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Doubling Down: Energy Efficiency Penalties Skyrocket

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At Congress's direction, the U.S. Department of Energy (DOE) has imposed minimum energy efficiency standards on the appliance and equipment industries for more than thirty years. But, inexplicably, it only began an enforcement program for these standards in 2009.

When DOE finally began a regime for enforcing its energy efficiency standards, it did so gingerly. Having virtually slept on its enforcement authority for decades, DOE justly thought that industry needed time to acclimate to the new reality. Proposed civil penalties were less severe than they could have been, and substantial discounts were given to those that agreed to settlements.

That changed over the last few years. DOE often proposed the maximum civil penalty of $200 per unit that violated the energy efficiency standards, and offered relatively small discounts – if any – in settlement discussions. One company settled claims by DOE by paying a civil penalty of $5,329,800, based on $200 per unit for 26,649 alleged violations. Moreover, DOE would on occasion seek these severe penalties even in cases where the regulations were unclear and the alleged violations far from certain.

Now it is About to Get Worse

A $100 per violation penalty was set by statute in 1975 in the Energy Policy and Conservation Act (EPCA). But Congress subsequently enacted the Federal Civil Penalties Inflation Adjustment Act (FCPIAA) requiring DOE and the Federal Trade Commission (FTC) to increase their civil penalties to take inflation into account. DOE increased to $200 per violation in 2009; and the FTC increased to $210 per violation in 2014. Pursuant to a recent revision of the FCPIAA, DOE's civil penalty authority will more than double, from $200 per violation to $433 per violation. That $5 million DOE penalty would now be more than $11 million. The FTC penalty authority will similarly rise from $210 per violation to $433. The DOE increase will be effective July 28, 2016; the FTC increase will be effective August 1, 2016. 81 Fed. Reg. 41790 (June 28, 2016) (DOE); id. 42476 (June 30, 2016) (FTC).

Industry concern should be further heightened by the prospect that the increased penalties might potentially be applied to certain alleged violations predating the increases. The DOE and FTC June 2016 notices state that the FCPIAA provides that any increase in the civil penalties shall apply only to civil penalties, "*including those whose associated violations predated such increase*, which are assessed after the date the increase takes effect" (emphasis added).

DOE has on multiple occasions issued enforcement guidance containing mitigating and aggravating factors when it considers appropriate penalties. These include the nature and scope of the violation, the ability or inability to pay, the type of product, self-reporting of the violation, self-initiated corrective action, and cooperation or lack thereof. The FTC, when seeking civil penalties, takes into account the degree of culpability, any history of prior conduct, ability to pay, effect on ability to continue business, and such other matters as justice may require. There has been no new guidance issued in light of these increased penalties, so it is unclear how these considerations will be applied given enormous increase in penalty authority. But it is almost certain that proposed penalties and settlements will increase dramatically.

Settle or Challenge?

Perhaps the most surprising aspect of DOE's energy efficiency enforcement regime is that no one has ever challenged a civil penalty enforcement action – every single case has settled.

Under EPCA, a company can challenge DOE's claim of a violation on both legal and factual grounds by asking for a hearing before an Administrative Law Judge (ALJ). If the company loses before the ALJ it can appeal to a U.S. court of appeals. Alternatively, a company can refuse to pay the penalty proposed by DOE and force the agency to seek an order in federal court affirming the penalty – where the company would be entitled to contest DOE's position on both the facts and law. But litigating, either before and ALJ or in court, can be expensive. So it may be that it was simply cheaper for companies to pay the penalties than to challenge DOE. But if proposed penalties increase by more than 100% – as they almost surely will – companies may be motivated to litigate.

California Too!

DOE and the FTC are not the only government agencies with the authority to assess penalties for alleged violations of energy efficiency mandates. It used to be that California, through the California Energy Commission (CEC), was limited to banning from the state products that did

not meet energy efficiency standards. But beginning in July of last year, the CEC has had the power to impose administrative civil penalties of $2,500 for each unit sold or offered for sale in California in violation of CEC requirements, or for a false statement. If DOE had this kind of authority, the $5 million penalty it assessed in its largest case could have been $66 million! See 20 Cal. Code Regs. § 1609.

Conclusion

Energy efficiency is a key element of government policy. As concern about climate change has intensified, so has enforcement of efficiency requirements. The DOE, FTC, and CEC penalty provisions provide the agencies with powerful cudgels. Industry efforts to assure compliance can help reduce the risk of being pummeled – and the time for resisting some of the agencies' more extreme claims may be at hand.