



ATTORNEYS AT LAW

WASHINGTON HARBOUR
3000 K STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20007-5109
202.672.5300 TEL
202.672.5399 FAX
foley.com

WRITER'S DIRECT LINE
202.672.5442
jsnewman@foley.com EMAIL

December 13, 2010

VIA E-Mail

(Celia.Sher@hq.doe.gov)

Ms. Celia Sher
U.S. Department of Energy
Office of General Counsel
Forrestal Building, GC-71
1000 Independence Avenue, S.W.
Washington, D.C. 585-0121

Re: Requested Summary of Telephone Conference Regarding Certification and Compliance Requirements

Dear Ms. Sher:

On behalf of Johnson Controls, Inc. (JCI), I am providing at your request a summary of the concerns raised during our telephone call on Wednesday, December 8, 2010 concerning the certification and compliance requirements for commercial air conditioning and heat pump equipment. These requirements are part of the Notice of Proposed Rulemaking (NPR) dated September 16, 2010, *Energy Conservation Program: Certification, Compliance, and Enforcement for Consumer Products and Commercial and Industrial Equipment*. Ms. Laura Barhydt from the Office of Energy Efficiency and Renewable Energy also participated in our telephone discussion.

As set forth below, JCI has two primary concerns. First, the proposed thirty (30) day requirement to obtain compliance certification for covered products is virtually impossible to satisfy and causes undue hardship on the entire universe of companies subject to these regulations. Second, the NPR does not address meaningfully the term *distribute in commerce* to take into account the fundamental manufacturing, marketing, and sales activities of commercial vendors that are affected by the NPR.

A. Undue Hardship of the Thirty (30) Day Period for Compliance Certification

The time period to obtain *initial* compliance certifications should be 180 days from the effective date of the Final Rule, which is consistent with earlier agency action concerning the subject *Certification, Compliance, and Enforcement* regulations. See Final Rule dated January 5, 2010 (75 Federal Register 652, 664) (“Manufacturers (or third-party organizations) of commercial and industrial equipment subject to today’s final rule are required to submit a compliance statement and the first certification report to DOE on or before the date 180 days after publication of the notice announcing OMB approval of the information collection requirements...DOE will provide notice of OMB approval and the OMB control number in a subsequent **Federal Register** notice.”)

The drastic reduction to 30 days creates undue hardship not only on JCI but on AHRI, the independent testing organization designated to provide the required compliance certifications. In support of the concerns of JCI, we are providing the following *best case* scenario or timeline that represents the steps necessary to obtain compliance certification from AHRI for commercial air conditioning and heating equipment.

TASK	ACTIVITY	TIME
Administrative Lead Time	<i>E.g.</i> , Application, license agreement, payment, identification of required test samples	2 weeks
Equipment Build	Typical lead time for a specified, build-to-order commercial product	6 weeks
Random Selection	Selection of equipment by AHRI and follow-on shipment of test samples to lab	1 week
Qualification	Rigorous testing of samples by AHRI-authorized Laboratory *(Assuming lab availability and success of all first samples passing)	2 weeks*
Administrative Follow-Up	<i>E.g.</i> , Review/verification of test data, letter confirming certification, upload of certified data to the AHRI Directory of Certified Products	1 week
TOTAL TIME		12 Weeks

Based on the foregoing, it will take a manufacturer a total of *twelve (12) weeks* under the most optimum circumstances to obtain the required certification through the AHRI qualification process. Consequently, the proposed 30 day window will only accommodate those manufacturers who already possess AHRI certification on existing products.

The NPR does not permit a manufacturer to obtain AHRI certification for an existing product that does not currently have AHRI certification *and* who will be unable to commence the required certification process within 30 days from the effective date of the Final Rule. It is our

understanding that DoE intends to issue a Final Rule by the end of 2010. If DoE does indeed publish a Final Rule with this 30 day requirement, then manufacturers would have to *complete* the qualification process likely by February/early 2011. The Tasks and Activities provided herein clearly demonstrate that many manufacturers will have a difficult, if not impossible, time complying with such a restrictive 30 day timeframe currently being proposed in the NPR.

Moreover, it is our understanding that the independent testing entity, AHRI, will be unable to comply with the new 30 day requirement. AHRI, which is authorized under DoE regulations to conduct the compliance testing, provides that the length of the qualification process should take 3-4 months. *See* AHRI's General Operations Manual for AHRI Certification Programs:

3.4 *Length of Qualification Process*. The length of the qualification process is dependent upon how quickly paperwork can be completed and exchanged between AHRI and the participant, availability of equipment, test scheduling and conduction, and payment of invoices. AHRI makes every effort to accommodate qualification tests quickly. **Participants who understand the certification process and are diligent in completing necessary paperwork, providing equipment, and paying invoices can typically complete the process within 3-4 months.**

(Emphasis added). Both JCI and the organization entrusted to perform compliance certifications recognize the gravity and potential hardships of the shortened timeframe to 30 days, including the adverse impact that it could have on employment and production capabilities. We request that DoE provide a more reasonable timeframe such as returning to the original 180 day time period in which to obtain initial compliance certifications.

B. The Term *Distribute in Commerce* is Vague

The meaning of *distribute in commerce* is quite vague and should be clearly defined in the Final Rule. We request that DoE *at the very least* provide further clarification into the application of *distribute in commerce* and the extent in which discussions relating to promotions of the product, planning with distributors, product designs are covered under this definition. Without clarification, JCI will be unable to perform the essential manufacturing, distribution-sales, and inventory planning to ensure compliance with the requirement that products must be properly certified before being *distributed in commerce*.

The NPR currently defines *distribute in commerce* as "to sell in commerce, to import, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after the introduction into commerce." NPR at 56801. It is unclear, however, from the plain meaning of the definition, as well as a review of other existing legal authorities and an assessment of DoE's

Ms. Celia Sher
December 13, 2010
U.S. Department of Energy
Office of General Counsel
Page 4

own statements during the NPR's public meeting, how DoE will interpret – and enforce – whether a product has been *distributed in commerce*.

The confusion about this definition was illustrated during the NPR's public meeting. The discussions were transcribed, and JCI is attaching pertinent portions of the record that are highlighted for DoE's review. (See discussion beginning on page 117 through page 126.)



cce_public_meeting_
transcript 09_30_10.

In each instance, DoE requested additional information or was unable to answer several difficult questions posed by industry (including JCI) regarding the scope and reach of *distribute in commerce*. Notably, JCI asked specifically for clarification as to whether it had “to hold off on promoting [its products] until [it has] provided [a] certification.... So that's the point of clarification we would like to – [JCI] would like to understand.” *Public Meeting Transcript* at 123-124, lines 15-17; 21-1. DoE's representative at the meeting, Ms. Barhydt, responded, “I don't think that I am going to be able to answer that one off the spot,” *Public Meeting Transcript* at 124, lines 2-4.

To remove any and all ambiguity, JCI would request that DoE expressly state that its definition of *distribute in commerce* does not include the designing, marketing, sales/distribution, and planning activities that were discussed (but not resolved) during the NPR's public meeting. An overbroad interpretation of the definition would lead to unnecessary confusion, undue delay, and compliance difficulties throughout the industry, which would hinder currently improving economic recovery/manufacturing activities and energy efficiency developments.

* * *

We would be pleased to discuss any of these or additional issues upon your request. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey S. Newman". The signature is fluid and cursive.

Jeffrey S. Newman
Counsel for Johnson Controls, Inc.