The Association of Electrical and Medical
Imaging Equipment Manufacturers
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Setting Standards for Excellence

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Submitted via email to: docket@energy.ca.gov

Ms. Karen Douglas
Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, California 95814

NEMA Comments to Staff Workshop on the Appliance Efficiency Enforcement Rulemaking March 23, 2012

Dear Commissioner Douglas,

The National Electrical Manufacturers Association (NEMA) thanks you for the opportunity to comment on this rulemaking.

As you know, NEMA is the association of electrical equipment manufacturers, founded in 1926 and headquartered in Arlington, Virginia. Its member companies manufacture a diverse set of products including power transmission and distribution equipment, lighting systems, factory automation and control systems, and medical diagnostic imaging systems. Worldwide annual sales of NEMA-scope products exceed $120 billion. These comments are submitted on behalf of all NEMA member companies who provide products to the California market which fall under the scope of California Appliance Efficiency Regulations (Title 20).

Thank you for your consideration of these comments. If you have any questions, please contact Alex Boesenberg of NEMA at 703-841-3268 or alex.boesenberg@nema.org.

Sincerely,

Kyle Pitsor

Kyle Pitsor
Vice President, Government Relations

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A. ESTABLISHING AN ADMINISTRATIVE PROCEDURE

As noted above, in implementing the provisions of Public Resources Code section 25402.11, the Energy Commission anticipates utilizing some of the existing enforcement processes in Title 20. The following steps are being considered:
1. Determine the amount of the penalty;
2. Notify the market participant responsible for the non-compliant model;
3. Notifying market participants in the non-compliant model's distribution chain;
4. Provide an opportunity, if appropriate, for the market participant involved to take corrective action (e.g., certify its product, cease to sell or offer for sale the product in California); and
5. If no response, resolve the matter by levying the fine, referral of the matter to an Energy Commission public hearing, referral of the matter to an appropriate agency (e.g., Attorney General's Office, local District Attorney, the Department of Energy, etc.)

Questions for stakeholder consideration:

1. What is a reasonable amount of time to allow a manufacturer/retailer to take corrective action regarding the certification of non-certified appliances (i.e. 30, 60, 90 days)?
NEMA comment: we suggest 60-90 days for corrective action to be completed, depending on the scope and severity of the infraction that might impact ability to correct.

2. Are there additional steps the Commission should include in the process?
NEMA comments:

1) NEMA suggests that all initial investigative and corrective actions be pursued privately until a violation is certain to exist, in this way potentially damaging negative publicity might be avoided where it is not warranted. Conversely, we believe that appropriate negative publicity might serve as a deterrent, and suggest public notice be made for proven non-compliance and other violations.
2) NEMA believes that an appeals provision must be incorporated into the process. There has been at least one instance NEMA is aware of in a DOE enforcement matter where a notice of violation was published and on further study it was determined that the products were not regulated under the Energy Policy and Conservation Act. So this is not an abstract issue.
3) The Commission might also consider how and when building owners will be notified if non-compliant products were determined to have been used in their buildings
4) Because the California energy standard is based on the sale of products within the state rather than restrictions on manufacturing, it will be imperative for the Commission to recognize that:
    a. Manufacturers do not always control the final destination of a product
    b. Manufacturers operate distribution centers within the state that provide products for use within California as well as outside the state.
    c. The compliance rulemaking must address violations within the distribution channel in addition to the manufacturer.

3. Are there alternative enforcement models the Commission should consider?

4. How should the Energy Commission's enforcement process interact with, or make use of, the enforcement processes of other state and federal agencies (e.g., identification of violations, appliance testing data, etc.)?
NEMA comment: as is already mentioned in CA Title 20 Section 1606, NEMA encourages the CEC leverage product lists on other nationally- and state-recognized databases when compliant with the listing requirements of Title 20, so as to reduce reporting burden.

B. DEFINING WHAT CONSTITUTES A "VIOLATION"
The Energy Commission considers the following action as "non-compliance" and violations of the Appliance Efficiency Regulations:
• The selling or offering for sale of regulated appliances in California that have not been certified to the Commission;
• The selling or offering for sale of regulated appliances in California that have been certified to the Commission but are subsequently determined to fail to meet the energy consumption levels that were reported to the Commission at the time of certification;
• The sale or offering for sale of a regulated appliance in California that has not been marked or labeled as required by state or federal law;
• Any other non-performance of a provision in Appliance Efficiency Regulations.

Questions for stakeholder consideration:
1. Should there be categories of violations, e.g., appliance model does not meet an existing standard, failure to certify, failure to pay for purchase/testing of an appliance by our independent laboratory, failure to properly mark, etc.?
NEMA comments:

1) Regarding what constitutes a violation NEMA stresses the need to account for manufacturing variation and other factors which affect the performance of a specific item. As such, NEMA recommends CEC afford products and suppliers some leeway in this matter and we suggest that CEC solicit input on tolerances. NEMA is happy to provide additional guidance and suggestions on this matter.
2) Regarding the above text "failure to pay for purchase/testing of an appliance by our independent laboratory", does this mean an initial test or does this mean California plans to use an external lab to verify manufacturer data and performance claims as part of routine enforcement checks? If it does mean California using an external lab to verify a manufacturer's data, NEMA wishes to know who is expected to pay for this. We discourage CEC from enacting test charges which would in effect place levies on participation in the California sales market. We also note that the U.S. Environmental Protection Agency employs a third party test and certification program for ENERGY STAR and this program is experiencing significant complaints and pushback, so we do not recommend any similar approaches in California.

3) NEMA suggests categories of violation which address varying degrees of infraction; such as products which meet standards but are not labeled, products that are not labeled and do not meet standards, and finally products that are labeled and listed but fail verification. These levels can help in the determination of time required for an evaluation, time allowed to rectify any violations and severity of penalty. Suggestions for the compliance levels may include (listed in order of increasing severity):
   a) listing a covered product in the CEC database;
   b) labeling a covered product;
   c) meeting the performance standard level. This item should also be evaluated based on the overall energy impact of the violation. A violation due to manufacturing tolerance would likely be a small energy impact compared with a clear or egregious violation of the standard.

2. Should each day of a sale or offer sale of a non-certified or non-compliant model be considered a violation (i.e., should this be "per unit sold/offered-for-sale", or per incident)?
NEMA comment: We are not sure how such detail might be obtained, except from manufacturer/retailer logs, which would become problematic. A per incident rating might be simpler, though a massive fine on a supplier from having spotted a single product would be counterproductive. This is where a notification and follow-up process might be more useful. Opening written communications between a suspected supplier of non-compliant goods as a first step might further enable CEC to more closely monitor and track that supply chain and become more aware of the scope of the potential problem.

3. How will the Commission determine "persistence of the violation"? In the absence of information to the contrary, should a rebuttable presumption of one year be used as a starting place to define "persistence"?
NEMA comment: We do not agree with an arbitrary definition of the time of persistence.

4. Should nonpayment of a fine be, in itself, a violation?
NEMA comment: Payment of a fine would logically be part of the detailed arbitration process whereby a violation is identified, researched, verified and acted upon, to include the appeals process. Fines for non-payment of fines do not make sense.

C. DETERMINING THE MONETARY PENALTY
Public Resources Code section 25402.11 states that the Energy Commission will consider several factors when determining the monetary penalty. These factors are:
1. the nature/seriousness of the violation;
2. the number of violations;
3. the persistence of the violation;
4. the length of time over which the violation occurred;
5. the willfulness of the violation;
6. the violator's assets, liabilities and net worth;
7. the harm to consumers (e.g., lost energy savings, increased cost).

Questions for stakeholder consideration:

1. How should the Commission determine the number of noncompliant models being "offered for sale?" Should the retailer/distributor be asked to self-report such data? Should we begin collecting sales data?
NEMA comment: NEMA does not recommend adding the burden of routine sales data collection to this process. Self-reporting of data of non-compliance is the simplest tool and arguably could be the most accurate, as long as proper oversight is exercised by the Commission.

2. How should the seven factors be applied in determining the fines for manufacturers of noncertified appliances?
NEMA comment: NEMA feels that these factors are the most serious and should be weighted above the others; Items 1, 7, 5 seem the most important. Additionally, we note that items 3 and 4 seem to be the same.

3. What is a reasonable amount of time to allow the penalty to be paid?
NEMA comment: we suggest 90 days as reasonable.

4. What should the penalty be for those who don't pay the fine in the time specified?
NEMA comment: As noted in our answer to item B4, fines on top of fines are illogical.

Additional NEMA Comments:

1. NEMA understands that CEC intends to pursue enforcement at many levels, to include retailers. NEMA agrees with this approach, because OEMs do not always know which specific market their products are destined for. In that vein, NEMA recommends that CEC make quite clear to retailers, wholesalers, distributors, on-line sales and other providers of product that they also share responsibility for compliance with enforcement and they may be subject to fines as well.
2. In consideration of the above, NEMA suggests that small contractors also be considered as within scope, as they also in effect sell product during renovations and construction.
3. NEMA suggests CEC develop a draft notice for all parties who are determined to be within the scope of enforcement, to be used by OEMs and anyone in the delivery chain as a reminder to those participating in downstream product procurement and delivery. Some NEMA members already do this. However, the commission notices will provide credible independent references reinforcing the materials developed by manufacturers or retailers.
4. Regarding reaction time to determined violations; NEMA recommends that lack of certification listing be corrected within 30 days of determination of violation. NEMA recommends 60-90 days for removal of non-compliant product from shelves, the specific time to be set with respect to the number and scope of products affected.

5. For non-compliant products determined to be part of a limited production run, i.e. "bad batches", NEMA suggests leeway be included in the determination process for removal from store shelves and also regarding the size of fines, so as to only target those products which are inferior and not similar, compliant models.
6. The implementation and effect date of the enforcement plan should allow sufficient time to comply. The significant time involved in verifying one's product and listing them, coupled with some lack of reporting in the past owing to non-enforcement, should in fairness be accommodated somewhat. This would alleviate concerns of an enforcement blitz.
7. Because of the significant sales, fines and bad publicity at risk involved when non-qualifying product is identified and pulled, it is critical that the Commission establish clear guidelines for the qualification and operation of those labs selected as verification and test labs for the Title 20 enforcement office. For Federal enforcement, labs must adhere to strict guidelines for testing procedures and internal certifications of competence, such as those found in NVLAP and other nationally recognized test programs.
8. NEMA believes that the current testing and listing requirements in Title 20 are sufficient and that this rulemaking should not establish additional testing and reporting burden.
9. Regarding testing costs, the California Appliance market should not be "pay to play" regarding enforcement. Manufacturers who have been responsive to their obligation to bring qualified products to the market should not be penalized for verification testing costs, as they have already essentially paid those costs internally as part of the initial qualification and listing process. Manufacturers and distributors already make significant, recurring investments to bring quality products to Californians shelves. The cost of verification testing should be shared by all parties with a stake in enforcement; the Manufacturers having paid the first cost, for qualification and listing. It follows too that the California utilities and the State should share the costs for product enforcement by funding the bulk of verification testing. NEMA does support adding to fines of offending parties the immediate testing costs associated with verification of their product's proven inadequate performance. Thus (some) manufacturers will also share the cost of verification, and it will be those who have the most obligation thereof.
10. Additionally, the testing and verification program should not be funded from fines, as this would encourage an overly aggressive practice and incentive to fail products to assure funding revenue.
11. In determining what products to verify, the state should develop approach guidance that supports a fair and reasonable pursuit of non-compliant products without respect for the size of the source of those products or focus on larger manufacturers or retailer alone. The ability of the offending party to pay should have no bearing on whether or not they are tested or fined.
12. It is noted that not all products in the CEC database are regulated products. For lighting, the CEC allows LED products to be listed as a resource for the marketplace; however these are not products that are regulated by Title 20. Only products covered by Title 20 should be evaluated under a compliance standard.

13. NEMA also calls the CEC's attention to comments on Federally-regulated products which we address in a joint Trade Associations letter filed at the same time as these comments.