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Get Ready For Stricter Energy Star Enforcement

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Law360, New York (July 29, 2013, 12:06 PM ET) -- Since its start in 1992, the Energy Star program has become one of the most significant consumer product rating programs in the United States. Shoppers have grown accustomed to looking for the blue Energy Star symbol on a wide variety of electrical devices. In the last few years, Energy Star status has also become a selling point for homes and office buildings, and the program's standards have been adopted outside the United States.

More than 4.5 billion Energy Star-labeled products have been sold since 1993. The U.S. Environmental Protection Agency credits the voluntary program with saving over \$230 billion in energy bills and preventing more than 1.8 billion metric tons of greenhouse gas emissions.

Until recently, the Energy Star program seemed to be one of the EPA's least controversial programs and one more likely to be a boon than a burden or a risk to manufacturers. In the last few years, however, stepped-up enforcement actions by both the EPA and the U.S. Department of Energy have presented increased risks for those who make and sell Energy Star products. In addition, plaintiffs' lawyers have pursued class actions on behalf of consumers who purchased appliances with allegedly misleading Energy Star labels.

The Energy Star program's recent focus on enforcement has come in response to intense criticism of the program from a variety of sources. In a 2008 cover story, Consumer Reports took Energy Star's administrators to task for supposed lax product certification, claiming that one tested refrigerator had a real-life energy use that was twice that reflected in its Energy Star rating.

Multiple audits of the Energy Star program followed by the Government Accountability Office and the Offices of Inspector General for both the DOE and the EPA. In response, in a 2010 program enhancement effort, the DOE and the EPA began requiring third-party product testing prior to Energy Star certification.

Energy Star also began a program of retail store-level assessment, testing products purchased from retail outlets. Manufacturers are now beginning to feel the impacts of Energy Star's expanded verification procedures.

The Energy Star program is jointly administered by the EPA and the DOE, which share responsibilities pursuant to a 2009 memorandum of understanding. Before a company may sell a product with the Energy Star trademark (which is owned by the EPA), that company must enter into a partnership agreement with both the EPA and the DOE.

The partnership agreement requires the company to abide by certain requirements, such as obtaining a certificate of Energy Star qualification from an EPA-designated certification body (CB) prior to use of the Energy Star symbol. To obtain such a certification, a product must achieve Energy Star-specified efficiency standards in testing by a third-party, EPA-designated laboratory. The laboratories report test results to the CBs, which are required to forward test failures to the EPA within two days.

As the owner of the Energy Star trademark, the EPA handles the later stages of the Energy Star disqualification process. Energy Star standards vary by product category, and change frequently, but often require a product to surpass mandatory federal energy efficiency standards by a certain percentage. If a company fails to abide by an Energy Star program requirement, the EPA may commence the disqualification process.

When the EPA receives a failing test result, the agency typically provides the Energy Star partner (as the company manufacturing or distributing the relevant product is called) 20 days to challenge the test result. This can prove to be a tight time frame. If the partner does not challenge the test, or if the EPA rejects the challenge, the EPA disqualifies the product, rescinding the product's Energy Star status and adding it to a publicly posted list of disqualified products.

The EPA then requires the partner to develop product control measures within another 20 days. These measures typically require the partner to cease shipping the product immediately, remove Energy Star references from all of the product's marketing materials and provide the EPA with detailed information on the product's status in the marketplace.

Frequently, the EPA also will require notification of downstream distributors and retailers of the product. If a partner fails to comply with EPA directives, the agency may terminate the partner's general agreement with the Energy Star program, ending Energy Star status for all of the company's products.

A company that continues to use the Energy Star symbol — a well-known, registered certification trademark owned by the EPA, which can only be used under license and which indicates that the EPA's Energy Star standards have been met — after being terminated from the program may be sued by the EPA for trademark infringement or dilution.[1]

The case of the Avanti Products refrigerator, Model BCA4560W-2T, illustrates the fast-paced and informal enforcement that is characteristic of the Energy Star program.

On April 6, 2012, the DOE notified Avanti that the model had failed verification testing.[2] Avanti responded by email to the DOE's claims on April 27, citing internal test data that suggested the model complied with Energy Star standards and claiming that the DOE-tested units had been damaged. The DOE replied by letter on May 22, 2012, rejecting Avanti's arguments and referring the matter to the EPA. The EPA disqualified Avanti Model BCA4560W-2 on June 13, 2012.[3]

Energy Star enforcement has been growing. In 2012, the EPA reported that, as a component of the Energy Star enforcement program, 1,169 product models underwent additional verification testing. This was an increase from 811 tested models the previous year.

The agency reported that 87 tested models (just over 7 percent) failed verification testing in 2012. This was the same failure rate as the agency reported the prior year when 811 products were tested.

Models may be selected for testing by CBs with input from the EPA, or testing may be prompted by a challenge from a competitor. Because the EPA disqualifies related models as well as those that fail tests, the total number of disqualified models in 2012 — 286 models — was substantially higher than the number of test failures. This was up from 241 models disqualified in 2011.

As of July 1, 2013, 191 models have been disqualified so far this calendar year, suggesting that the EPA may be on track to disqualify a larger number of models in 2013.

The Energy Star program divides tested products into Energy Star-designated product categories, using different testing programs for different product types. In 2012, Energy Star greatly expanded its testing of computers and office equipment, testing 162 models, up from 15 the previous year.

Failure rates have varied substantially by product category. Although 59 water heaters were tested in 2012, only one failed. On the other hand, of 113 compact fluorescent lamps (CFLs) tested in 2012, 54 failed. As of July 1, the EPA has already disqualified 117 CFLs in 2013.

Disqualification can be costly. Loss of Energy Star status can harm sales and damage a company's relationship with its distributors and retailers. Follow-on consumer protection lawsuits are also a risk if, for example, a company has allegedly misrepresented a product's energy consumption.

Given the fast pace of enforcement and the potentially severe consequences of disqualification, companies selling Energy Star products may wish to take several protective measures. These may include internal auditing and testing, as well as having a plan in place permitting a rapid, sophisticated response to the government as well as business partners, should failures be detected internally or should one of their products become the subject of disqualification procedures. In some larger cases, a public and consumer relations plan may also be warranted.

Effective responses to disqualification procedures vary. In some cases, a company may be able to identify flaws in the test results that form the basis for disqualification, for example, by demonstrating that the tested product was damaged or outdated or that there was a problem with the test procedure.

In other cases, Energy Star test failures may be traceable to quality control issues within production. When testing reveals a quality control issue, an effective response often will depend on a company's ability to define the extent of the issue in a short amount of time. On a separate track, effective response also will depend on the company's rapid development and presentation of a response plan that both reassures the agency and limits any harm to the company.

Throughout the process, the company should bear in mind the risk of possible consumer lawsuits. Plaintiffs' firms have advertised dozens of Energy Star-related class actions, primarily involving larger appliances such as air conditioners and refrigerators.[4] In some cases, companies have obtained the dismissal of consumer lawsuits by arguing that the Energy Star mark does not constitute an express warranty of energy efficiency.[5]

To reduce the risk of consumer lawsuits, it may be appropriate in some circumstances for a company to take quick action to clear the market of a product that has lost its Energy Star status or to remove Energy Star marketing or labeling of the products that remain on the market, reducing the potential for consumers to argue that the company knowingly misrepresented the Energy Star status or the efficiency of the product or fell short of an affirmative duty to discontinue Energy Star representations for the product.[6]

If the EPA does not accept a company's response plan, the EPA may terminate all or a portion of the company's partnership with Energy Star. In response, a company may challenge the EPA's action in court.[7] Depending on the facts of the case, such a challenge may be brought under the Administrative Procedures Act, the Energy Policy and Conservation Act, federal trademark law or other basis.

Against the backdrop of the large scale of the Energy Star program, a relatively small portion of the total number of Energy Star-qualified products are disqualified each year. According to the EPA, the agency expects its CBs to submit a minimum of 10 percent of unique models to verification testing each year. Of

models tested in 2012, 93 percent passed, suggesting an overall disqualification rate of less than 1 percent of all unique models.

Still, for companies with a product that is disqualified, the costs can be substantial. Companies that have or are considering participating in the Energy Star program may wish to monitor current trends in enforcement and consider adopting internal controls designed to reduce the risk of noncompliance and an enforcement response plan to address problems promptly if they arise.

[1] See *United States of America v. EnergyStar Home Improvement Inc.*, Case No. 1-11-cv-5279 (N.D. Ill. 2011) (permanent injunction entered against unauthorized user of EPA's ENERGY STAR certification trademark).

[2] See Letter from Laura Barhydt to Leslie Jones (May 22, 2012), available at http://energy.gov/sites/prod/files/Avanti_EPA_referral.pdf.

[3] See U.S. Environmental Protection Agency, Non-Lighting Products Disqualified from the ENERGY STAR® Program, available at http://www.energystar.gov/index.cfm?c=partners.pt_es_integrity.

[4] See, e.g., <http://www.zimmreed.com/Energy-Star-Investigation/63419/> (listing products).

[5] See *Savett v. Whirlpool Corp.* (N.D. Ohio 2012) (not reported) (“[N]either the parties nor the Court uncovered any case in which a logo has ever been held to constitute an express warranty.”); *Rossi v. Whirlpool Corp.* (E.D. Cal. Mar. 28, 2013) (dismissing consumer lawsuit involving the ENERGY STAR status of KitchenAid refrigerators in part on the basis that the plaintiff failed satisfactorily to explain how the ENERGY STAR logo communicated an express warranty).

[6] See *Savett* (noting that “it appears that plaintiff is claiming that upon learning of the government testing in which certain washers failed DOE testing, defendants owed plaintiff a duty of disclosure,” but rejecting this claim because plaintiff failed to allege that plaintiff “acted or refrained from acting as a result of defendants’ subsequent failure to disclose the results of the DOE testing”).

[7] See *LG Electronics U.S.A., Inc., v. U.S. Dept. of Energy*, Civ. No. 09-2297 (D.D.C. 2010) (rejecting a challenge by LG to DOE’s order that LG remove the ENERGY STAR label from approximately 40,000 refrigerators).

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