

February 6, 2009

The Honorable Elizabeth Craig
Acting Assistant Administrator for Air
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: EPA's Proposed Ban on the Sale or Distribution of Pre-Charged Appliances, Docket ID No. EPA-HQ-OAR-2007-0163, 73 Fed. Reg. 78705 (December 23, 2008).

EPA's Proposed Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, Docket ID No. EPA-HQ-OAR-2008-0496, 73 Fed. Reg. 78680 (December 23, 2008).

Dear Ms. Craig:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comment on the Environmental Protection Agency's (EPA) proposed rule, *Protection of Stratospheric Ozone: Ban on the Sale or Distribution of Pre-Charged Appliances*¹ ("pre-charged ban"). Beginning on January 1, 2010 ("deadline"), the proposed rule would ban the sale or distribution of air-conditioning and refrigeration appliances containing HCFC-22, HCFC-142b, or blends containing one or both of these substances.² The rule would also extend to air-conditioning and refrigeration appliances that are suitable only for use with newly produced HCFC-22, HCFC-142b, or blends containing one or both of these controlled substances ("restricted refrigerants").³

Advocacy applauds EPA for issuing prompt clarifications about the pre-charged ban in response to concerns raised by stakeholders about servicing equipment that use restricted refrigerants. Advocacy encourages EPA to incorporate those provisions in the final rule, clarifying: (1) that uncharged components manufactured after 2010 that can be field charged with recycled refrigerant can continue to be manufactured after the deadline, and (2) that the rule will allow charged component parts manufactured prior to the deadline to be used in servicing existing equipment. However, as discussed below, additional rule revisions are also warranted to address some remaining small business issues.

This comment letter also discusses EPA's related proposed allocation rule, *Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export*,⁴ published on the same day as the pre-charged ban

proposed rule. Advocacy believes it is necessary to address both proposed rules in this letter because a proper interpretation of the pre-charged ban proposal requires use of certain definitions and interpretive language contained in the preamble of the proposed allocation rule.

We and many others were surprised by EPA's certification in the pre-charged ban proposal that this rule would have no effect on small entities. However, as explained below, we now understand that EPA meant that there would be no adverse effect on small entities based on the assumption that EPA's proposal would leave no stranded inventory. In fact, many small manufacturers, distributors and retailers could incur significant financial losses unless the EPA revises the proposed rule and related interpretations of the scope of the ban. Advocacy agrees with EPA regarding the need for restrictions on refrigerants in order to protect stratospheric ozone, and believes the proposals below will offer adequate flexibility for small entities, while still achieving the goal of protecting stratospheric ozone.

Office of Advocacy

Advocacy was established by Congress under to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration.

The Regulatory Flexibility Act (RFA),⁵ as amended by the Small Business Regulatory Enforcement Fairness Act,⁶ 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, federal agencies are required by the RFA to assess the impact of the proposed rule on small businesses and to consider less burdensome alternatives.

Moreover, Executive Order 13272⁷ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Advocacy Comments

The Factual Basis for the Proposal's Certification Is Incorrect; A Revised Final Rule Can Provide a Proper Foundation for A New Certification of No Significant Economic Effect

EPA certified that the pre-charged ban "will not have a significant economic impact on a substantial number of small entities."⁸ EPA identified the following categories of

businesses affected by the proposed rule: chlorofluorocarbon gas manufacturers, importers, and exporters (NACIS Code 325120) and manufacturers and importers of air conditioners and refrigerators (NACIS Code 333415).⁹ EPA further explained that, “[t]his proposed rule will not impose any requirements on small entities.¹⁰ None of the entities affected by this rule are considered small as defined by the NACIS Codes listed above.”¹¹

Advocacy disagrees with the EPA’s factual basis for the certification: approximately 90% of businesses that manufacture and import air conditioners and refrigerators (NAICS codes 333415) have fewer than 500 employees.¹² The relevant small business size standard is 750 employees, and therefore, over 90% of the businesses in these two sectors are considered small businesses. The proposed rule states there is *no* impact, but even if the costs associated with purchasing alternative refrigerant and manufacturing component costs are only slightly higher than status quo,¹³ the rule will have *some* economic impact on the manufacturers, although we agree that this cost would not cause a significant economic impact.

However, there was no discussion of the potential economic impact of stranded inventory on retailers and distributors of air conditioners, refrigerators, and other appliances subject to the pre-charged ban. The adverse economic impact to those small entities, as well as manufacturers, could be quite high due to stranded inventory that could not be sold to the ultimate consumer by the deadline. Either retailers and distributors would have to absorb the inventory costs, or manufacturers would be left with equipment they can no longer sell.

Advocacy now understands that EPA’s intent was to prevent any significant stranded inventory problem, and thus assumed there were no inventory related costs, and no adverse impacts on retailers and distributors. Indeed, EPA stated in the preamble that the January 2010 date was chosen “to provide adequate planning time for the various stakeholders to take actions to permit for a smooth transition.”¹⁴ If the final rule achieves EPA’s intent of eliminating inventory related costs, then EPA could properly certify the rule as having no significant cost on affected small businesses of all types. EPA should revise its factual foundation for the certification in the final rule. In conclusion, while the agency failed to provide a factual foundation for the proposal, Advocacy agrees that, with a solution to the stranded inventory problem, the final rule can be properly certified.

EPA should allow sale and distribution of air conditioning and refrigeration units that were placed into initial inventory prior to January 1, 2010.

Advocacy endorses exemptions to the “interstate commerce” ban that would allow the continued sale of products subject to the pre-charged ban beyond the deadline if the items were manufactured prior to January 1, 2010. Otherwise, the pre-charged ban could have adverse effects reaching beyond the air-conditioning and refrigeration industry to retailers, distributors, and manufacturers of products that incorporate such products (e.g. boat manufacturers).

The air-conditioning business is seasonal, and many purchasing and manufacturing decisions for summer 2009 have already been finalized. We have been informed by small

entity representatives that manufacturers, distributors and retailers virtually all understood that products could be manufactured through December 31, 2009. Retailers and manufacturers with leftover inventory should be allowed to sell their inventory to mitigate any harmful effects on the industry, as EPA apparently intended. Advocacy encourages EPA to adopt a grandfathering provision for air-conditioning and refrigeration appliances and components containing restricted refrigerants manufactured prior to January 1, 2010, that are placed in initial inventory prior to the deadline.¹⁵

Definition of manufactured

Advocacy disagrees with EPA's new proposed interpretation of when air-conditioning and refrigeration appliances and components are considered "manufactured." EPA puts forward a narrow definition of "manufactured" in the allocation proposed rule: an appliance is considered to be "manufactured" at the point it becomes "a stand-alone piece of equipment," ready to function for its purpose.¹⁶ As a result, EPA considers some appliances, such as those used in commercial and industrial process refrigeration, to be "manufactured" at the installation site: at the point when all the components are installed, the refrigerant loop is completed, and the devices are fully charged with refrigerant.

Advocacy believes that for split systems (e.g., an air handler and a compressor unit), the completion of a refrigerant loop, or the on-site adjustment of equipment to its proper charge should not be considered the date of manufacture of the appliance. Advocacy would argue that these actions should be considered service or installation activities, rather than manufacturing. Even though installation of these component appliances may be a more complex process, the actual manufacture of each component appliance should be the date when the appliance component left the manufacturer and entered initial inventory, regardless of the complexity of installation. This comports with the conventional understanding of the word "manufacturing."

Advocacy asks EPA to use the same language adopted in the 2001 *Reconsideration of the 610 Nonessential Products Ban*¹⁷ for class I refrigerants so that the items are considered "manufactured" once they enter the initial inventory at the manufacturing site. The 2001 rule gives a definition of initial inventory that is compatible with common industry usage: the date "that the original product has completed all its processes and is ready for sale by the manufacturer." EPA has used shipping forms, lot numbers, manufacturer date stamps or codes, invoices, or the like to determine proof of the date of manufacture, and Advocacy would urge a similar objective approach for all appliances subject to the pre-charged ban. EPA's new definition would conflict with the conventional understanding of "manufacturing" and contribute to unnecessary confusion.

Exemptions from the pre-charged ban

Manufacture of component parts containing very small initial charge for servicing equipment

Advocacy understands that EPA is open to considering an exemption to allow some small pre-charged units (TXV valves and other equipment as industry may suggest) to continue to be manufactured beyond 2010 if the industry can show that it is not cost-effective or practical to manufacture such item as an uncharged component. Advocacy asks that EPA allow exemptions for these units in order to ensure an adequate inventory of component parts available to service equipment manufactured prior to January 1, 2010.

Prior existing contracts or plans for equipment subject to the pre-charged ban

In order to minimize the adverse economic effects of the pre-charged ban, Advocacy also suggests that the EPA: (1) make exemptions for binding contracts for the purchase of equipment made prior to the deadline but for economic or other reasons cannot be delivered until after 2010, and (2) provide an exemption for construction projects that have received building code approval of plans that include equipment subject to the pre-charged ban but will not be completed until the pre-charged ban is in effect. In this current economic climate, we expect that this would be a significant problem. These exemptions are necessary to achieve EPA's expressed goal of avoiding stranded inventory. Without these exemptions, EPA would jeopardize the RFA certification of no significant economic impacts on small entities.

Conclusion

Advocacy believes that EPA's current certification is improper because its stated factual basis is incorrect. However, a revised final rule incorporating Advocacy's suggested changes may be properly certified as posing no significant economic impact on small entities.

Advocacy recommends that EPA address the following issues:

- interpret "manufactured" as "the date in which the appliance is placed in initial inventory, where the original product has completed all of its manufacturing processes and is ready for sale by the manufacturer," a definition consistent with both industry practice and prior EPA and DOE rulemakings;
- allow continued production of certain small units containing de minimis levels of restricted refrigerant after the deadline if it is not practical or cost-effective to manufacture these items with no charge; and
- provide exemptions from the pre-charged ban where plans to use restricted refrigerants were in place before the ban.

Thank you for the opportunity to comment on this proposed rule. Please feel free to contact me or Kevin Bromberg at (202) 205-6964 (or Kevin.Bromberg@sba.gov) if you have any questions or require any additional information.

Sincerely,

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Office of Management and Budget

ENDNOTES

¹ 73 Fed. Reg. 78705 (Dec. 23, 2008).

² Ibid.

³ Ibid.

⁴ 73 Fed. Reg. 78680 (Dec. 23, 2008).

⁵ 5 U.S.C. § 601 et seq.

⁶ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁷ Executive Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

⁸ 73 Fed. Reg. 78714 (Dec. 23, 2008).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Out of 720 total firms, 633 have fewer than 500 employees. *Employer Firms, & Employment by Employment Size of Firm by NAICS Codes, 2006*.
http://www.sba.gov/advo/research/us06_n6.pdf

¹³ 73 Fed. Reg. 78710 (Dec. 23, 2008).

¹⁴ 73 Fed. Reg. 78714 (Dec. 23, 2008).

¹⁵ Advocacy asks EPA to use an approach similar to that found in 40 CFR Part 82, subpart C.

¹⁶ 73 Fed. Reg. 78699 (Dec. 23, 2008).

¹⁷ 66 Fed. Reg. 57520 (Nov. 15, 2001).