CLIENT ALERT

Appliance Manufacturers Should Prepare for Increased DOE Enforcement Activity

Jan.08.2021

The Biden Administration has promised an across-the-government effort to combat climate change, consistent with policy priorities during the Obama Administration. While much speculation has focused on a climate infrastructure package or a possible revamp of the Clean Power Plan, appliance manufacturers should be prepared for a less publicized but similarly significant change in direction from the current administration: increased enforcement under the U.S. Department of Energy's (DOE) appliance standards program.

Background

The DOE administers the appliance standards program under the Energy Policy and Conservation Act (EPCA), which includes setting mandatory appliance energy and water efficiency standards for over 60 covered products, such as refrigerators, dishwashers, vacuums, and battery chargers. Each appliance standard has two components: a conservation standard and an associated testing procedure through which the manufacturer demonstrates compliance with the applicable standard.

Although this program has existed since the 1980s, the Obama Administration was the first to explicitly include goals for greenhouse gas emission reductions as a component of the standards-setting process. Over the course of 8 years, DOE issued new and updated conservation standards for numerous products, and DOE's Office of Enforcement investigated and issued monetary penalties to companies failing to comply with updated standards incorporating these emission reduction goals. The Trump Administration, by comparison, has not directly incorporated these greenhouse gas-related factors into the rulemaking process, and has been comparatively less active in updating standards in general. The Trump Administration also has pursued fewer enforcement actions on the whole – and appears to have sought smaller penalties – relative to the Obama Administration.

Enforcement Guidance for a Biden Administration

The Biden Administration seems likely to hew closely to the Obama Administration's approach, both in its commitment to adopting new energy efficiency standards and its enforcement activities. It is therefore important for manufacturers to refresh themselves on DOE's expansive enforcement authority; to understand the necessity of quickly redressing any incidence of noncompliance; and to understand proactive steps they may take to mitigate their exposure to potential penalties.

Under EPCA, the DOE has the authority to issue a civil penalty of up to $468 for each noncompliant unit introduced to the stream of commerce – i.e., sold *or made available for sale* – with a five year "look-back" period. These penalties quickly can add up to millions, if not tens or even hundreds of millions, of dollars. In addition to the DOE's civil penalty authority, the agency can also require noncompliant manufacturers and importers to:

- Immediately halt sales of noncompliant products,
- Ensure that replacement products are compliant, and

- Notify customers who may have purchased noncompliant products

To avoid these penalties companies should maintain active compliance programs with appropriate testing and certification. Given the potentially significant penalty exposure, companies also should be aware of EPCA compliance obligations when performing regulatory due diligence on any transactions that may involve a manufacturer or importer of EPCA-regulated products. And if a company has not recently revisited the EPCA compliance program for its products, now is the time to do so, ahead of the Biden Administration's expected increase in investigative and enforcement efforts.

In the event that a company discovers its own noncompliance or finds itself in the DOE's crosshairs, the agency's penalty guidelines and Crowell's practical experience provide some basic principles applicable regardless of who is in office: (i) self-reporting violations may be the most effective means of forestalling significant enforcement penalties and maintaining goodwill with the agency; (ii) DOE may consider a penalty reduction if the company has taken well documented corrective action before DOE has opened an investigation into allegations of noncompliance; and (iii) it is important to engage early and often with the agency, including requesting any testing performed by DOE personnel.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Matthew B. Welling
Partner – Washington, D.C.
Phone: +1 202.624.2588
Email: mwelling@crowell.com

Charlene Sun
Associate – Orange County
Phone: +1 949.798.1329
Email: csun@crowell.com

Cheryl A. Falvey
Partner – Washington, D.C.
Phone: +1 202.624.2675
Email: cfalvey@crowell.com