

In a letter to DOE dated June 7, 2016, Empire disclosed that it had tested fifteen additional models as manually controlled, the units of which are also accompanied by a thermostat and instructions on how to install the unit as thermostatically controlled. In Empire's view, these models suffer from the same issue as model FAW-40-2—the models do not meet the applicable standard when tested according to the procedures applicable to thermostatically controlled models. In a subsequent communication, Empire informed DOE that two of the fifteen basic models identified in the June 7, 2016 letter—models DV25 and DV35—comply with the applicable energy conservation standard when tested pursuant to the procedures applicable to thermostatically controlled models. Empire provided test reports that appear to support this assertion. Therefore, this Notice of Noncompliance Determination applies only to the remaining thirteen models, identified by Empire as basic models DV55, DVC35, DV210, DV215, FAW55, HWDV081BN, HWDV081BP, HWDV150BN, HWDV150BP, 3588, 5088, 7088, and MV130 (together, with all individual models covered by the basic models, the “subject basic models”).

FINDINGS

Based on the facts stated above, DOE has determined that the subject basic models and all individual models within the subject basic models do not comply with the applicable energy conservation standard.

MANDATORY ACTIONS BY EMPIRE

Empire notified DOE that it has ceased distribution in commerce in the United States all units of the subject basic models. In light of the above findings, Empire must take the following additional steps in accordance with 10 C.F.R. § 429.114(a):

- (1) Provide immediate written notification of this noncompliance determination to all persons in the United States to whom Empire has distributed units of any model within the subject basic models;
- (2) Provide to DOE within 15 calendar days of the date of this Notice a copy of the written notification required by paragraph (2) and a list of the parties that Empire notified; and
- (3) Provide to DOE within 30 calendar days of the date of this Notice any and all records, reports, and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of units of the subject basic models in the United States in the past five years.¹

If you claim that any of the information sought by this Notice constitutes confidential commercial material within the meaning of 5 U.S.C. § 552(b)(4), or is protected from disclosure pursuant to 18 U.S.C. § 1905, you must (1) provide one complete and full copy and one copy with the confidential information deleted and (2) submit supporting information together with the

¹ Please note that “[t]he terms ‘to distribute in commerce’ and ‘distribution in commerce’ mean to sell in commerce, to import, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.” 42 U.S.C. § 6291(16).

materials that are the subject of the confidentiality request. *See* 10 CFR § 429.7. Failure to adhere to these procedures will result in a rejection of your request for confidential treatment.

OPTIONAL ACTIONS BY EMPIRE

In addition to ceasing distribution in commerce in the United States of all units of the subject basic models, Empire may elect to modify any or all of the subject basic models to bring it into compliance with the applicable standard. A modified basic model shall be treated as a new basic model under the regulations and must be certified in accordance with the provisions of 10 C.F.R. Part 429. In addition to satisfying all requirements of this part, any models within the basic model must be assigned new model numbers and Empire must also maintain, and provide upon request to DOE, records that demonstrate that modifications have been made to all units of the new basic model prior to distribution in commerce.

Prior to distribution of the modified basic model in commerce in the United States, Empire must provide to DOE test data demonstrating that the modified basic model complies with the applicable standard. All units must be tested in accordance with DOE regulations, and Empire shall bear the costs of all such testing. If, after this testing, DOE determines that the modified basic model complies with the applicable standard, DOE will issue a Notice of Allowance to permit Empire to resume the distribution of the modified basic model in the United States. Until DOE determines that the modified basic model complies with the applicable standard, Empire is prohibited from selling or otherwise distributing units in commerce in the United States.

CONSEQUENCES FOR FAILURE TO COMPLY WITH THIS NOTICE

Should Empire fail to cease immediately the distribution in the United States of all units of models within the subject basic models, this letter serves as notice that DOE will seek a judicial order within 30 calendar days to restrain further distribution. If, however, Empire provides DOE with a satisfactory statement within that 30-day period detailing the steps that Empire will take to ensure that units of the noncompliant basic models will no longer be distributed in commerce in the United States, DOE may elect to defer seeking such an order until a more appropriate time, if needed.

The distribution of any units of a noncompliant basic model may result in DOE seeking all appropriate legal remedies available under federal law, including injunctive relief and civil penalties with respect to each unit of the basic model distributed in violation of federal law.

/S/

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for Enforcement