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www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomediamedia.com

Energy Efficiency: High Stakes For Manufacturers

Law360, New York (January 22, 2009) -- Energy efficiency for appliances and other products has been a subject of intense interest and regulation since at least the oil embargo in the mid-1970s. More recent concerns about climate change and escalating energy costs have further put the focus on efficiency.

Buying cost-effective, efficient products can not only save consumers money and lessen dependence on foreign sources of energy but also help curb demand for power plants, thereby cutting emissions.

Development of efficiency rules is thus an increasingly high-stakes undertaking with important consequences for product manufacturers.

The establishment and application of such rules involves a complex web of interests: Congress, the U.S. Department of Energy, the Federal Trade Commission, the Environmental Protection Agency, states, manufacturers, distributors, trade associations, standards developers, testing laboratories, utilities, energy advocates, the media (e.g., Consumer Reports) and even foreign governments.

Efficiency is expected to play an even greater role in the new administration as a means to further environmental, economic and strategic policies. More stringent rules are likely to be adopted — profoundly affecting product design, costs and the ability to market.

The Importance Of EPCA

Product efficiency falls under the Energy Policy and Conservation Act (EPCA), signed into law by President Ford in 1975.

EPCA was enacted as part of a comprehensive national energy policy. It provides for establishment of test procedures, labeling, efficiency standards and preemption of state requirements. Standards and test procedures are administered by DOE, and labeling is administered by the FTC, based on DOE test procedures.

Initially, EPCA provided for establishment of energy efficiency improvement targets and potential establishment of mandatory standards. In 1978, it was amended to call for DOE to issue standards on covered products.

In response, DOE held an extensive rulemaking during the Reagan Administration, resulting in so-called "no-standard standards" for most of the products. This decision was based on

DOE's view that minimum efficiency requirements were not justified. The no-standard standards had a preemptive effect.

However, in the meantime, states were issuing energy requirements, some as a result of waivers of preemption granted by DOE. In addition, a federal court decision in 1985 overturned the no-standards standards and sent the matter back to DOE for further rulemaking. *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985).

Industry Negotiates For Uniform Federal Standards And Stronger Preemption

As a result of this unsettled situation, appliance manufacturers were faced with the absence of federal standards and a growing plethora of differing state regulations, complicating industry's long-term planning.

This led to negotiations between appliance manufacturers and efficiency advocates, resulting in a comprehensive agreement that was the foundation of the 1987 National Appliance Energy Conservation Act (NAECA) amendments to EPCA.

The agreement included uniform national standards, stronger preemption of state requirements, and new and more stringent criteria making it much more difficult for a state to obtain a waiver of preemption. This negotiated agreement was enthusiastically embraced by Congress, which adopted it virtually intact.

DOE Regulation Increasing

NAECA has provided the template for further legislative amendments expanding coverage to other products and increasing the stringency of rules for products already covered.

There have been extensive, highly complex DOE rulemakings to consider amendments to standards, taking into account such factors as technological feasibility and economic justification.

The outcomes of these rulemakings can have profound effects on products and manufacturers. A company that can meet a standard will benefit; one that cannot can be put out of business.

DOE was sued by states and energy advocates arguing that DOE was falling behind in its standards rulemaking. The litigation resulted in a settlement in which DOE agreed to conduct further rulemakings based upon an agreed-upon schedule. See *State of New York v. Bodman*, 2007 U.S. Dist. LEXIS 80980 (SDNY 2007).

This has escalated the pace of DOE rulemaking. New legislation imposed further requirements. And even more obligations are likely to be imposed during the new administration.

Therefore, manufacturers must be vigilant to protect their interests as legislation and related rulemakings move forward.

Classes, Exceptions And Waivers

Consideration is often given in DOE rulemaking to establishing separate classes of products within a product type. The establishment of a separate class may be critically important for a product containing a feature valued by consumers that requires additional energy.

The DOE energy program also provides opportunities for manufacturers to request exceptions and waivers for their products. An exception petition would be appropriate for a product that contains a valuable feature, not yet recognized in the rules, that requires additional energy. DOE could adjust a standard to take the feature into account.

A waiver petition would be appropriate where either a product has a characteristic that prevents testing pursuant to the DOE test procedure or the test procedure may evaluate the product in a way so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

DOE may provide a waiver and impose an alternative test procedure for the product until it changes its rules.

Manufacturers should keep these provisions in mind as they develop innovative products that may not be adequately addressed by existing rules. The efficiency rules should not be used as a barrier to trade and effective competition.

The Energy Star Program

A significant further development has been the federal Energy Star program. The Energy Star logo has become an increasingly important part of manufacturers' marketing. Indeed, having an Energy Star logo is often seen as a necessity for a successful product. Manufacturers therefore make considerable effort to meet Energy Star criteria.

DOE and EPA each has administrative responsibility under the program, depending on the product. The program entails manufacturers entering into voluntary agreements with DOE or EPA, allowing the manufacturer to use the Energy Star logo for products that meet certain criteria.

These criteria generally are that a product is substantially more efficient than the federal minimum standard. The Energy Star program often has added further criteria, and the program includes coverage of some products that are not subject to DOE minimum standards.

Congress has amended EPCA to require the Energy Star program generally to obtain comments on proposed criteria and to provide lead times before they go into effect.

Manufacturers should consider participating in Energy Star proceedings on proposed criteria. For example, whether Energy Star provides for one class or separate classes can drastically affect the viability of a product under the program.

Utilities

Utilities often provide rebates to consumers who purchase energy-efficient products, often those meeting Energy Star criteria. This is an important stimulus for manufacturers to produce efficient products.

State Involvement

Despite strong federal preemptive provisions, some states, particularly California, have remained active on energy efficiency issues. State involvement has included rules for products that are not covered by federal regulations and certain exceptions to preemption, such as state procurement.

There has been considerable dispute between the industry and California over the scope of preemption.

This led to litigation over the extent to which California could bar federally covered products from being marketed in California if manufacturers do not provide extensive product information for a database maintained by the California Energy Commission.

A court of appeals, in a 2-1 decision, held that California database rules were not preempted. *Air-Conditioning & Refrigeration Inst. v. Energy Resources Conservation & Development Comm'n*, 397 F.3d 755 (9th Cir.), cert. denied, 547 U.S. 1205 (2006).

Manufacturers should therefore be alert to the potential for state regulation, particularly in California, even with respect to products that are federally covered.

Trade Associations

Important work leading to standards development takes place in trade associations, which develop industry positions and industry standards that are often incorporated by reference in federal standards.

Associations have pushed for adoption by DOE of interpretations of the meaning of standards. They also administer product testing and certification programs based on the federal rules.

Manufacturers participating in the development of association positions and standards therefore have an opportunity to help shape proposals to governmental decision makers.

International Involvement

Energy efficiency has an important international component. For example, Canada has a standards program that parallels that of DOE. In addition, there is an agreement between Canada and EPA allowing Canada to use the Energy Star logo for products in Canada.

In summary, regulation of efficiency is here to stay and will profoundly affect the ability of manufacturers to market their products. The rules will only become increasingly stringent in the new administration. Manufacturers should pay close attention and consider participation in the proceedings that will govern their products.

--By John A. Hodges, Wiley Rein LLP

John A. Hodges is a partner with Wiley Rein in the firm's Washington, D.C., office.

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