



July 6, 2021

via Regulations.gov

Attn: Mr. Andy Chang
U.S. Environmental Protection Agency, Stratospheric Protection Division
Mail Code 28221T
1200 Pennsylvania Avenue NW, Washington, DC 20460

Re: Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act (Docket ID No. EPA-HQ-OAR-2021-0044).

Dear Mr. Chang:

The Retail Industry Leaders Association (RILA), National Retail Federation (NRF), National Association of Chain Drug Stores (NACDS), and the Food Industry Association (FMI) (hereinafter, collectively, Joint Retail Associations or the Associations) appreciate the opportunity to jointly submit comments on the U.S. Environmental Protection Agency's (EPA or Agency) proposed Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing (AIM) Act of 2020¹ (86 Fed. Reg. 27150, May 19, 2021) (hereinafter, Proposed Rule or Proposed Phasedown).

Together, the Joint Retail Associations represent a broad cross-section of the retail industry and the U.S. economy, from large national retail chains to small businesses, grocers, and drug store chains. Collectively, the Associations' members sell food, medicines, household items, clothing, appliances, electronics, tools, auto parts, pet supplies, as well as a vast number of other essential consumer products that Americans use and rely on in daily life. While the retail industry is not among the largest contributors to greenhouse gas (GHG) emissions, it is nonetheless working diligently to address and reduce the climate change impacts related to retail operations.

The Joint Retail Associations will be significantly impacted by the Proposed Phasedown because their members both sell products containing hydrofluorocarbons (HFCs) and use HFCs in extensive food refrigeration and HVAC systems throughout their networks of distribution centers and stores across the United States.

BACKGROUND ON ASSOCIATIONS:

RILA's members include the largest and most innovative U.S. retailers. RILA members account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA and its members recognize that responding to the economic and moral imperatives of addressing climate change requires thoughtful and meaningful action.² RILA members' efforts include building and

¹ 42 U.S.C. § 7675 (hereinafter AIM Act or Act).

² See RILA's Retail Climate Priorities Report (April 2021) *available at* <https://www.rila.org/retail-climate-priorities>.

retrofitting facilities and stores to increase energy efficiency and use of renewable energy, reducing waste and excess packaging, and streamlining and creating more efficient supply chain, transportation, and distribution systems to decrease GHG emissions.

NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies, and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring, and communicating the powerful impact retail has on local communities and global economies.

FMI is a trade association representing the food industry, including nearly 1,000 supermarket member companies that collectively operate almost 33,000 food retail outlets and employ approximately 6 million workers. As the food industry association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply. FMI brings together a wide range of members across the value chain — from retailers who sell to consumers, to producers who supply the food, as well as the wide variety of companies providing critical services — to amplify the collective work of the industry. FMI is a champion for the food industry and the issues that make a difference to its members' fundamental mission of feeding and enriching society.

NACDS represents traditional drug stores, supermarkets, and mass merchants with pharmacies. Chains operate nearly 40,000 pharmacies, and NACDS' 80 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ nearly 3 million individuals, including 155,000 pharmacists. They fill over 3 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability. NACDS members also include more than 900 supplier partners and over 70 international members representing 21 countries.

EXECUTIVE SUMMARY

The Joint Retail Associations' comments on the EPA's Proposed Phasedown Rule cover six important issues set forth below.

First, the Associations strongly support EPA's clarification in the Proposed Rule that its allowance-based phasedown of HFCs applies only to "bulk" regulated substances and not HFCs within manufactured products. For the reasons discussed in comments below, excluding HFC-containing consumer products from the proposed HFC allowance scheme is consistent with the Congressional intent and legislative history of the AIM Act and will avoid significant market confusion, supply chain disruptions, and administrative burdens that would result from requiring allowances for every consumer product that may contain small amounts of HFCs.

Second, to enhance clarity and regulatory certainty around HFC-containing consumer products, EPA should clearly state in its final rule that use of the term "small cans" in the definition of "bulk" is intended as an example of containers used to transport "bulk" HFCs and does not include HFC-containing consumer products sold in small cans. Some consumer products that are small cans that contain HFCs include self-help products like air conditioning recharge kits and drain cleaners. Absent clarity, inclusion of these consumer products under the proposed phasedown regime would have the unintended consequences of limiting their availability

and use, which would disproportionately affect economically disadvantaged communities that are more likely to rely on do-it-yourself tools.

Third, the Associations are concerned that EPA’s proposed ban on non-refillable cylinders of HFCs is not required by the statutory language of the AIM Act and is not supported by sufficient analysis of the economic costs and environmental benefits, including accounting for industry best practice to fully evacuate HFCs from cylinders prior to sending them for scrap metal recycling. The Associations request that EPA eliminate its proposed ban on non-refillable cylinders from the final rule absent a more thorough analysis and review of available cost and benefit information.

Fourth, in its final rule EPA should clarify the scope of recordkeeping and reporting obligations applies only to “bulk” HFCs as well as streamline these obligations so that they can be easily implemented by industry. As currently written, the Proposed Rule includes some language inconsistencies around the use of “regulated substances” that leave the scope of tracking obligations unclear. Additionally, the Associations are concerned with the lack of detail on the goals, design, and implementation process of the proposed quick response (QR) code tracking system, and that the current 2024 deadline does not account for the complexity, cost, and time necessary to implement this type of system across supply chains.

Fifth, the Associations request that EPA issue allowances at the parent company level rather than the subsidiary or facility level. Issuing allowances at the parent company level will facilitate the flexibility retailers need to address shifting needs and consumer demands across several brands, facilities, and locations.

Sixth, as EPA moves forward with regulatory actions around refrigerants, it should take a holistic approach to ensure all relevant programs are working in concert with one another and do not create uncertainty, confusion, and unnecessary moving targets that will increase the costs of compliance. Any new rules should include an analysis of their impact on existing regulatory requirements to avoid these contradictory and inconsistent regulatory outcomes.

Each of these issues is discussed in more detail below.

COMMENTS

The Associations and their member companies share the EPA’s concern about climate change and its impact on our communities. Retailers support the Agency’s efforts to reduce GHG emissions, including the hydrofluorocarbons (HFCs) that are the subject of EPA’s Proposed Phasedown as mandated under the AIM Act of 2020 and are working toward emission reduction targets in a manner that is cost-effective and minimizes impacts on consumers.

The Associations are providing the below shared comments to highlight areas in the Proposed Rule where additional clarity is appropriate and needed to provide regulatory certainty and minimize unnecessary and overly burdensome record keeping and reporting requirements. Additional comments below are intended to highlight potential unintended consequences of the Proposed Rule, including those that could result from misinterpretations of the Proposed Rule language.

1. Clarifications on the Proposed Phasedown’s Intersection with Manufactured Products

A. EPA Appropriately Clarifies that the Allowance-Based Phasedown Applies to “Bulk” Regulated Substances, Not the HFCs within “Manufactured Products”

The AIM Act was the product of years of bipartisan negotiations and compromise, resulting in one of the most significant climate policy actions in years. The Associations recognize this achievement and want to do their part to make sure the environmental goals set forth in the Act are met on time and with minimum impact to individual customers.

Throughout the legislative process, members of Congress raised concerns regarding issues such as the scope of state preemption; the treatment of HFC production and consumption for essential uses like defense sprays; and transitions to HFC substitutes that while better for the climate carry other trade-offs in terms of flammability and cost.³ Legislators ultimately reached a bipartisan compromise on these and other issues that led to passage of the AIM Act in late 2020 with overwhelming bipartisan support.⁴

There is no indication in the text of the AIM Act, or its legislative history that anyone in Congress contemplated a chaotic and far-reaching scenario where the Act's allowance program would apply directly to imported products or equipment.⁵

As discussed further below, **EPA properly proposes to clarify that the Act's allowance-based requirements do not apply directly to such products or equipment.** EPA proposes the following definition of "bulk" in order to distinguish the regulated substances that Congress actually cared about from those that are merely "in a product or other type of use system":⁶

Bulk means a regulated substance of any amount that is in a container for the transportation or storage of that substance such as cylinders, drums, ISO tanks, and small cans. A regulated substance that must first be transferred from a container to another container, vessel, or piece of equipment in order to realize its intended use is a bulk substance. A regulated substance contained in a manufactured product such as an appliance, an aerosol can, or a foam is not a bulk substance.⁷

The Associations support EPA's common sense reading of the AIM Act and clarification by using the term "bulk" that the regulatory requirements of the Act and proposed implementing regulations do not extend to "manufactured products."

An unreasonably literal reading of the AIM Act's definition of "import," or an unreasonably overbroad reading of "regulated substance," would create dramatic marketplace disruptions and an administrative nightmare for EPA, as hundreds of thousands of common products that contain relatively small amounts of HFCs that consumers use daily would be swept into the regulatory scheme. Such an irrational reading would result in significant supply chain disruptions, leaving retailers unable to provide a broad range of consumer products from drain cleaners to humidifiers. Additionally, this reading of the AIM Act would impose excessive administrative burdens without providing meaningful emissions reductions. EPA's construction of "bulk" to exclude HFCs inside manufactured products appropriately clarifies that the AIM Act's phasedown focuses on the more

³ See, e.g., Statement of Chairman John Barrasso, Senate Committee on Env't & Pub. Works, Mar. 25, 2020, *available at* <https://www.epw.senate.gov/public/index.cfm/2020/3/s-2754-american-innovation-and-manufacturing-act-of-2019-written-testimony-and-questions-for-the-record>.

⁴ See "Senators Announce Historic, Bipartisan Agreement on Environmental Innovation Legislation," Senate Committee on Env't & Pub. Works, Dec. 21, 2020 (press release), *available at* <https://www.epw.senate.gov/public/index.cfm/2020/12/senators-announce-historic-bipartisan-agreement-on-environmental-innovation-legislation>.

⁵ See e.g., 86 Fed. Reg. at 27,163–64 (explaining this and other impractical consequences of a contrary interpretation).

⁶ 86 Fed. Reg. 27,161 ("EPA is proposing to define this term so as to distinguish between a regulated substance that is in a container from a regulated substance that is in a product or other type of use system.")

⁷ 86 Fed. Reg. at 27,207 (proposed regulatory definition).

significant sources of HFCs that will provide meaningful emissions reductions and that can be reasonably identified and tracked without imposing unreasonable costs that Congress clearly did not intend.

i. An Overly Expansive Interpretation of the AIM Act Would Sweep in Hundreds of Thousands of Everyday Products

Many types of consumer products potentially include some amount of HFCs. Some obvious examples are refrigerators and window air conditioners where the coolant may contain HFCs. Less recognized, however, are the myriad of other consumer products that may contain HFCs in small quantities, many of which may be sold and distributed without the retailer or consumer being aware of the presence of HFCs in the product. A preliminary review of available information on the chemical makeup of consumer products suggests that hundreds of thousands of products may contain small amounts of HFCs. Some common products that may include small quantities of HFCs include:

- Lubricants, degreasers, rust-proofing sprays, and similar materials,
- Air freshener sprays,
- Drain cleaners,
- Electronics dusters,
- Spray jewelry polish,
- Automobile wax,
- Household and commercial appliances (e.g., air conditioners; freezers; icemakers; heat pumps; dehumidifiers)
- Fire suppressant devices
- Foam building insulation
- Aerosol products that use HFC as a propellant, including:
 - Personal care products (e.g., antiperspirants/deodorants; hairspray; mousse; dry shampoo; foot powder spray; temporary hair color spray)
 - Insect killer
 - Anti-static fabric sprays
 - Spray adhesives
 - Party streamer string

The above list of examples is not intended to be exhaustive and merely illustrates the wide range of manufactured products and consumer product applications where HFCs may be present in small amounts.

As EPA acknowledged, an unreasonably expansive reading of the AIM Act as attempting to incorporate every consumer product that may contain some minute quantity of HFCs would create massive confusion, disrupt supply chains, and impact hundreds of thousands of products sold in the U.S. market. In addition, the number of entities required to obtain allowances would expand dramatically, from those who import HFCs in a bulk container, to any individual or entity who imports a single pallet of drain cleaners or air fresheners.

Similarly, any individual or entity who imports⁸ or manufactures any of these products would have to comply with the associated reporting/recordkeeping requirements including tracking of all such regulated material down to the point of sale to the end-user. As discussed more fully in Section 3

⁸ The definition of “import” in the AIM Act is so broad – broader than U.S. Customs regulations – that if products are regulated, a tourist who brings a can of aerosol sunscreen back into the United States after a vacation could be charged with smuggling HFCs.

below, such an expansion of the program would increase the regulatory burdens on industry and costs associated with the program by orders of magnitude above EPA's current estimates.⁹ While these additional regulatory administrative burdens and costs would be borne by large and small businesses alike, the adverse impact on small businesses would be severe.

The Associations agree with the EPA's concerns about expanding these significant regulatory obligations to an entire new universe of entities that are completely unaware of and unfamiliar with EPA's allowance program and so do not have the systems and resources necessary to comply within the AIM Act's tight timeframes.

ii. Expansion of the Scope of the Proposed Rule to Include Hundreds of Thousands of Manufactured Products Would Require Significant Revisions to the Proposed Allowance Program

The starting point for the Proposed Phasedown is the calculation of the production and consumption "baselines," the historic quantities of HFCs and other substances that were produced or consumed in specific years. For the consumption baseline relevant to imports, EPA has calculated a baseline as 299 million metric tons of exchange value equivalent (MMTEVe).

After calculating this baseline, the AIM Act directs the Agency to ratchet down consumption to meet the phasedown schedule set forth in the AIM Act. These reductions are implemented by a system of allowances, which decrease over time. In 2022, the phasedown will provide enough allowances to cover 90% of the baseline.¹⁰ Under EPA's proposed baseline, there would be approximately 269.1 million consumption allowances available in 2022, which could cover up to 269.1 MMTEVe of HFCs. By 2036, the AIM Act's phasedown would be only 15% of the baseline or 44.85 million consumption allowances.¹¹ EPA has proposed various methods of equitably allocating these allowances in the initial years.

Critically, however, EPA's baseline – and thus all the subsequent allowance calculations — was determined based on historic data that includes only *bulk* substances. It does not account for regulated substances that were contained in the potentially hundreds of thousands of manufactured products that were produced and imported in those historic years.¹²

As a result, the 299-MMTEVe baseline that EPA has calculated is lower than it would be if the regulated substances within manufactured products were included. This, in turn, means that the available allowances that EPA has proposed for each step of the phasedown would also be too low to reflect any of the HFCs in consumer products.

If EPA were to include HFCs in products within the allowance system, companies would be required to obtain allowances for HFCs contained within imported manufactured products, even though those products were not accounted for by EPA in the baseline itself. In this scenario, EPA would first have to modify the baseline to include the amount of regulated substances in those products during the baseline years. However, EPA does not have and cannot reasonably obtain the information necessary to reconstruct product imports from 2011–2013.¹³ Nor can the Agency retroactively quantify the amount of hydrochlorofluorocarbons (HCFCs) and chlorofluorocarbons

⁹ In addition to the added costs that would be imposed on industry, the EPA would also incur additional costs for an expansive monitoring and enforcement program.

¹⁰ 42 U.S.C. § 7675(e)(2)(C).

¹¹ Proposed § 84.7(b)(2), 86 Fed. Reg. at 27210.

¹² See 86 Fed. Reg. at 27163 & nn. 33–34.

¹³ 86 Fed. Reg. at 27163.

(CFCs)¹⁴ contained within imported products in 1989.¹⁵ Moreover, the tight deadlines that Congress imposed suggest that it never intended this sort of complex reconstruction of historical data.

Finally, even if EPA were able to adjust the baseline to include HFCs in products, to ensure a fair and equitable system, EPA would have to allocate allowances to companies that import manufactured products containing HFCs. The Proposed Rule does not contemplate such an approach and does not provide any information for how such an allocation to product importers would work. Any rule that would require product importers to possess allowances but provides no way for them to do so would be arbitrary and capricious. The result would be that an untold number of imported consumer products containing HFCs would be effectively banned as of 2022, resulting in significant marketplace disruptions adversely impacting consumers. Additionally, as addressed below, all other indicators point to congressional intent in the AIM Act to exclude manufactured products from the phasedown allowance scheme.

iii. EPA’s Interpretation of the AIM Act to Exclude Manufactured Products is Consistent with its Legislative History and Congressional Intent

The AIM Act’s phaseout of HFCs is modeled heavily on the phaseout of ozone-depleting substances under Title VI of the Clean Air Act’s (CAA).¹⁶ Indeed, the AIM Act expressly incorporates by reference several CAA requirements applicable to Title VI, including existing CAA mechanisms for monitoring and enforcement.¹⁷ The CAA’s phaseout of ozone-depleting substances under Title VI implemented U.S. commitments under the Montreal Protocol¹⁸ and tracked imports and exports but only of *bulk* quantities of those substances, not the much smaller quantities located in imported and exported products. Similarly, the AIM Act’s phaseout of HFCs mirrors commitments under the Kigali Amendment¹⁹ to the Montreal Protocol and only covers bulk quantities of HFCs.²⁰ The legislative history clearly demonstrates congressional awareness of how the AIM Act “mimics” Title VI.²¹ EPA also assured Congress that Title VI would provide

¹⁴ Historically, HFCs are transitional substitutes for HCFCs. HCFCs are categorized as Class II ozone-depleting substances and were developed as transitional substitutes to their historical precursors, CFCs. CFCs are categorized as Class I ODS and have a higher global warming potential. *See* U.S. ENVTL. PROTECTION AGENCY, “Phaseout of Class II Ozone Depleting Substances,” *available at* <https://www.epa.gov/ods-phaseout/phaseout-class-ii-ozone-depleting-substances>.

¹⁵ 42 U.S.C. § 7675(e)(1)(C) (ii)(I)-(II). Note that this information *is* readily available for bulk chemicals, because bulk chemicals have been regulated since the phasedown of ozone-depleting substances under Title VI of the CAA was first adopted in 1990. However, HCFCs and CFCs in products were not regulated under that program, and so EPA never collected the relevant data and cannot reasonably recreate it over thirty years later.

¹⁶ 42 U.S.C. §§ 7671–7671q.

¹⁷ 42 U.S.C. § 7675(k)(1)(C) (applying CAA requirements at 42 U.S.C. §§ 7413, 7414, 7604 to the AIM Act, “as though [the AIM Act] were expressly included in title VI of [the CAA]”).

¹⁸ The Montreal Protocol on Substances that Deplete the Ozone Layer, Decision I/12A, U.N. Doc No. 26369, at 30 (May 5, 1989).

¹⁹ Kigali Amendment to the Montreal Protocol on Substances That Deplete the Ozone Layer, Dec. XXVIII/1, U.N. Doc. CN.872 (Oct. 15, 2016); *see also* U.N. Env’t Programme, *Report of the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Doc. UNEP/OzL.Pro.28/12, Annex I (Nov. 15, 2016).

²⁰ Some commenters on this proposal imply that the European Union subjects imported products to their phasedown. *See, e.g.*, EPA-HQ-OAR-2021-0044-0091 at p. 2. The E.U. program requires allowances (“quotas”) “for the import and production of bulk HFCs.” *See* EUROPEAN COMM’N, *Quota allocation, the HFC registry, and data reporting*, https://ec.europa.eu/clima/policies/f-gas/reporting_en (last visited July 6, 2021). By contrast, “Quotas are not allocated to manufacturers and importers of gases contained in products and equipment.” *Id.* Accordingly, there is no basis for EPA to use the E.U.’s regulatory scheme as a reason to impose allowance requirements on imported products.

²¹ *See, e.g.*, Statement of Ranking Member Tom Carper (D-Del.), “EPW Committee Information-gathering Process Entitled, ‘S. 2754, American Innovation and Manufacturing Act of 2019: Written Testimony and Questions for the Record’” (Mar. 25, 2020) (referring repeatedly to how the AIM Act is “similar to Title VI of the Clean Air Act,”

relevant experience if the AIM Act became law.²² Therefore, it is both logical and appropriate for EPA to interpret the AIM Act to include bulk quantities only consistent with the manner in which Title VI of the CAA and the Montreal Protocol have been interpreted and implemented.

As it relates to HFCs in manufactured products, the AIM Act can be reasonably construed in only one way: that Congress intended the scope of the AIM Act phasedown to be comparable to the scope of the earlier Title VI program on which it is based, meaning HFCs in products should not be included. This is the approach reflected in the Proposed Rule.

An alternative reading that would apply the phasedown to imports of manufactured products would be highly unreasonable and would create significant challenges for industry, consumers, and the Agency alike.²³ Such a reading of the AIM Act would begin with the assumption that, despite Congress' reliance on the Title VI program to provide a framework and baseline data for the new HFC phasedown, it nevertheless intended to include HFCs in products in the current phasedown. As previously discussed, since Congress specified the years that must be used to determine the baseline, and EPA does not have the requisite data from those years, the portion of the baseline accounting for these chemicals in consumer products would be zero. The result would be that countless consumer products containing HFCs would be effectively banned as of 2022, resulting in significant marketplace disruptions adversely impacting consumers. Alternatively, the quantity of bulk HFCs produced and imported would need to be reduced even below the calculated allowance levels, so that product manufacturers and importers can purchase sufficient allowances to cover the HFCs in those products. In either event, as noted above, either result would be inconsistent with the statutory language of the AIM Act.

Given that Congress took the time to carefully set forth a very precise – and stringent – phasedown schedule and target in the AIM Act, and in fact prohibited EPA from acting more rapidly before 2025 unless specific requirements were first met,²⁴ it is entirely illogical to construe the Act as compelling those more stringent phasedown obligations by requiring allowances for HFCs in imported products, but not counting those HFCs in the consumption baseline. As the Supreme Court has noted, “Congress [does not] hide elephants in mouseholes.”²⁵ Accordingly, the Associations support EPA’s reasonable interpretation of the Act, which reflects congressional intent and is consistent with the Agency’s past regulation of ozone-depleting substances.

B. EPA Should Clarify That the Term “Small Cans” Does Not Include HFC-Containing Consumer Products Sold in Small Cans

“mimics what has worked in the Title VI,” saying the AIM Act uses “a tried and true model for success,” and that the AIM Act’s bipartisan drafters had “baked in the legislation protections for consumers”).

²² See, e.g., *Hearing on The American Innovation and Manufacturing Leadership Act of 2020 Before the Subcomm. on Env. And Climate Change of the H. Energy and Commerce Comm.*, 116th Cong. (Jan. 14, 2020) (Statement of Cindy Newburg, Stratospheric Protection Division, U.S. Environmental Protection Agency) (“the AIM Act would require the EPA to do many of the same types of activities for HFCs that we have done and continue to do for the ozone-depleting substances”)

²³ See *Util. Air Reg’y Grp. v. EPA*, 573 U.S. 302, 324 (“EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization”); *id.* (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²⁴ The AIM Act prohibits EPA from adopting a more stringent phase-down schedule unless (i) it receives a petition to do so, (ii) it conducts notice-and-comment rulemaking on the expedited schedule, (iii) the Administrator makes a specific determination addressing numerous statutory factors, and (iv) the decision occurs no earlier than 2025. 42 U.S.C. § 7675(f)(1)–(4). None of these criteria have been met here.

²⁵ *Whitman v. American Trucking Ass.*, 51 U.S. 457, 470 (2001).

The Associations fully support the exclusion of manufactured products from the proposed regulatory program, and further request that EPA clarify in its final rule that certain types of products would fall within this exclusion. As currently written, the proposed definition of “bulk” includes “a regulated substance of *any amount* that is in a container for the transportation or storage of that substance such as cylinders, drums, ISO tanks, and *small cans*.”²⁶ Yet the definition also states that “[a] regulated substance contained in a manufactured product such as an appliance, *an aerosol can*, or a foam is *not* a bulk substance.”²⁷

The references to small “cans” in both the definition and the exclusion creates confusion over how products including HFCs that are sold in small cans would be treated. For example, many Joint Retail Association members sell window air conditioning (AC) units.²⁸ Based on the plain language of the Proposed Rule, the refrigerant contained within those air conditioners would not be subject to the phasedown, because it is part of an appliance. Some of those same retailers also sell AC recharge kits. These recharge kits are theoretically “*small cans*” containing small amounts of listed HFCs that allow consumers to perform minor repairs to their home or auto AC units (*i.e.*, sealing leaks and recharging the AC unit). Other examples of consumer products that in theory are “small cans” of HFCs include but are not limited to: drain cleaners used to remove clogs in plumbing drain lines, electronics dusters, and spray jewelry polish. Unlike the definition of “bulk,” where “small cans” are being used *primarily for transportation or storage purposes*; in these examples *the can itself is* the manufactured consumer product.

The logical interpretation of the remaining text of the definition of “bulk” is that it was intended to clarify the distinction between regulated cans of HFCs and exempt products that are sold in cans. That language states, “[a] regulated substance that must first be transferred from a container to another container, vessel, or piece of equipment in order to realize its intended use is a bulk substance.”²⁹ This provision seems to state that a “can” containing HFCs will be regulated *only* if it provides temporary or interim storage of HFCs (*e.g.*, cans that may be used to transport bulk HFCs to a manufacturing facility), whereas cans that are themselves the final product that is sold to a consumer would be considered “products” and are thus excluded. Under this interpretation, the HFCs within each of the above products would not be considered “bulk” regulated substances, because although the can contains HFCs, the can itself is a product sold to the consumer, and the regulated substances contained within that manufactured consumer product are not removed from that can to some other container prior to deployment.

In the alternative, if EPA were to interpret the proposed rule as including HFC-containing products that are sold in small cans, that decision would impose significant regulatory burdens and costs particularly on small businesses that, at a minimum, would require additional analysis of the economic impact of that decision. The proposed rule requires each person who sells regulated containers of HFC to implement an extensive tracking system to trace each can to the final customer.³⁰ As currently written, that obligation ends with the manufacturer who converts the bulk HFCs into the consumer product. As a result, the impact of the rule is limited to the large companies that produce or import HFCs and use those HFCs to manufacture products.

If a “container” were to include small cans that contain HFC products, the tracking obligations would not stop with the product manufacturer but would extend to each and every retailer who

²⁶ Proposed § 84.3, 86 Fed. Reg. at 27207 (emphases added).

²⁷ *Id.* (emphasis added).

²⁸ For example, one retailer member counted nearly 300 different window AC unit products available on its e-commerce site.

²⁹ Proposed § 84.3, 86 Fed. Reg. at 27207.

³⁰ Proposed § 84.23, 86 Fed. Reg. at 27215.

sold any HFC-containing product. The products subject to the tracking obligation would no longer be limited to bulk containers of HFCs, and instead would now include every can of HFC-containing products, including lubricants or AC recharge kits or drain cleaners. EPA has not considered any of the additional costs that would be imposed by such a dramatic expansion of the program – some of which would fall on small businesses that are ill-equipped to manage them.³¹

The Associations request that EPA confirm in its final rule that the definition of “bulk” and the related new regulatory scheme is intended for major chemical companies and importers of bulk chemical substances and that consumer products which happen to be small cans containing HFCs are subject to the Proposed Rule’s tracking obligations.

C. Excluding Consumer Products Containing HFCs From the Scope of the Proposed Rule Avoids Unintended Consequences that Disproportionately Impact Economically Disadvantaged Communities

The most significant public health risk associated with climate change is heat-related mortality. Climate change increases the likelihood of heat waves, which are associated with increased deaths and illnesses[.]”³² Economically disadvantaged areas of the U.S., many of which are also considered environmental justice (EJ) communities, are “especially vulnerable to climate change impacts because they tend to have more limited adaptive capacities and are more dependent on climate-sensitive resources such as local water and food supplies.”³³ The Associations support EPA’s actions to mitigate climate change and its attendant heat-related public health risks, which disproportionately impact EJ communities. However, if HFC-containing products were included in the scope of the phasedown, it would limit accessibility to products that many in economically disadvantaged communities rely on to keep cool.

Affordable refrigerants in consumer products, such as those found in consumer products like AC recharge kits, or AC units, are a critical tool many economically disadvantaged communities have to mitigate the very heat-related risks the AIM Act seeks to address. These communities are more likely to consist of older apartment buildings and homes that rely upon older HVAC systems or window units. In addition, community members are more likely to drive older-model cars, many of which require the use of HFC-134a. Restricting the availability of HFCs will increase the cost of the refrigerants those systems require, which may affect availability and accessibility of those materials for those least able to afford them. Furthermore, the cost to retrofit automotive cooling systems for a new refrigerant chemical formulation would create an undue burden for consumers who drive older vehicles.

The adverse impact on economically disadvantaged communities would be magnified if EPA were to construe the AIM Act’s phasedown requirements to include HFCs in consumer products, such as those identified above. Consumer products like do-it-yourself AC recharge kits allow individuals to make minor repairs to maintain their homes and cars in a safe operating condition, at significantly lower costs than would be charged for professional repairs. Subjecting these types of products to the same phase-out schedule as bulk HFCs would therefore disproportionately impact those citizens who are least able to afford to upgrade their AC systems to newer refrigerants – leaving them even more vulnerable to heat-related mortality risks.

³¹ EPA based its economic analysis on those companies that reported to EPA’s GHG reporting program and a U.S. Customs system in 2018 and 2019. 86 Fed. Reg. at 27205. That universe of companies, however, would not include retail stores that have not previously been considered “importers” of HFCs because they merely sell products to the final customer.

³² 86 Fed. Reg. at 27156.

³³ *Id.* at 27158.

The Associations therefore urge the EPA to make the exclusion for HFC-containing products clear in the final rule to avoid potential adverse impacts and unintended consequences on economically disadvantaged communities by maintaining access to self-help products like AC recharge kits.

2. EPA Should Not Include a Ban on Non-Refillable Cylinders in Its Final Rule

In addition to the HFC phasedown program required by the AIM Act, EPA has also proposed to ban non-refillable cylinders (*e.g.*, Department of Transportation (DOT)-39 canisters). The Associations understand EPA's intent in including the ban is to reduce the overall environmental impact of these cylinders. The ban, however, fails to adequately account for industry best practice, and the economic costs and environmental benefits of mandating the use of refillable cylinders. As discussed in more detail below, EPA's sister state agency in California, the California Air Resources Board (CARB), previously explored the costs and benefits of a similar ban and concluded that minimal environmental benefits would be realized at a high economic cost. In fact, under some scenarios, a ban on non-refillable cylinders could have the perverse result of increasing GHG emissions to the atmosphere. Given the AIM Act does not require EPA to impose such a ban, and that doing so would not result in appreciable, if any, environmental benefits, EPA should not include this requirement in the final rule.

First, EPA's assessment of the benefits of the proposed ban is based on the incorrect assumption that each non-refillable cylinder will be disposed of still containing a residual heel of around 8% of the total contents of the can. This analysis ignores the fact that HFCs are currently valuable and costly products. End-users, including operators that service AC and refrigeration units at retail locations, along with customers that purchase these types of cylinders,³⁴ have a strong incentive to fully empty each cylinder prior to disposal or recycling. This economic incentive will only grow stronger as the phasedown proceeds and HFC costs increase.

Second, it is unclear if EPA has accounted for fact that the value of the metal cylinder itself has resulted in the common industry practice to send the non-refillable cylinders for scrap metal recycling rather than dispose of them in a landfill. Furthermore, this scrap metal recycling can often take place at a relatively local level, whereas returning a refillable cylinder back to a supplier for reuse may require transporting it hundreds, if not thousands, of miles. Any proposed ban must take into consideration the costs and benefits of these material-specific recycling rates.

Third, EPA also overlooks the logistical and supply-chain issues associated with a mandated requirement for refillable canisters that not only increase the costs of the proposal but also increase emissions associated with transport, storage, and use of these canisters. After discussions with service providers and manufacturers, the Associations raise the following challenges with implementing a ban on non-refillable cylinders:

- Non-refillable canisters while filled weigh approximately 35 lbs. each; refillable canisters containing the same amount of HFCs weigh over 52 lbs. Transporting the same quantity of HFCs in refillable canisters will therefore require significantly more trucks burning more fuel to distribute the canisters to the consumer. The additional weight of refillable canisters also raises potential safety issues for workers handling the canisters.
- Refillable canisters have a collar and are physically larger than nonrefillable canisters, which makes them more difficult to stack, store, and transport. Each manufacturer,

³⁴ It is the Associations' understanding that some of its retailer members sell DOT-39 cylinders directly in a business-to-small business transaction (*e.g.*, to a solo contractor or HVAC business that use the cylinders to service HVAC systems).

transport vehicle, storage facility, and end-user will need to develop entirely new storage racks to support the new canister design.

- Refilling canisters will increase the transport costs and emissions: instead of traveling a short distance from the end-user to the local scrap-metal recycling facility, empty canisters will now need to be transported hundreds if not thousands of miles back to the producer for refilling.
- Refillable canisters will require an entirely new system to recycle, retest, and refill the canisters, including wholesale locations, warehouses, vehicle fleets, new staff, and tracking costs.

Mandating these significant changes in such a short period of time will very likely cause significant disruptions to the supply chain. Racks for the transport and storage of refillable canisters exist, as do alternatives to DOT-39 canisters. There are not, however, enough storage racks or DOT-approved refillable canisters to serve the full demand by 2023. Additionally, the process for designing and obtaining DOT approval for new canisters meeting the extensive criteria under the DOT hazardous materials regulations³⁵ takes significant time and resources. Manufacturing new canisters and storage racks, converting the transport fleet, and requalifying the new equipment will take years and could easily cost upwards of \$2 billion – without even considering the costs required to retrofit each retail store.

EPA has also failed to consider the unintended consequences of the proposed ban. Put simply, when demand for a particular piece of equipment spikes well beyond the available supply, unscrupulous or unqualified vendors will attempt to fill the breach to obtain the high level of profits available. For example, when the European F-Gas Regulation went into effect, the result was an influx of low-quality, leak-prone refillable cylinders.³⁶ These inferior cylinders resulted in both increased HFC emissions from leaks and increased safety risks to technicians, homeowners, and businesses that purchased them. It is unclear from the Proposed Rule how EPA would address possible influx of counterfeit and noncompliant refillable cylinders and account for it in its enforcement program.

Finally, the benefits of the proposed ban are not only limited but will also decrease over time. The AIM Act itself mandates an 85% reduction in HFC production and consumption within 15 years, and newer, lower-global warming potential (GWP) refrigerants are being developed every day. In the time that would be required for the entire supply chain to retrofit to ensure a reliable supply of safe, compliant refillable canisters, there will be significantly fewer HFCs in commerce and the quantities will only decrease from that point. The significant costs and economic disruptions posed by a requirement for refillable cylinders are simply not justified in the face of the minimal-and-decreasing HFC emissions the ban on non-refillable cylinders may achieve.

A conclusion that banning nonrefillable containers will yield only minimal benefits while imposing high costs is supported by an independent analysis commissioned by CARB to assess the impacts of a similar ban.³⁷ That report concluded that while such a ban would reduce 0.7 MMTCO₂eq over *almost 40 years*, at a cost of \$388 per MMTCO₂eq avoided, it would also *increase* in NO_x emissions associated with transportation of close to 70 tons per year. The report

³⁵ See 49 C.F.R. Part 178.

³⁶ See “We have good EU F-Gas regulations, now we need good regulating,” MultiBriefs (Oct. 4, 2018) *available at* <https://exclusive.multibriefs.com/content/we-have-good-eu-f-gas-regulations-now-we-need-good-regulating/civil-government>.

³⁷ See “Lifecycle Analysis of High-Global Warming Potential Greenhouse Gas Destruction,” ICF International (Oct. 2011) at 130, 133.

further noted that the ban would be more cost-effective only in the event of widespread noncompliance with existing refrigerant regulations (e.g., failure to comply with existing requirements for managing and evacuating cylinders before disposal); that scenario achieved 20x the reductions at 1/25th the cost.³⁸ The logical conclusion to be drawn from these findings is that simply enforcing existing regulations/industry best practice (*i.e.*, fully evacuating cylinders prior to disposal or recycling) provides significantly more environmental benefits at a small fraction of the cost than would be obtained by banning nonrefillable canisters.

The Associations therefore request that EPA eliminate its proposed ban on nonrefillable canisters from its final HFC phasedown rule. At a minimum, EPA should conduct a thorough analysis of the long-term costs and benefits of such a ban before moving forward. After such an analysis, and opportunity for review and public comment, if EPA concludes that additional restrictions on nonrefillable containers are warranted, the Agency should provide an appropriate phase-in schedule to minimize any supply chain disruptions.

3. EPA Should Streamline and Minimize the Burdens Associated with the Proposed Recordkeeping, Reporting, Compliance, and Enforcement Provisions

The proposed rule imposes significant packaging, labeling, and reporting obligations to track the movement of HFCs throughout the domestic economy, including the extensive use of QR codes. EPA should minimize the recordkeeping and reporting obligations associated with these obligations to the greatest extent possible, particularly as to any requirements that may apply to tracking small quantities of HFCs.

Most significantly, the current language in Section 84.23 of the Proposed Rule³⁹ is unclear as to the scope of the tracking obligations. While the section for the most part refers to “bulk regulated substances” – a term that, as discussed above, excludes the consumer products that the Associations’ members sell – some of the provisions refer more broadly to “regulated substances.” For example, that provision states:

At the time of sale or distribution, a person selling or distributing *regulated substance* must ensure there is a valid and legible certification identification on each container of regulated substance, scan the certification identification system to identify a transaction, identify the person receiving the regulated substance, and indicate whether the person receiving the regulated substance is a final customer or supplier.⁴⁰

Inclusion of the general reference to “regulated substances” could significantly expand the scope of the requirements and burdens imposed by this provision especially if the EPA does not clarify that unregulated “manufactured products” include small containers of common household products (*e.g.*, air fresheners, drain cleaner, AC recharge kits, and many more) sold to retail consumers. Those burdens would be exacerbated by the inconsistent treatment of HFCs produced domestically (which would not be subject to the certification and tracking obligations in Section 84.23) and those produced internationally (which would be).

Failure to properly limit the tracking obligations would significantly distort the intended purpose of EPA’s regulatory effort here. The scope of the tracking and recordkeeping obligations would extend all the way down the value chain to the “final customer,” which would no longer be the

³⁸ *Id.* at 133.

³⁹ Proposed § 84.3, 86 Fed. Reg. at 27208.

⁴⁰ *See, e.g.*, § 84.23(c)(3) (emphasis added); *see also id.* § 84 (b)(2) (prohibiting the sale of any “regulated substance” without first registering with EPA).

manufacturer that purchased HFCs to manufacture the product, but instead would reach the everyday retail consumer who purchased a single product. Under this scenario, each retailer, brick-and-mortar store, e-commerce platform, or individual who sells imported products containing HFCs would be required to 1) register with EPA, 2) develop the electronic systems necessary to comply with the tracking provisions, and 3) implement an environmental management system to ensure ongoing compliance.⁴¹ The majority of retailers are unlikely to have existing systems that could implement the complex tracking obligations imposed by § 84.23 and to purchase and implement such a system or to make modifications to an existing system would be costly and require significant time to implement. While developing and implementing such a system would pose a sizeable regulatory and cost burdens on larger retail chains, these would be prohibitive for smaller retailers and businesses that do not have either the knowledge or the resources necessary to implement such a complex system. Accordingly, at a minimum, if EPA were to interpret some consumer products such as those common household examples discussed above to be containers of bulk regulated substances, the Agency would need to substantially revise its cost-benefit analysis to assess the significant additional burdens and costs that would be imposed on businesses.

Additionally, to the extent the tracking requirements may apply to their members, the Associations are very concerned about the feasibility of the QR code system imposed by the rule especially since the system that EPA intends to develop to track the relevant data does not yet exist. The Associations note and appreciate EPA's statement that it intends to develop a "streamlined" system that will minimize burdens on the regulated community.⁴² However, past experiences suggest that "easy" and "streamlined" systems do not always turn out as easy and streamlined as originally envisioned. It is the Associations' understanding that it can be difficult to update information tied to a particular QR code once it is created. It is unclear what additional information is going to be obtained in a QR code that would offset the cost of implementing such a tracking system. More to the point, it is impossible to perform any adequate cost-benefit analysis when the system that companies must implement does not exist at the time the rule is adopted. EPA's proposal should be based on systems that currently exist, not on those that EPA hopes will be developed in time to meet the 2024 deadline. This is especially true if retailers that sell consumer product that contain HFCs are swept up under the tracking provisions.

Moreover, adding a QR code to a consumer product label is not a feat that can occur within the short timeframes proposed in the Phasedown Rule. Labeling and packaging for consumer products are carefully designed to account for numerous product safety and regulatory requirements. Supply chains are attenuated, with multiple third parties involved in the design, manufacture, and distribution of products. These third parties would need to be educated on any new regulatory requirement before process changes involving adding a QR code could be implemented. Accordingly, to impose a new labeling obligation would take considerable time and resources to implement throughout the complex product supply chain.

Lastly, it is unclear from the Proposed Rule what additional value or benefit EPA would achieve from requiring tracking obligations to extend down the value chain. In theory, EPA should understand what HFCs are being imported or produced domestically and consumed through its allowance system.

⁴¹ Proposed 84.23(c)(1)-(3), 86 Fed. Reg. at 27215.

⁴² 86 Fed. Reg. at 27192.

4. EPA Should Issue Allowances at the Parent Company Level, Rather Than the Subsidiary or Facility Level

Consistent with the statutory language of the AIM act, and appropriate scope of the allowance regulatory regime, some retail companies will be required to seek allowances for bulk HFCs they import and/or sell. Given that the majority of the Associations' members operate more than one retail location, it is critical that EPA issue these allowances at the parent company level, rather than at the subsidiary or facility level. Retailers operate in a fundamentally different manner than chemical manufacturing plants that use HFCs in their manufacturing processes. Rather than operating a single facility that requires large volumes of HFCs, retailers may operate hundreds, or even thousands, of locations that when combined import only a fraction of the total HFCs covered by the Proposed Rule. Retailers are also subject to shifts in consumer demand that can change where a particular bulk canister is sold in any given year, even if the overall amount of HFCs sold remains the same.

Issuing allowances at the parent-company level will provide needed flexibility for the Associations' members to arrange for the acquisition and distribution of bulk HFCs at the locations and times demanded by their customers. Issuing allowances at the subsidiary or store level would significantly increase the costs associated with compliance while providing no additional benefit, given that HFCs are regulated for their global, not local, impacts.

Accordingly, the Associations request that EPA make clear in its final rule that it will issue allowances at the parent company level.

5. EPA Should Address Refrigerant Regulation Holistically to Ensure Consistency and Predictability Across All of its Related Refrigerant Management and Reduction Efforts

The Proposed Phasedown is only one of several regulatory programs that manage the production, use, reclamation, recycling, and disposal of a wide variety of refrigerants. While largely independent of each other, these programs are interrelated. The aggregate effect of these programs increases complexities and regulatory uncertainties that may discourage innovation and investment in newer technologies and materials. EPA should take a holistic approach to any forthcoming refrigerant regulatory action to ensure consistency and minimize confusion.

For example, for many years EPA's Significant New Alternatives Policy (SNAP) program – and the Agency's enforcement arm – have focused on requiring companies to transition to refrigerants with lower GWP, also known as advanced refrigerants. For example, a recent EPA settlement agreement with a grocery chain required several its stores to transition to certain non-ozone depleting substance (ODS) and low-GWP refrigerants.⁴³ Two of those advanced refrigerants were R-448A and R-449A, which are in fact blends of three HFCs – R-32, R-125, and R-134a. Only two years later, EPA proposes to phasedown the production and import of all HFCs, which will restrict the volume of the alternative blends that can be manufactured, and directly impact those retail stores' ability to comply with the settlement terms.

With respect to this specific issue of advanced refrigerants, the Associations request that EPA provide for the continued use of these types of blends – such as by providing an application-specific allowance for these uses. More broadly, however, the Associations request that EPA consider each proposal in the context of the larger regulatory picture. All these rules are designed

⁴³ See U.S. Dept. of Justice, "United States Settles with Southeastern Grocers to Reduce Ozone-Depleting Emissions at Grocery Stores in the Southeastern States," Aug. 23, 2019 (press release), <https://www.justice.gov/opa/pr/united-states-settles-southeastern-grocers-reduce-ozone-depleting-emissions-grocery-stores>.

to drive change and encourage transition to less-ozone-depleting and/or lower-GWP materials. Retailers support these overall goals. However, retailers should not be placed in untenable situations where they are required to invest the billions of dollars⁴⁴ to transition to non-HFC refrigeration and HVAC systems if the very refrigerants that it intends to transition to might be limited or prohibited by upcoming changes to the SNAP rules. Similarly, that same retailer cannot, and should not be expected to, agree to settlement terms that require a (costly) transition to newer refrigerants if those refrigerants may be restricted or banned at any time in the future.

At a minimum, any new rules should include an analysis of their impact on existing regulatory requirements. The rules should also provide appropriate implementation schedules and grandfathering provisions necessary to encourage the kinds of proactive changes the rules are designed to spur – or at least to remove the serious disincentive to such changes posed by the current ever-shifting regulatory environment.

In addition, EPA has announced in its regulatory agenda that it will propose new SNAP rules for refrigeration and air conditioning systems in January 2022.⁴⁵ There is considerable uncertainty for retailers and their suppliers regarding EPA's proposed allowance application process because they do not yet know what refrigerants will be allowed under the New SNAP Rule. Accordingly, retailers may be required to use a certain type of refrigerant under SNAP in their food refrigeration or HVAC systems but will not be able to acquire that refrigerant due to the lack of available allowances distributed under the Phasedown Rule. Our national food supply depends on consistent refrigeration. Therefore, EPA should take a holistic and strategic approach to refrigerants and any phase downs or new SNAP rules to prevent such a catch-22 situation that would adversely impact this critical supply chain.

CLOSING

The Joint Retail Associations share EPA's concerns about climate change and wish to reiterate their support of EPA's efforts to reduce GHG emissions to the environment. The Associations appreciate this opportunity to provide comments on their shared input on key elements within the Agency's Proposed Phasedown that have implications for retailers. The Associations and their members look forward to further engagement with EPA during this rulemaking process, and other forthcoming regulatory actions on refrigerants.

If you have any questions or need any additional information, please contact Susan Kirsch, Senior Director, Regulatory Affairs and Compliance, RILA at susan.kirsch@rila.org / (202) 866-7477; Jonathan Gold, Vice President, Supply Chain and Customs Policy, NRF at goldj@nrf.com / (202) 626-8193; Stephanie Harris, Chief Regulatory Officer & General Counsel, FMI at sbharris@fmi.org / (202) 220-0614; and Mary Ellen Kleiman, Deputy General Counsel and Vice President, Legal Affairs, NACDS at MKleiman@nacds.org / (703) 837-4327.

Respectfully submitted,

Retail Industry Leaders Association

National Retail Federation

⁴⁴ For example, one retailer member estimated that it would cost \$4-5 million per retail location to switch out its current refrigeration systems that use HFCs or HFC-blends before the end of their useful life for a system that runs on CO₂. With that cost estimate, it could cost the retailer over \$2 billion to changeout equipment across its 550 locations nationwide.

⁴⁵ See EPA Regulatory Agenda, RIN 2060-AT78 (hereinafter New SNAP Rule).

The Food Industry Association

National Association of Chain Drug Stores