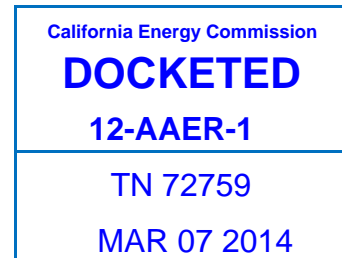


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March 7, 2014



VIA ELECTRIC SUBMISSION

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 12-AAER-1
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: Comments of OSRAM SYLVANIA in Response to the California Energy Commission's Proposed Appliance Efficiency Enforcement Rulemaking, Docket No. 12-AAER-1

Dear Commissioners:

OSRAM SYLVANIA ("OSRAM") appreciates the opportunity to provide these comments regarding the California Energy Commission's ("CEC" or "the Commission") February 2014 draft regulations implementing an administrative enforcement process for the Commission's Appliance Efficiency Regulations, California Code of Regulations, tit. 20, sections 1601-1608 ("Appliance Efficiency Standards").

I. INTRODUCTION

Senate Bill ("SB") 454 (Pavley, 2011) (adding section 25402.11 to the Public Resources Code), authorized the Commission to adopt regulations establishing an administrative enforcement process to enforce its existing Appliance Efficiency Standards. SB 454 enabled the Commission to assess an administrative civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, and required the Commission to consider a number of factors in assessing the amount of each penalty.¹ On January 12, 2012, the CEC adopted an Order Instituting Rulemaking to implement Pub. Res. Code, section 25402.11. Draft administrative enforcement regulations were released to the public in early February 2014. On February 25, 2014, the Commission held a "Staff Workshop" to seek comments from interested parties on its draft enforcement regulations. OSRAM submitted oral comments at the Staff Workshop. We expand upon those comments below.

OSRAM SYLVANIA ("OSRAM") is the second largest light and materials company in the world, serving customers in more than 140 countries. Manufacturing and marketing a wide range of lighting products, OSRAM creates products for business and industry, consumers, the automotive industry, and for the computer, aerospace and other major industries worldwide. The company is committed to developing sustainable lamps and ballasts that process energy safely and efficiently.

¹ See Pub. Res. Code § 25202.11(a).

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OSRAM supports the CEC's efforts to promulgate appliance efficiency enforcement standards. We believe that firm enforcement of Appliance Efficiency Regulations will maintain a level playing field among appliance manufacturers and ensure continued use of environmentally responsible, quality appliances. These regulations should deter the sale of noncompliant units and enable the Commission to punish violations efficiently. At the same time, the Commission should ensure that its enforcement procedures do not unfairly disadvantage compliant manufacturers.

Towards this end, we encourage the Commission to add language clarifying that a manufacturer must have some knowledge of a violation to be held liable for a violation that occurs later in the chain of transaction; explicitly address liability associated with internet sales into California; institute a cap on the maximum penalties that may be assessed under the regulations; reward efforts to correct violations prior to the government learning of a violation, as well as initiation of enforcement; ensure that harm to consumers and the State from energy wasted due to a violation is quantified uniformly; provide a clear timeframe for penalty payments and levy additional fees for late payments; and clarify language to streamline enforcement. These recommendations are discussed in detail below.

II. RECOMMENDATIONS

A. Manufacturers Should Not Be Liable for Violations For Which Manufacturers Have No Knowledge, Despite Commercially Reasonable Due Diligence

Section 1609(a)(1)(ii) provides that "[a] manufacturer of an appliance... may be subject to an administrative civil penalty for each sale or offer for sale of a unit of that appliance [that does not comply with Appliance Efficiency Standards]". While OSRAM supports the CEC's efforts to punish manufacturers who sell noncompliant appliances, manufacturers with no knowledge of this kind of sale, despite commercially reasonable due diligence, should not be penalized for violations that occur farther down the line in the chain of transaction. Despite a manufacturer's best efforts to ensure that all of its products meet California efficiency standards, retailers can independently sell noncompliant appliances without the manufacturer's knowledge or approval. For example, manufacturers do not have control over retailers' sale of older versions of appliances or products designed for non-California markets. While these retailers would likely be penalized under section 1609(a)(1)(i), manufacturers with no knowledge of these sales should not also be penalized under section 1609(a)(1)(ii).

At the same time, the enforcement regulations should ensure that manufacturers are not incentivized to turn a blind eye on noncompliant retailers. As a result, manufacturers must continue to exercise commercially reasonable efforts to control the sale of noncompliant product. If, however, after engaging in commercially reasonable due diligence, manufacturers still have no knowledge of noncompliant sales, they should not be liable for those sales.

Punishing manufacturers for these kinds of retailer violations could result in negative market effects. Fearful of incurring liability, national and international manufacturers could refuse to contract with retailers selling into California. This would reduce consumer selection, create higher prices, and lead to job loss in the state. Alternatively, holding innocent manufacturers liable for retailers' noncompliant sales could force manufacturers to expend significant resources redesigning products to be compliant with California regulations. Although this prospect may be environmentally beneficial, manufacturers could simply pull out of California markets. While CEC penalties should serve as a deterrent to selling noncompliant appliances, they should not be so punitive so as to stifle business in California.

To ensure that manufacturers with no knowledge of a noncompliant sale are not unfairly punished, we offer two recommendations. First, section 1609(a)(ii) should include a statement that “a manufacturer with no knowledge of the sale of a unit of an appliance in a manner inconsistent with section 1608(a)(2) through 1608(a)(4), despite commercially reasonably due diligence, will not be subject to an administrative civil penalty.” Second, as further protection against penalization of non-culpable entities, section 1609(b)(2) should be revised. While section 1609(b)(2) enables the Commission flexibility to consider each violation on a fact-specific basis, this section should include specific consideration of the violator’s *knowledge* of the violation. Persons with no knowledge of a violation that occurs at a different point in the chain of transaction shall not be subject to administrative penalties.

B. The Enforcement Regulations Should Explicitly Cover Internet Sales and Consider the Violator’s Intent to Sell Into California

The regulations do not explicitly address liability for sales of noncompliant appliances over the internet into California. The number of appliances sold over the internet increases every year as more and more people get access to computers. If internet sales into California are not fully regulated, California industry will be severely disadvantaged: internet sellers in different states could sell noncompliant product without repercussion, while non-internet sellers are held to a different standard. Moreover, a loophole for internet appliance sales would increase the prevalence of noncompliant product in California. To ensure a level playing field for industry, protect California consumers from noncompliant product, and ensure the environmental benefits associated with increased use of energy efficient appliances, the Commission should include explicit language demonstrating its enforcement power over internet sales into California.

At the Staff Workshop on February 25, 2014, the Commission specifically stated that it was their intention to regulate internet sales into California. To ensure that these sales are regulated, Sections 1609(1)(i) and 1609(1)(ii) should be modified to cover “each sale or offer for sale, including a sale over the internet into California...”.

Further, as discussed in more detail in part II.A above, the regulations should be revised to ensure that manufacturers are not held liable for internet sales of noncompliant products if, after engaging in reasonable due diligence, manufacturers have no knowledge of these sales. First importers should be liable, not innocent manufacturers. Towards this end, section 1609(b)(2) should be revised to require the CEC to consider the violator’s “intent to sell into California” when assessing penalties.

C. The Commission Should Institute a Maximum Cap on Penalties Assessed For Multiple Violations

While Pub. Res. Code 25402.11(a)(1) requires the Commission to assess an administrative civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, the statute does not discuss a cap on penalties for multiple violations. However, as appliance sales are often completed in bulk, imposition of \$2,500 per violation could result in an enormous penalty. For example, if a retailer inadvertently stocked and sold 1,000 noncompliant units, it could be liable for a \$2.5M fine. A strict per-unit calculation would be unfair to manufacturers who typically sell multiple units to consumers. For example, the typical home has 30 lighting sockets but a very limited number of other appliances, such as toasters or televisions. As a result, manufacturers of lighting appliances like OSRAM, who commonly sell multiple appliances in one sale, would likely be disproportionately penalized under the regulation as written.

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At the Staff Workshop, the Commission suggested that it sought to avoid a situation where it would be required to impose an “unreasonable” fine. The prospect of this kind of penalty would deter many entities in the appliance industry from doing business in California. Moreover, a cap would enable the CEC to assess penalties more efficiently. With a cap, the Commission would not have to expend the time and resources necessary to make an individual penalty calculation for each violation in a multi-violation scenario. We urge the Commission to institute a cap on the maximum penalty allowed. This will ensure that violators are reasonably punished while, at the same time, streamlining the CEC’s administration process.

We believe that the CEC is well-suited to determine exactly where this cap should be set. Consequently, OSRAM is not recommending a specific maximum penalty at this time.

D. A Responsible Person’s Efforts to Correct a Violation Should Be Considered Prior to the Government Learning of the Violation, As Well As Prior to Initiation of an Enforcement Action

SB 454 requires the CEC to consider a number of factors in assessing the amount of an administrative penalty.² The Commission expanded upon these factors in drafting its proposed enforcement regulations. OSRAM supports a multi-faceted analysis of each violation. Towards that end, the Commission should take into account all efforts to correct a violation, instead of simply efforts to correct the violation prior to initiation of an enforcement action.

Section 1609(b)(2)(H) provides that the CEC will consider “efforts to correct the violation prior to initiation of an enforcement action by the Energy Commission.” However, much time could elapse between commission of a violation and initiation of an enforcement action. Thus, the provision as written provides a violator with a significant amount of time to correct a violation and suggests that the CEC may lessen the penalty based on this correction. Instead of simply considering a violator’s efforts to correct noncompliance prior to enforcement, the Commission should also consider efforts to correct a violation prior to the government *learning* of the violation. This immediate correction, not subject to the pressure of a looming enforcement action, may also be useful evidence of a violator’s contrition and acknowledgement of wrongdoing.

E. The Harm to Consumers and To the State Resulting from Energy Wasted Due to a Violation Should be Calculated Using Excess Emissions

Section 1609(b)(G) requires the CEC to consider “[t]he harm to consumers and to the state that resulted from the amount of energy wasted due to the violation.” In order to ensure that this “harm” is quantified uniformly, the CEC should calculate the amount of energy waste by evaluating the excess greenhouse gas emissions associated with the lifecycle of a noncompliant product. Not only would this methodology further the state’s greenhouse gas emissions reduction program, it would provide the Commission with a definitive method of quantification, thereby conserving CEC time and resources.

² Pub. Res. Code § 25402.11(a)(2).

F. Payment of a Penalty Assessed Should Be Required Within a Clear Timeframe With Additional Penalties For Non-Payment

To ensure that violations are processed efficiently, the Commission should institute a clear timeframe for submission of payment for administrative civil penalties. The proposed regulations contain no information regarding when a penalty assessed must be paid. Once a decision regarding a violation is issued or adopted, the Commission should require payment within ninety (90) days. OSRAM believes that ninety days provides a reasonable timeframe for a violator to pay its penalty. By defining an acceptable time period for penalty payment, the Commission will ensure that Appliance Efficiency Standards enforcement operates efficiently and uniformly.

To further incentivize quick payment, OSRAM suggests that the Commission assesses additional fees for late payment (i.e., payment outside of this ninety-day window). Not only will these additional penalties deter violators from late payment, it will ensure that the Commission receives penalty payments in a timely fashion.

G. The Commission Should Revise Language to Clarify the Regulations' Intent

So that there is no confusion regarding the meaning of the regulations, there are two provisions of the enforcement regulations that would benefit from clarification. These changes will ensure that all parties fully understand the Commission's intent.

First, section 1609(1) states that "[a]ny act or omission in violation of this Article may be subject to an administrative civil penalty, including: (i) Any person.... [or] (ii) A manufacturer". The current structure suggests that an "act or omission" includes a "person" or a "manufacturer". This simply does not make sense and should be revised.

Second, section 1609(a)(2) provides that "Any person who makes a false statement in a declaration submitted to the Energy Commission... may be subject to an administrative civil penalty for that false statement." While OSRAM supports efforts to penalize the submission of false statements to the Commission, the Commission should make clear that clerical errors or other inadvertent mistakes will not qualify for penalty under this section. Consequently, the regulations should clarify that only persons "willfully" making false statements will be penalized.

IV. Conclusion

The Commission staff initiated rulemaking to implement the provisions of SB 454 on January 12, 2012. Since that time, the Commission has worked diligently with stakeholders to address this important matter. We recognize the CEC's efforts to address this issue, and we support the promulgation of Appliance Efficiency Standards enforcement regulations.

As described above, however, we encourage the CEC to provide (1) add language clarifying that a manufacturer must have some knowledge of a violation to be held liable for a violation that occurs later in the chain of transaction; (2) explicitly address liability associated with internet sales into California; (3) institute a cap on the maximum penalties that may be assessed under the regulations; (4) revise the provision regarding penalty reductions for efforts to correct violations; (5) ensure that energy wasted due to a violation is quantified efficiently and uniformly; (6) institute a clear timeframe for penalty payments

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with additional penalties in the event of late payment; and (7) clarify language to streamline enforcement. Without such regulatory amendments, manufacturers may be unfairly punished for violations of which they had no knowledge, hefty fines associated with noncompliance may deter appliance sales in California, and enforcement procedures may prove overly burdensome for the Commission.

Consistent with these comments, we respectfully request that the Commission incorporate the proposed regulatory amendments included as Exhibit A to this comment letter.³

We look forward to working with Commission staff to facilitate the necessary enforcement regulations to ensure that only compliant appliances are sold in California.

Respectfully submitted,



Peter H. Weiner

cc: John Nuffer, Project Manager, Appliance & Existing Buildings Office, Efficiency Division

³ Recommended insertions are shown in underlined text and deletions are shown in ~~strike through~~.

CEC Revised Proposed Appliance Efficiency Standards Enforcement Regulations

Exhibit A: Recommended Amendments

§ 1609. Administrative Civil Penalties

* * * *

(a) Violations subject to administrative civil penalties.

(1) Any person who commits Any act or omission in violation of this Article may be subject to an administrative civil penalty, including:

(i) Any person who sells or offers to sell a unit of an appliance within the scope of Section 1601 in a manner inconsistent with Section 1608(a)(1) may be subject to an administrative civil penalty for each sale or offer for sale, including a sale over the internet into California.

(ii) A manufacturer of an appliance within the scope of this article, including a third party representative acting pursuant to 1606(f), may be subject to an administrative civil penalty for each sale or offer for sale, including a sale over the internet into California, of a unit of that appliance in a manner inconsistent with Section 1608(a)(2) through 1608(a)(4). However, a manufacturer with no knowledge of the sale of a unit of an appliance in a manner inconsistent with Section 1608(a)(2) through 1608(a)(4), despite commercially reasonably due diligence, will not be subject to an administrative civil penalty.

(2) Any person who willfully makes a false statement in a declaration submitted to the Energy Commission under penalty of perjury pursuant to any provision of this Article may be subject to an administrative civil penalty for that false statement. This is in addition to any administrative civil penalty assessed pursuant to subsection (a)(1) for each sale or offer for sale of a unit of an appliance for which a false statement was made. The Energy Commission may also consider the willful making of a false statement in a declaration submitted under penalty of perjury to be evidence of willfulness under subsection (b)(2)(e).

(b) Assessment of administrative civil penalty.

(1) For each violation specified in subsection (a), an administrative civil penalty of up to the maximum amount provided by Section 25402.11 of the Public Resources Code may be assessed. However, at no time shall the administrative civil penalty for multiple violations exceed _____.

(2) In determining the administrative civil penalty for each violation, the Energy Commission shall consider the following factors:

(A) The nature and seriousness of the violation.

(B) The number of violations.

(C) The persistence of the violation, meaning the responsible person's history of past violations of this Article over the previous seven years.

(D) The length of time over which the violation occurred.

(E) The willfulness of the violation.

(F) The violator's assets, liabilities, and net worth. This information will be considered to reduce the administrative civil penalty amount, should the responsible person elect to provide asset, liability, and net worth documentation to the Executive Director to demonstrate that a reduction in penalty is necessary to avoid undue burden.

(G) The harm to consumers and to the state that resulted from the amount of energy wasted due to the violation. The amount of energy wasted will be calculated by evaluating excess greenhouse gas emissions associated with the lifecycle of a noncompliant product. This calculation will be based off of the excess inefficiency of the noncompliant product, the carbon dioxide equivalent emissions intensity of an average megawatt hour in California in the year the noncompliance was discovered, and the average use factor—per the methodology of the U.S. Department of Energy—of the product at issue. The consumer harm of the excess emissions would then be monetized

based on the published clearing price of an allowance in the most recent California Air Resources Board-conducted auction pursuant to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (Cal. Code Reg. tit. 17, §§ 95800 et seq.). The harm associated with the violation would be the value of an allowance in the most recent auction multiplied by the metric tons of carbon dioxide equivalent associated with the noncompliance.

(H) The responsible person's efforts to correct the violation prior to discovery of the violation and initiation of an enforcement action by the Energy Commission.

(I) The responsible person's cooperation with the Energy Commission during its investigation.

(J) The responsible person's knowledge of the violation. Persons with no knowledge of a violation that occurs at a different point in the chain of transaction, despite commercially reasonable due diligence, shall not be subject to administrative penalties.

(K) The responsible person's intent to sell into California.

(c) Notice of Violation.

The Executive Director shall send a written Notice of Violation to any person in violation of this Article. The Notice of Violation shall contain the following information:

- (1) The name and address of the person responsible for the violation;
- (2) A statement indicating the statute, regulation, order, or decision upon which the Notice of Violation is based, including a description of the administrative civil penalties associated with this violation; ~~any provisions relating to the assessment of penalties;~~
- (3) A statement of facts upon which the Notice of Violation is based, including a description of the appliances or units of appliances at issue and a reference to model numbers.

(d) Settlement.

Consistent with California Government Code Section 11415.60, the Energy Commission may at any time issue a decision by settlement with the responsible person. The settlement agreement may include appropriate sanctions and remedies to address violations and promote compliance.

(e) Administrative Proceeding.

(1) No earlier than 30 days after issuing a Notice of Violation, the Executive Director may initiate an adjudicative proceeding to impose administrative civil penalties if the Executive Director determines that the responsible person has not made sufficient progress in addressing the violations identified in the Notice of Violation.

(2) The proceeding shall be initiated by filing and serving an accusation as specified in California Government Code Section 11505. The accusation shall include an assessment of penalties based on the factors set forth in subsection (b)(2), and may include other information from the Notice of Violation.

(3) The proceeding shall be conducted in a manner consistent with Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the California Government Code.

(4) The proceeding shall be heard by an administrative law judge pursuant to Government Code Section 11517(c), unless the Chair orders that the proceeding be heard directly by the Energy Commission with the assistance of an Administrative Law Judge pursuant to California Government Code Section 11517(b).

(5) After the hearing referenced in subsection (e)(4), the Energy Commission shall issue or adopt a decision on whether a violation of this article has been committed, and assess appropriate penalties based on application of the factors set forth in subsection (b)(2) above.

(f) Payment of Administrative Civil Penalty.

The responsible person must pay any administrative civil penalty assessed under subsection (e) above within ninety (90) days of the Energy Commission's issuance or adoption of a decision. If the responsible person does not pay the administrative penalty assessed with ninety (90) days, the Energy Commission may assess additional fees for late payment.

(g) Other Enforcement Procedures.

The Executive Director and Energy Commission may take other such actions as are authorized by statute and Energy Commission regulations to address or prevent any act or omission addressed under this Article.

(h) Judicial Review.

An order of the Energy Commission imposing an administrative civil penalty shall be subject to judicial review pursuant to Public Resources Code Sections 25534.2(a) and 25534.2(b).