

## ENERGY EFFICIENCY ADVISORY

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### DOE Proposes Revisions to Efficiency Enforcement Regime

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The Department of Energy (DOE) is proposing significant revisions to its energy efficiency enforcement rules.<sup>1</sup> Industry and other interested parties have an opportunity to participate in this important rulemaking. Comments are due by October 30, 2020.

#### Proposed amendments to enforcement rules

Under the Energy Policy and Conservation Act (EPCA),<sup>2</sup> DOE is responsible for enforcing energy efficiency standards for covered consumer products and commercial and industrial equipment. The agency is revisiting its enforcement rules, saying it wants to convey a clear and comprehensive enforcement process.

Key proposed changes include the following:

- Currently, DOE issues a finding of noncompliance, *i.e.*, Notice of Noncompliance Determination (NND), without being required to provide formal notice that it intends to issue an NND. DOE is proposing to change the process by first providing respondents with a letter stating its intent to issue an NND. Respondents could ask DOE, within 30 days after issuance of a letter of intent, to reexamine its pending determination.
- Currently, manufacturers are required to inform customers of DOE's determination of noncompliance. DOE is proposing to drop this requirement.
- After a finding of noncompliance, DOE can issue a notice of allowance to distribute a redesigned or modified basic model. DOE is proposing to spell out the full notice of allowance process.
- DOE is proposing to be more transparent how it may exercise its authority under EPCA to:
  - make a determination of noncompliance for a basic model subject to a design requirement conservation standard;

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<sup>1</sup> Enforcement for Consumer Products and Commercial and Industrial Equipment, Notice of Proposed Rulemaking, 85 Fed. Reg. 53691 (Aug. 31, 2020).

<sup>2</sup> 42 U.S.C. § 6291 *et seq.*

- request from any party information concerning the certification of or compliance of a basic model with a conservation standard;
  - make a finding of noncompliance based on information received through the course of an investigation, which may include information other than DOE's own test data;
  - pursue or settle enforcement actions, with adherence to statutory timeframes set forth in EPCA;
  - request and attain test units via the issuance of a test notice; and
  - seek injunctive relief.
- DOE is proposing to have the discretion to consider third-party certification program testing as official enforcement test data.
  - DOE is proposing to restructure and clarify its regulations pertaining to DOE's sampling provisions. This includes providing that in addition to DOE enforcement testing, there are other bases upon which DOE may make a finding of noncompliance (*e.g.*, in whole or part on DOE's own enforcement testing, testing from another Federal agency, or a manufacturer's own test report).
  - DOE is proposing to account for prohibited actions prescribed in EPCA that are not reflected in its enforcement regulations.
  - DOE is proposing that it may make a finding of noncompliance based on a single test where the results of the assessment test are so far from an applicable standard (*i.e.*, at least 25% worse) that a finding of compliance is extremely unlikely.
  - DOE is proposing to harmonize the enforcement provisions for electric motors with all other types of covered products and covered equipment.
  - In response to a notice of proposed civil penalty, a respondent may request a hearing on the record before an administrative law judge (ALJ). DOE is proposing to add a reference to ALJ hearing procedures, which it plans to address in a subsequent rulemaking.

## Conclusion

DOE's proposal, if adopted, would significantly affect companies enmeshed in the agency's enforcement regime. Interested parties should take advantage of this opportunity to make their views known.

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For more information regarding Harris, Wiltshire & Grannis LLP's energy practice, please contact [Scott Blake Harris](#), [Sam Walsh](#), [Stephanie Weiner](#), or [John A. Hodges](#).

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