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CALIFORNIA DRAMATICALLY ESCALATES ENERGY EFFICIENCY ENFORCEMENT

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The California Energy Commission (CEC) has an aggressive program to enforce its energy efficiency requirements. In 2015, CEC was given a big stick by the California legislature to enhance enforcement – the ability to impose civil penalties of up to \$2,500 per unit sold in violation of the regulations. And in 2018, it imposed penalties on companies nearly 250% more often than it did in 2016, the first full year of its new stringent enforcement regime.

The enforcement program includes numerous factors that CEC is required to consider in setting penalty levels. The new penalties, along with CEC's increased effort to impose them, heighten the need for manufacturers and others in the California market to pay close attention to the CEC requirements. No matter how the agency applies its authority, the threat of potentially crippling penalties has an *in terrorem* effect.

CEC adopts stronger enforcement rules

CEC has by far the most extensive – and most stringent – set of appliance efficiency regulations of any state.¹ Before July 2015, CEC only had authority to ban from the state products that did not meet energy efficiency standards. But since July 2015, 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 rules.² Covering a broad range of products, the CEC requirements include testing; meeting established efficiency standards; marking; and certifying products in CEC's Modernized Appliance Efficiency Database System (MAEDbS). By contrast, for violating analogous federal requirements, the Department of Energy (DOE) appliance efficiency program can impose a maximum civil penalty of \$460 per unit.³

CEC has said that penalties must be set at levels sufficient to deter violations. In determining the amount of an administrative civil penalty, CEC is to consider the following:

- The nature and seriousness of the violation.
- The persistence of the violation, *i.e.*, a violator's history of past violations of CEC's 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.

¹ Cal. Code Regs. tit. 20, §§ 1601-1609.

² *Id.* § 1609.

³ 10 C.F.R. § 429.120.

- 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 CEC.
- The cooperation, by those responsible for the violation, with CEC during its investigation.
- 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).⁴

These factors are similar to those used by DOE in determining penalty amounts.⁵

CEC enforcement activity skyrockets

But 2015 did not just usher in a new penalty regime. It also spawned a remarkable increase in CEC's enforcement efforts. In 2015, there was one settlement. In 2016, there were 16. In 2017, there were 20. And in 2018, there were 37 – nearly 250% more than in 2016. In 2019, there have been four settlements through March. Penalties have ranged from \$366 to \$1,000,000.⁶ According to CEC, cases have resulted from market survey investigations performed by agency staff and from complaints made to CEC.

CEC has said that in developing settlements it has taken into account not only the factors discussed above, but also such things as a company's cooperation in the investigation by redesigning their products; testing, certifying, and marking the units; notifying retailers of units; removing the noncompliant units within a company's control from the California market; and providing to CEC sales data for noncompliant units. CEC has stressed that such efforts by companies have saved it time and resources in investigating the violations and minimizing the impacts on energy consumption and the environment in California from the noncompliant units. In short, CEC indicates that constructive actions by violators will be looked on favorably in setting penalty amounts.

Settlement agreements have included not only civil penalties, but also the following actions for relevant models a company will sell or offer for sale in California: testing of all basic models, utilizing the applicable test method, to ensure conformance with the CEC appliance efficiency

⁴ See Cal. Code Regs. tit. 20, § 1609(b)(3).

⁵ DOE, Civil Penalties for Energy Conservation Standards Program Violations – Policy Statement (revised Jan. 11, 2018), at https://www.energy.gov/sites/prod/files/2018/04/f50/PenaltyGuidance01_11_2018_0.pdf.

⁶ See CEC, Case Settlements at <https://www.energy.ca.gov/commission/enforcement/litigation/index.php>.

regulations; certifying all basic models in MAEDbS; ensuring listings are kept current and up to date; and providing appropriate marking.

In the largest settlement, \$1,000,000, iRobot Corporation was accused of selling or offering for sale 34,089 robotic vacuum cleaners containing noncompliant small battery charger systems (SBCS). These SBCS did not meet the energy efficiency standard; were not labeled correctly; and were incorrectly certified. iRobot agreed to reengineer its chargers to comply with the energy efficiency standard, certify each model to the database, and add the required labeling to the product and packaging. It also agreed to offer a \$20 rebate to California customers who registered their products by a specified date. This rebate represents the approximate overpayment for energy consumed by using a noncompliant device.

It bears note that if a per-unit penalty of \$2,500 were imposed on the number of units (34,089) reportedly involved in the iRobot case, the penalty would reach over \$85,000,000.

Conclusion

The significant penalties authorized by the CEC regime and the agency's dramatic increase in enforcement cases are stark reminders of the need to take CEC's requirements into account when participating in the California market.

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