



July 6, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Michael S. Regan
Administrator
Environmental Protection Agency
Washington, DC 20460

Re: Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act (Docket ID EPA-HQ-OAR-2021-0044)

Dear Administrator Regan:

On May 19, 2021, the Environmental Protection Agency (EPA) published a proposed rule titled “Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

A wide range of small businesses will be affected by this proposed rule, from importers and blenders, to equipment servicers and reclaimers, and eventually the owners and operators of refrigeration equipment. Because of this diversity of views and effects, Advocacy believes that EPA should be evaluating alternatives for the long-term health of a future market for hydrofluorocarbons (HFCs), including minimizing transaction costs and encouraging innovation. EPA should recognize that allowances have a market value and give small business blenders and reclaimers reasonable preferences in their allocation to aid their long-term viability. EPA should reconsider its proposed HFC tracking system and ban on disposable cylinders since they raise transaction costs significantly.

¹ 86 Fed. Reg. 27150 (May 19, 2021)

I. Background

A. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

B. The Proposed Rule

On December 27, 2020, the American Innovation and Manufacturing Act (AIM Act) was enacted as section 103 in Division S, Innovation for the Environment, of the Consolidated Appropriations Act, 2021.⁶ The AIM Act mandates a phase-down of hydrofluorocarbons (HFCs) domestic production and net imports to 15 percent of a 2011-2013 baseline, weighted by the global warming potentials (GWPs) of each component HFC. It grants EPA new authorities in three main areas: implement the phase-down of production and net imports of listed HFCs, manage these HFCs and their substitutes, and facilitate the transition to next-generation technologies by restricting use of these HFCs where they are used. The AIM Act requires EPA to have most of this system in place for calendar year 2022.

On May 19, 2021, EPA published a proposed rule partially implementing this program. The proposed rule includes creation of:

- Allowances and allocation of those allowances in 2022 and 2023;
- Application-specific allowances for six uses of HFCs listed in the AIM Act;
- A pool of allowances set aside primarily for small businesses;
- Rules for transfer and conveyance of allowances;

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ Pub. L. 116-260

- A ban on disposable cylinders; and
- A certification and labeling system for HFCs in domestic commerce.

In addition, EPA has requested comment on the program design and allocation of allowances for 2024 and beyond.

Advocacy held two Small Business Environmental Roundtables on this rule, both with EPA's participation: in February 2021, in advance of the proposal, and in June 2021, after the proposal was published. EPA and Advocacy have also met with a significant number of small businesses and their representatives during development of the proposed rule and during Executive Order 12866 review.

II. Advocacy's Small Business Concerns

A wide range of small businesses will be affected by this rule. The direct impacts of this rule will fall on small businesses that currently import HFCs into the United States or may wish to at some point in the future. To our knowledge, no small businesses produce HFCs domestically. However, small businesses dominate the industries that process, resell, use, and reclaim HFCs, and the reduced availability of HFCs under the AIM Act's phase-down schedule will affect them significantly through increased costs of HFCs and, eventually, the need to transition away from equipment that uses HFCs.

Because small businesses fulfill different roles in the supply chain and have different short-term and long-term priorities, there is no one set of regulatory alternatives that will satisfy all small business interests. Therefore, Advocacy believes that EPA should be evaluating alternatives for the long-term health of the market in HFCs, including minimizing transaction costs and encouraging innovation that furthers the goals of the AIM Act.

A. Advocacy supports EPA's proposed set aside pool of allowances.

EPA has proposed a set aside pool of allowances for small businesses that are new market entrants and not otherwise eligible in an allocation scheme based on historical activity. Advocacy supports this set aside, given that the AIM Act mandates a phase-down rather than a phase-out, and appreciates that EPA recognizes prior barriers to small business access in programs under Title VI of the Clean Air Act. Advocacy does not have information to suggest an appropriate size of the set aside pool for 2022 or 2023. EPA should leave open the ability to adjust the size of the pool based on applications and demonstrated use of the set aside pool.

B. Advocacy supports the maximum flexibility in trading allowances.

EPA has proposed a system of trading allowances. This gives allowances asset value, but only for the one-year duration of the allowance. Combined with the weighting of HFCs in accordance with their greenhouse gas potential, the system creates a powerful incentive for rapid use of the allowance and toward low GWP HFCs.

1. EPA should allow for trading of set aside allowances.

As part of the set aside pool of allowances, EPA proposed that holders of these allowances would not be able to sell or trade them. EPA states that this will discourage small businesses from requesting allowances that exceed their need or solely for the purpose of selling. Advocacy appreciates this concern and encourages EPA to consider each application on a case-by-case basis to evaluate a small businesses ability to use the HFCs requested.

However, a restriction on the sale or transfer of these allowances may have the unintended consequence of limiting the total HFC allowances available in the covered year. For the individual small business, it could have two unintended consequences. First, it could incentivize the immediate purchase of HFCs to capitalize the value of the allowance before it expires. Second, it would force the small business to purchase and stockpile HFCs for future use before cashflow may justify it.

Advocacy recommends EPA allow for sale and transfer of set aside allowances. EPA has proposed gathering information on sales and transfers as they occur. EPA could identify abuses of the program through this data and address issues through denial of future applications for set aside allowances.

2. EPA should adopt the lowest possible transfer offset.

EPA is proposing to allow transfers of allowances for HFCs provided the transferor's remaining allowances are reduced by the amount it transferred plus some percentage of the amount transferred (i.e., an offset). This offset would reduce the total amount of allowances available and create a disincentive to trading allowances. However, EPA has included this provision in response to section (g)(2) of the AIM Act, which requires that transfers under this provision result in greater total reductions in HFCs that in the absence of transfers.

Advocacy believes that this offset provision will reduce HFC availability and make it less likely allowances will be put to their best economic use, including towards low-GWP alternatives. Therefore, Advocacy recommends EPA adopt the lowest reasonable offset possible.

C. EPA should consider an additional set aside to encourage HFC-related practices that have environmental benefits.

Small businesses have discussed with EPA several activities with significant environmental benefits that may require special consideration. These activities include the recovery, reclamation, and/or destruction of HFC refrigerants. One small business has also discussed with EPA an industrial use of HFCs that lowers lifecycle GHG emissions. Other small businesses have discussed their efforts to develop new low-GWP substitutes.

The AIM Act intends EPA to encourage these activities. For reclaimers, the AIM Act tasks EPA with increasing opportunities for reclaiming and creates a grant program for the purchase of recycling, recovering, and reclaiming equipment. It is unclear what role the reclaiming industry will play after 2036, when the HFC phase-down is complete and end-users will be further along in a transition away from HFCs, but the availability of reclaimed HFCs will help mitigate the economic impacts between now and then.

EPA should use its authority to allocate allowances to economic activities that have economic benefits related to the reduction of HFC production and GHG impacts. Advocacy suggests EPA propose for 2024 and beyond an additional set aside pool of allowances for reclaimers and innovators, to encourage growth of these industries.

EPA should also consider granting allowances for destruction of HFCs. Reclaimers want to establish reliable and consistent recovery programs, but that may require accepting recovered HFCs that cannot be economically reclaimed. A grant of allowances would give them the ability to recoup these costs while making more reclaiming possible.

D. EPA should not ban disposable cylinders.

EPA has proposed a ban on disposable cylinders for the storage and transport of HFCs. EPA's justification based in part on a concern about leftover HFCs at the bottom of disposed cylinders and on experiences in other countries with smuggling.

Advocacy recommends EPA not include this provision in this final rule. Small businesses oppose it. This provision will significantly raise their costs, requiring large expenditures in the next year for a product that is increasingly expensive and difficult to procure. It will significantly increase transportation costs, both because refillable cylinders are heavier than disposable and because they will require a return trip to the owner. Refillable cylinders are not easily reused for virgin or reclaimed HFCs, since they need to be extensively cleaned to meet the mandated AHRI purity standards, an expense these small businesses do not currently bear.

Small businesses challenge EPA's assertion that leftover HFCs present an environmental risk. Reclaimers say that they accept disposable cylinders for recycling, reclaiming the leftover HFC in the process. Requiring the proper disposal of disposable cylinders would be a better solution, better for reclaimers, and more consistent with existing business practice.

EPA also states that a ban on disposable cylinders will make customs enforcement easier because illegal HFCs smuggled into other countries are often in disposable cylinders. However, this characteristic of smuggled HFCs is a function of the regulatory design, not of the cylinder itself or its legitimate users. In contrast to other countries, EPA is proposing a broad range of measures related to imports, including a real-time check to ensure importers have the required allowances and labeling requirements. EPA should consider whether a ban on disposable cylinders is necessary in conjunction with the rest of the proposal, not in isolation. Further, Advocacy believes that it is unfair to impose such significant costs on the domestic market if the solution can be more tightly focused on imports.

E. EPA should delay implementation of the proposed certification and labeling system.

Small businesses have expressed significant concern about the cost and complexity of EPA's proposed certification and labeling system. Some small businesses agree that a well-designed low-cost system could help them compete against illegal HFCs but still raise concerns that the system, sight unseen, will be hard to use, impose significant costs on their customers, and impede acceptance of low-GWP HFC replacements. EPA's proposal lacks the details necessary

to address these concerns. EPA will need the confidence and buy-in of the regulated community if this tracking system is to have its desired effect.

Advocacy recommends EPA delay adoption in the regulations of this proposed system until EPA has had more time to design the system, consult with regulated parties and run a pilot program to identify and resolve unreasonable costs and challenges.

F. EPA should reconsider the audit requirement for producers, importers, and reclaimers.

1. EPA should reconsider the audit requirement for reclaimers.

EPA proposes an audit requirement to improve the integrity of the allocation program. This program would require annual audits for producers, importers, and reclaimers. However, reclaimers are not required to hold allowances, and other users of HFCs that might get allowances through, for example, the application-specific allowances are not covered by this audit requirement. As written, it is unclear why reclaimers are singled out. Thus, EPA should exclude reclaimers from this audit requirement.

2. EPA should tailor the impact of the audit requirement to its stated purpose.

EPA requested comment on limiting the frequency of audits for companies below a certain threshold. Advocacy supports all reasonable efforts to reduce the paperwork burden of these regulations. Audits should only be conducted annually and on a continuing basis for those companies with a history of compliance difficulties. If the purpose of the audit program is to improve integrity of the program rather than to duplicate compliance reporting, then an audit of the previous year should be required only periodically.

G. EPA should consider whether imported HFCs should meet AHRI purity standards.

The AIM Act defines reclaiming by referencing AHRI purity standards and verification of that purity and prohibits the sale of recovered HFCs that are not reclaimed. Small business reclaimers are concerned that this definition puts them at a competitive disadvantage to importers, who can bring HFCs into the country without a similar requirement. EPA should take this concern seriously, particularly since the AIM Act requires EPA to expand opportunity for reclaiming. However, there are small businesses that import or purchase imported HFCs for processing and blending, for whom such a requirement would be unnecessarily burdensome and would not address the reclaimers concern about competition from low quality imports.

Advocacy recommends EPA consider requiring imports intended to be sold to end users without subsequent processing, blending, or reclamation demonstrate compliance with AHRI purity standards.

III. Conclusion

Advocacy appreciates the efforts EPA has made in this proposed rule to identify and address small business concerns. EPA makes an explicit recognition of the history and role of small businesses in the Title VI programs and the crucial role they will fulfill in implementation of the AIM Act. Nonetheless, Advocacy believes that there are additional opportunities to maximize

availability of HFCs within the statutory bounds, avoid unreasonable costs on small businesses and encourage environmentally beneficial activities. Advocacy also recommends EPA to move more cautiously on measures that will directly regulate the entire supply chain.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Dave Rostker at (202) 285-6860 or by email at david.rostker@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Dave Rostker
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U.S. Small Business Administration

Copy to: Sharon Block, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget