a person manufactures, imports or distributes an appliance that is subsequently sold or offered for sale by another person for end use in California, when the manufacturer has not tested, marked or certified the appliance, in violation of CEC requirements, or when the appliance does not meet CEC efficiency standards. An exception applies where it is demonstrated that the appliance was in-

tended for shipment and use outside of California and that reasonably prudent precautions were taken to assure that the appliance would not be sold or offered for sale in California.

A penalty also may apply to knowingly providing materially false information to the CEC in a statement made pursuant to CEC efficiency regulations that includes a declaration, executed under penalty of perjury. The CEC may consider the making of a false statement in a declaration submitted under penalty of perjury to be evidence of willfulness in the factors to be considered in assessing the amount of a penalty.

There is ample opportunity to run afoul of the enforcement regulation. For example, the declaration executed under penalty of perjury is wide-ranging, including that all the information in the declaration is true, complete, accurate and in compliance with all applicable provisions of the efficiency regulations; that appliances meet applicable standards; that they were tested under the applicable test method; and that they were marked properly.

Penalties

The CEC may impose the administrative civil penalty up to a statutory maximum, which is currently \$2,500, for each unit that was sold or offered for sale in California in violation of the CEC requirements, or for each false statement discussed above. The CEC may apportion liability among violators.

A number of factors are to be considered by the CEC in determining the amount of an administrative civil penalty:

- the nature and seriousness of the violation;
- the persistence of the violation, i.e., a violator's history of past violations of CEC appliance efficiency regulations over the previous seven years;
- the number of violations arising from the course of conduct that is the subject of the enforcement proceeding;
- the length of time over which the violation occurred;
- the willfulness of the persons responsible for the violation;
- the harm to consumers and to the state that resulted from the amount of energy wasted due to the violation;
- the number of persons responsible for the violation;
- the efforts of the persons responsible for the violation to correct the violation prior to initiation of an enforcement action by the CEC;
- the cooperation, by persons responsible for the violation, with the CEC during its investigation; and
- the assets, liabilities and net worth of the persons responsible for the violation (bearing on whether a reduction in penalty is necessary to avoid an undue burden).

During proceedings on adoption of the regulation, industry expressed concern that the CEC might "consider" these factors but nonetheless not mitigate a proposed penalty. The CEC refused to adopt stronger pro-

tections against overly burdensome penalties, relying instead on reasonableness in enforcement. The regulation provides that penalties “shall” be “based on application” of the list of factors, thereby providing some protection against the agency merely considering, but not applying, the factors.

Procedure

The CEC is required to send violators a notice of violation and may at any time issue a decision by settlement with a responsible person. The settlement agreement may include appropriate sanctions and remedies to address violations and promote compliance. No earlier than 30 days after issuing a notice of violation, the CEC may initiate an adjudicative proceeding to impose administrative civil penalties if the CEC determines that the responsible person has not made sufficient progress in addressing the violations identified in the notice of violation. The proceeding is to be before an administrative law judge.

After the hearing, the CEC is to issue or adopt a decision on whether a violation has been committed, and assess appropriate penalties based on application of the factors discussed above. It may take other such actions to address or prevent any act or omission addressed in the CEC regulations. The CEC order is subject to judicial review.

Preemption Issues

Federal preemption has been a recurring theme regarding CEC regulations, and the new CEC enforcement regulation is no exception.

The CEC acknowledges that the new regulation is enforceable only to the extent to which it is not preempted by federal law. It also asserts that the regulation does not duplicate or conflict with federal law—but the CEC efficiency standards purport to include federal standards and the CEC Appliance Efficiency Database includes federally covered products. CEC efforts to impose civil penalties for related alleged violations for federally covered products would run up against preemption.

During proceedings on the adoption of the regulation, industry stressed that the regulation could lead to duplicative and inconsistent enforcement, such as where DOE addresses a typographical error for certification of a DOE regulated product without imposing a penalty and the CEC imposes a civil penalty for the same error. The CEC refused to specify the scope of preemption as it relates to the regulation. Instead, it indicated that application of preemption is complicated

and fact-specific. Disputes on preemption can be expected. The CEC indicated that it might consider issuing guidance on preemption as cases get resolved.

Reach of Regulation to Expand

The CEC is in the midst of an ambitious standards rulemaking effort. As one prominent example, the CEC is in pre-rulemaking on potential standards for computers, computer monitors and signage displays. The civil penalty provision will thus very likely reach more products than it does now.

Implications of Rule

The CEC standards have always been taken seriously by industry, particularly given the importance of the California market. The dramatic penalties authorized by the new regulation move the implications of non-compliance to a new level. No matter how the penalty provision is applied, the threat of a penalty of \$2,500 per unit will have an *in terrorem* effect.

Manufacturers and others participating in the California market will need to focus additional attention on the California requirements. The regulation may affect the supply chain, as companies review their business arrangements to account for the new risk. To what extent will costs associated with the new risk have an effect on the market? Will some companies forgo participation in the California market rather than bear that risk?

The CEC regulation may have a ripple effect in other jurisdictions. Other states might consider jumping on the California bandwagon. Additionally, the CEC regulation could result in upward pressure at the federal level—with desire by some to have the DOE penalty regime more in line with the CEC’s. Other countries are likely to take notice as well.

The new CEC enforcement regulation also may have an effect on federal rulemaking. In instances in which the DOE has discretion on whether to adopt standards, it might decide not to act—on the grounds that the enforcement regime for a CEC standard is so stringent that it drives the national market, therefore making federal regulation unnecessary.

The CEC is an important player in the energy efficiency arena, and its new enforcement regulation dramatically increases its purported authority. Time will tell how it will exercise that authority, including whether it will overreach—leading to a confrontation with industry—and how the regulation will influence behavior of industry and other governments. Will the CEC regime be an outlier, or will it become the new normal?