



THE VOICE OF FOOD RETAIL

Feeding Families  Enriching Lives

April 24, 2012

The Honorable Lisa P. Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Re: Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export; 77 Fed. Reg. 237 (January 4, 2012)

Supplemental Comments

Docket No. EPA-HQ-OAR-2011-0354

Dear Administrator Jackson:

On January 4, 2012, the Environmental Protection Agency (EPA) published a proposed rule in the Federal Register which would adjust the allowance system controlling U.S. consumption and production of hydrochlorofluorocarbons (HCFCs) as a result of a recent court decision vacating a portion of the rule titled “Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import and Export; Final Rule.” The Food Marketing Institute (FMI) appreciates the opportunity to comment on this important matter. **These comments supplement the comments FMI filed on February 27, 2012.**

FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI’s U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly \$650 billion. FMI’s retail membership is composed of large multi-store chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI’s nearly 330 associate members include the supplier partners of its retail and wholesale members.

EPA Should Immediately Increase R-22 Production and Consumption Allowances Consistent with the Montreal Protocol to Provide Relief to Grocery Retailers

Since the Proposed Rule was published the cost of HCFC-22 (R-22) refrigerant, the refrigerant most commonly used in the supermarket industry, has spiked 200-300 percent or more. Many companies in the industry have told us that it is becoming difficult to find any R-22 period. If the Proposed Rule is not rescinded or significantly changed, many retailers and wholesalers will face hundreds of thousands or millions of dollars of new costs. Competition in the supermarket industry is fierce. Retailers and wholesalers know that in order to succeed in the marketplace, they have to deliver the freshest food possible to meet consumer demands. Commercial refrigeration is the lifeblood of the industry and refrigeration equipment is among the most expensive in the store. The recent jump in R-22 prices has had a significant impact on the industry.

Another key cause of the spike in R-22 prices is due to the fact that in January EPA issued No Action Assurance letters to importers and producers of R-22 that reduces the amount of R-22 that can be manufactured and/or imported in 2012 by approximately 45 percent from the amount allowed to be produced and/or imported in 2011. These levels are far below what the United States is permitted to produce/import under the Montreal Protocol. Importers and producers are operating under these limits until the rulemaking process for HCFC allowances for 2012-2014 is finalized. We believe that these levels are much too low and should be raised immediately to provide relief to the marketplace. We suggest that EPA reissue No Action Assurance letters that allow producers and importers to operate under the 2011 limits until the Proposed Rule is finalized.

The fact of the matter is that current stock of reclaimed and recycled R-22 is grossly inadequate to have a price effect to counteract the spike caused by the Proposed Rule and No Action Letters.

Phaseout Schedule for R-22 Between 2012 and 2014

FMI believes EPA's top priority in structuring the R-22 phaseout should be minimizing the economic burden to industry. Indeed Executive Order 12866 requires each agency to "tailor its regulations to impose the least burden on society."¹ The Proposed Rule unfortunately does not minimize economic burdens. We believe the phaseout schedule set forth below will minimize these economic burdens while allowing EPA to achieve its regulatory objectives.

¹ Exec. Order No. 12866 (October 4, 1993).

Pursuant to obligations under the Montreal Protocol, the United States is required by 2015 to reduce production and consumption levels of HCFCs by 90 percent of the baseline under the Eleventh Meeting of the Parties and the Copenhagen Amendment respectively. The Copenhagen Amendment established the U.S. consumption baseline at 15,240 ODP-weighted metric tons (MT). The Eleventh Meeting of the Parties established the U.S. production baseline at 15,537 ODP-weighted MT. This corresponds to approximately 277,091 and 282,491 MT of R-22 respectively.² By January 1, 2015, the United States is obligated under the Montreal Protocol to cap consumption of R-22 at 27,709 MT and production of R-22 at 28,249 MT.

FMI proposes the following consumption allocation schedule to minimize the burdens of the phaseout:

		2012		2013		2014	
		MT	ODP MT	MT	ODP MT	MT	ODP MT
R-22	Cons.	65,000	3,600	50,000	2,800	40,000	2,200
	% of Baseline Allocated	45.8%		35.8%		28.2%	

FMI proposes the following production allocation schedule to minimize the burdens of the phaseout:

		2012		2013		2014	
		MT	ODP MT	MT	ODP MT	MT	ODP MT
R-22	Prod.	65,000	3,600	50,000	2,800	40,000	2,200
	% of Baseline Allocated	50.4%		38.8%		31.0%	

FMI thus recommends the following changes to § 82.16 of the Proposed Rule:

Calendar-Year HCFC Production Allowances	
Control Period	Percent of HCFC-22
2012	50.4%
2013	38.8%
2014	31.0%

² Based on the ODP of 0.055 for R-22.

Calendar-Year HCFC Consumption Allowances	
Control Period	Percent of HCFC-22
2012	45.8%
2013	35.8%
2014	28.2%

For comparison, EPA's schedule for production and consumption allowances in the Proposed Rule is 17.7%, 14.7% and 11.6% for 2012, 2013 and 2014. This equates to roughly 50,000, 41,000 and 32,000 MT of R-22 respectively.

Cumulative Regulatory Burdens

On March 20, 2012, the Administrator of the Office of Information and Regulatory Affairs, Cass R. Sunstein, issued a memorandum for the heads of executive departments and agencies directing them to consider the cumulative effects of regulations pursuant to Executive Order 13563.³

Consideration of cumulative effects and of opportunities to reduce burdens and to increase net benefits should be a part of the assessment of costs and benefits, consistent with the requirement of Executive Order 13563 that, to the extent permitted by law, agencies must "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits."⁴

The grocery industry ranks among the most heavily regulated. Grocery retailers and wholesalers face a plethora of federal rules from agencies ranging from USDA and FDA to the Departments of Transportation, Labor, HHS and Treasury to name a few. Compliance resources (and budgets) are stretched thin and the recent spike in refrigerant prices has had a significant impact on the industry. In an industry where the profit margins average less than a penny a dollar, an additional new regulatory cost can be very difficult to cope with. As the cost of doing business in the grocery industry goes up consumers often share the burden in the form of higher prices.

The memorandum orders agencies to identify "opportunities to reduce administrative and other costs . . . while meeting policy goals and legal requirements." By adopting the schedule set forth in these comments, FMI believes the Agency will clearly reduce costs while meeting policy goals and legal requirements.

³ Exec. Order No. 13563 (January 18, 2011).

⁴ Memorandum from Cass R. Sunstein (March 20, 2012).

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We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is written in a cursive style with a long horizontal flourish at the end.

Erik R. Lieberman
Regulatory Counsel