Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Refreshed Efficiency Regulations May Impact Appliance Cos.

By **Richard Lehfeldt, Matthew Welling and Tyler O'Connor** (March 15, 2019, 3:28 PM EDT)

Richard Lehfeldt

Richard Lehfeldt

Tyler O'Connor

Today we update you on a lesser-known law that can have major compliance consequences for appliance manufacturers and importers: the Energy Policy and Conservation Act, or EPCA.

Background

The EPCA was born out of legislation in the late 1970s, which authorized the setting of nonbinding "energy efficiency improvement targets" for 13 categories of appliances. Congress beefed up the statute in the 1980s to impose mandatory energy efficiency standards for a suite of covered products, and empowered the U.S. Secretary of Energy to promulgate new standards for additional products in his or her discretion.

Pursuant to that authority, the Secretary of Energy has promulgated efficiency standards for a multitude of additional products over the course of the last three decades. Today, the U.S. Department of Energy has set mandatory energy and water efficiency standards for over 60 covered products, including everything from battery chargers to refrigerators, and microwave ovens to air conditioners.

Each efficiency standard has two components: a conservation standard and an associated testing procedure, which the manufacturer must apply to demonstrate compliance with that conservation standard. The DOE is required to reassess each standard and each test procedure at least every six years, but critically, the department only has the authority to strengthen, not weaken, energy efficiency standards — even in response to technological advancement that may nevertheless result in overall greater energy savings — meaning that manufacturers subject to onerous standards may only get relief from Congress (except in very limited circumstances).

Participating in the DOE proceedings in which the agency reassesses a given product's conservation standards and testing procedures is a critical means for companies and other stakeholders to ensure that standards are revised in an equitable and sensible manner.

Enforcement

It is essential for any manufacturer or importer to understand whether their products are covered by the EPCA, and whether they have complied with its substantive and procedural requirements, because the penalty for a failure to comply can be substantial.

Companies should also be aware that the EPCA defines "manufacturers" more expansively than many other regulatory regimes, to include importers of EPCA products that are manufactured internationally. Importers may be responsible for EPCA compliance obligations and subject to enforcement actions for noncompliance as if they were the literal manufacturer.

Each noncompliant unit is subject to a maximum civil penalty of (currently) $449, with a five year "look-back" period. For manufacturers or importers with large inventories, the penalties can quickly add up to millions of dollars. It is important, therefore, for companies to not only maintain adequate EPCA compliance programs, but to also respond swiftly in the event they find themselves in the DOE's crosshairs. If the DOE determines that a company's products are noncompliant, it will typically demand that the company:

- Immediately halt sales of noncompliant products,
- Ensure that replacement products are compliant,
- Notify customers who may have purchased noncompliant products, and
- Pay some (but not usually all) civil penalties.

In negotiating with the DOE, it is important for companies to abide by the following principles, which have served our clients well. First, do not immediately go to war with the DOE. The department understands its leverage (large civil penalties, reputational damage and collateral litigation) and is not afraid to use it.

Second, engage early and often with the department. For example, request any testing performed by the DOE and all other pertinent materials in the department's possession. Similarly, it is important for a company to quickly compile all EPCA-related testing and other materials in its own possession. Understanding the scope of possible liability is necessary to understand one's negotiating position.

Third, if a company is publicly traded, it should consult with its attorneys who handle U.S. Securities and Exchange Commission compliance. If the possible civil penalty is sufficiently large, the company may be required to publicly disclose the proposed or final penalty.

Finally, key personnel must read and understand the DOE's Civil Penalties Guidelines, and apply them to the company's situation. The guidelines are current, plain English, and valuable in understanding the mitigating factors that could help adjust the maximum penalty downwards. The DOE has often been willing to settle civil cases at a significant discount to the maximum penalty permitted under law — but only if the settling party has checked the appropriate boxes described by the guidelines, and worked collaboratively with the DOE to address its concerns.

The Future of the EPCA

As the EPCA ages and products evolve, stakeholders are reconsidering the EPCA's basic structure. In the past year and a half, the DOE has issued three requests for information — typically a precursor to initiating a rulemaking or even proposed legislation — asking industry, nonprofits and other interested parties to weigh in on the EPCA's future.

It has sought comment on (i) whether the EPCA should adopt market-oriented mechanisms for achieving reductions in energy consumption; (ii) how the department should reform its process for developing appliance standards; and (iii) how to address the growing market for appliances enabled with smart technology, a topic not yet addressed in either the EPCA or the DOE's existing regulations.

The agency's pace is only quickening. In January it announced its intention to roll back proposed standards for certain lightbulbs which were expected to take effect in 2020. And last month, the DOE published a proposal in the Federal Register that would rewrite the agency's Process Rule, which is the standard by which the agency seeks input regarding potential revisions to its energy efficiency standards.

Comments on the DOE's wide-ranging proposal are due by April 15, 2019. Understanding how both the existing regulatory regime and proposed changes will impact a company's products are essential but often overlooked components of a smart compliance program.

Richard Lehfeldt is a partner, Matthew B. Welling is counsel and Tyler A. O'Connor is an associate at Crowell & Moring LLP.