



July 6, 2021

Administrator Michael Regan
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act

Dear Administrator Regan:

Today, I write on behalf of Americans for Prosperity (“AFP”) activists across all 50 states to provide comments opposing the U.S. Environmental Protection Agency’s (“EPA” or the “Agency”) proposed rule to implement a phaseout of hydrofluorocarbons (HFCs) under the American Innovation and Manufacturing Act (“AIM Act”) and Clean Air Act Amendments of 1990 (“CAA”). The proposed rule would hurt those least able to afford the increased cost of air conditioning while benefiting large corporate interests who would benefit from an eventual mandate for their more expensive products.

These comments focus on the insufficiency of EPA’s economic and environmental justice analysis, including the failure to appropriately consider domestic costs and the regressive effects of a de facto tax on refrigeration and air conditioning, and clear violations of the Environmental Research, Development, and Demonstration Authorization Act of 1978 (“ERDDAA”; 42 U.S. Code § 4365) and the CAA (42 U.S. Code § 7607). AFP also calls for the Agency to withdraw, clarify, and repropose this rule based on its limited statutory authority and the unclear relationship between this proposal and Administration efforts to transmit, seek U.S. Senate ratification, and implement the Kigali Amendment to the Montreal Protocol.

The Proposed Rule Violates ERDDAA Requirement for Science Advisory Board Advice
ERDDAA directs the EPA Administrator to establish a standing Science Advisory Board. Congress further required that “[t]he Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the Clean Air Act..., or under any other authority of the Administrator, is provided to any other federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.” Providing this information at the stage of interagency review and comment facilitates the Board providing “its advice and

comments on the adequacy of the scientific and technical basis of the... regulation, together with any pertinent information in the Board's possession."¹

EPA clearly violated this requirement with the proposed rule. On March 25, 2021, the proposed rule began formal review and comment by other federal agencies through the Office of Information and Regulatory Affairs Executive Order 12866 process. It completed the interagency process on April 30, 2021.² There is no evidence in the docket, the Science Advisory Board's website, or elsewhere that EPA provided the proposed rule or any relevant scientific and technical information to the Board at any time since the enactment of the AIM Act. Any claim by EPA that the interagency process under Executive Order 12866 does not constitute "formal review and comment" ignores the context of ERDDAA and CAA Section 307 and would eviscerate this clear direction from Congress. In addition, the failure to provide the proposed rule to the Board even after interagency review had been completed, including through the full public comment period, is a compounding violation that eliminates the Board's role under ERDDAA as well as its potential role as an interested stakeholder in the notice-and-comment process. These violations are particularly egregious for three reasons:

First, on March 31, 2021, less than five business days after the proposed rule had been provided to other agencies for review and comment, EPA announced it was "resetting" the entire membership of its Science Advisory Board, removing the several dozen sitting members before the end of their membership terms for the first time in the Board's history.³ The SAB has not yet been reconstituted, although the Agency has solicited nominations and public comment on the nominees. Even if there was a mechanism for the Board, either during the interagency or public comment process, to provide their advice and comment pursuant to the law and at their own initiative, the fact that the Board was disbanded for the duration of the period in which the proposal was public and available for comment demonstrates underscores the harm of this violation of ERDDAA, actions that undermine the dual goals of independent scientific advice and transparency.

Second, the proposed rule incorporates a large amount of new, "relevant" scientific and technical information which has not been subjected to formal peer review and which would likely be of significant interest to the Board, other scientific bodies, and the American people. This includes the first ever use of the social cost of HFCs, which appears to refer back to a procedurally defective attempt to estimate a social cost of greenhouse gases (a document that has not been peer reviewed or had public comment responses), the use of EPA's Vintaging Model, which has not been updated and subsequently peer reviewed since 2017 and contains substantial assumptions and variability in inventory estimates, and a series of business-as-usual assumptions, including relating to private, international, and state actions, that represent key methodological inputs for the magnitude of the proposal's costs and benefits. As noted below in the context of CAA Section 307, this relevant scientific and technical information may also extend to several other documents that do not appear in the docket for the rule.

¹ 42 U.S. Code § 4365(c).

² <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2060-AV17>.

³ <https://www.epa.gov/newsreleases/administrator-regan-directs-epa-reset-critical-science-focused-federal-advisory>.

Third, the uncertainty in the relationship between the proposed rule and the U.S. Senate’s potential consideration of the Kigali Amendment to the Montreal Protocol directly relates to the roles and responsibilities of the Science Advisory Board under ERDDAA. In addition to the Board’s role in providing “scientific advice as may be requested by the Administrator...”, the SAB also plays an important role in responding to requests from the Committee on Environment and Public Works of the United States Senate and other committees of jurisdiction.⁴ EPA’s violation of ERDDAA for this has also deprived the Congress with the Board’s independent scientific advice on the phaseout of HFCs as well as other pertinent scientific and technical information that should inform their consideration of the Kigali Amendment as well as oversight of implementation of the AIM Act. In other words, EPA’s violation has undermined the Board’s required “advice and comment” role under ERDDAA and the U.S. Senate’s “Advice and Consent” role under the U.S. Constitution.

Major Methodological Problems Undermine EPA’s Regulatory Impact and Environmental Justice Analysis

This proposed rule would result in direct economic benefits for a small number of rent-seeking firms while virtually all Americans will bear the enormous direct costs, substantially driving up the price of life-changing technology like air conditioning and refrigeration in a manner that undermines economic growth, health and safety, and human flourishing. As scholars at the Caesar Rodney Institute,⁵ Heritage Foundation,⁶ and Competitive Enterprise Institute⁷ have frequently noted, the consumer costs of alternatives are already often an order of magnitude higher than HFCs. This could add hundreds of dollars in costs to the cost of new residential and industrial air conditioning units as well as cars and trucks, with much higher maintenance and repair costs.

Incorrectly presuming that demand for HFCs is a market failure, EPA utilizes a series of cost-benefit tools that obscure this reality, including international, indirect, and private benefits as well as deploying a non-peer-reviewed social cost of HFCs, that are inconsistent with past practice, long-standing executive branch guidelines like Circular A-4, and basic economic principles. Even if Congress took the unusual step of prohibiting a widely used product and endorsing a de facto air conditioning and refrigeration tax that resembles an unratified treaty, EPA’s promulgation of rules during a pandemic still requires a forthright and transparent analysis of costs and benefits of this particular action and an evaluation of alternatives.

⁴ 42 U.S. Code § 4365(a).

⁵ <https://www.congress.gov/116/meeting/house/110388/documents/HHRG-116-IF18-20200114-SD015.pdf>; <http://www.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-R-A-0004/Exhibit-19-Copies-of-all-public-comments-received.pdf>.

⁶ https://www.epw.senate.gov/public/_cache/files/1/1/11b42cd7-423d-43c9-8ae4-b869bf62bf17/F65980979CA164B6BDABAB66D7791360.04.08.2020-the-heritage-foundation.pdf; <https://www.heritage.org/environment/commentary/ready-pay-lot-more-air-conditioning-senate-may-leave-you-no-choice>.

⁷ https://cei.org/regulatory_comments/testimony-of-ben-lieberman-before-house-subcommittee-on-environment-and-climate-change/; <https://cei.org/blog/the-bipartisan-war-on-affordable-air-conditioning/>; https://fredericksburg.com/opinion/commentary-the-epa-is-coming-after-your-air-conditioner/article_bfe4fb60-50d2-5e35-bd74-f00ca35e9b11.html; https://www.epw.senate.gov/public/_cache/files/b/2/b223f883-984b-4300-91b4-bbaaa952f58d/7589F18BE4F5A42BD2DDCCF961A2E9BB.04.06.2020-competitive-enterprise-institute.pdf; https://cei.org/coalition_letters/cei-leads-coalition-letter-opposing-restriction-of-hfcs/.

EPA excludes from its analyses the ways in which phasing out HFCs through this regulatory approach will result in significant regressive cost increases for low-income Americans, exacerbate energy poverty, and disproportionately affect environmental justice communities. A large body of academic literature supports the relationship between federal regulations and a regressive effect on low-income communities, including increased poverty, impacts on consumer prices, and reduced job opportunities.⁸ EPA also sidesteps the substantial literature on adverse public health, welfare, social, economic, or energy effects from implementation of CAA regulations.⁹

EPA appears to also ignore the substantial literature on energy poverty. More than 30 million American households face high energy burdens, with the lowest income households devoting more than 20 percent of their after-tax income to residential utilities and fuel.¹⁰ A 2021 study published in *Nature Energy* found:¹¹

[E]nergy insecurity is highly prevalent among households at or below 200% of the federal poverty line. We further show that Black and Hispanic households are more likely to experience energy insecurity and face utility disconnection, as are households with young children, individuals that require electronic medical devices and those in dwellings with inefficient or poor conditions. These conditions exist under normal circumstances, and the COVID-19 pandemic seems to have exacerbated the overall incidence of energy insecurity.... Individuals in energy-insecure households are more likely to remain in poverty for longer periods of time and are more likely to suffer adverse mental and physical health consequences, which include an increased incidences of death; these impacts are especially prevalent for children and the elderly.

Even a small increase in the cost of air conditioning, including the price of a new unit, premature obsolescence, or expanded maintenance costs, could generate significant environmental justice- and health-related concerns. Home air conditioning has cut premature deaths on hot days in the U.S. by more than 80 percent since 1960.¹² A review of available studies suggest that associations between the risk of heat-related health effects and race, education, and income “are likely mediated by characteristics such as use of air conditioning....”¹³ Another multi-city

⁸ <https://www.mercatus.org/publications/regulation/regressive-effects-regulation-0;>
<https://www.mercatus.org/publications/regulation/regressive-effects-regulation;>
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191409;
<https://www.mercatus.org/publications/regulation/regulation-and-poverty-empirical-examination-relationship-between-incidence;> [https://www.mercatus.org/system/files/mclaughlin_thomas_chambers_and_waldron_-_policy_brief_-_the_regressive_effects_of_regulation_a_primer_-_v1.pdf;](https://www.mercatus.org/system/files/mclaughlin_thomas_chambers_and_waldron_-_policy_brief_-_the_regressive_effects_of_regulation_a_primer_-_v1.pdf)
[https://www.mercatus.org/system/files/McLaughlin-Regulations-Contribute-Poverty-testimony-for-web.pdf.](https://www.mercatus.org/system/files/McLaughlin-Regulations-Contribute-Poverty-testimony-for-web.pdf)

⁹ [https://downloads.regulations.gov/EPA-HQ-OAR-2018-0365-0009/attachment_1.pdf.](https://downloads.regulations.gov/EPA-HQ-OAR-2018-0365-0009/attachment_1.pdf)

¹⁰ [https://www.aceee.org/sites/default/files/pdfs/u2006.pdf;](https://www.aceee.org/sites/default/files/pdfs/u2006.pdf) [https://www.americaspower.org/wp-content/uploads/2016/06/Family-Energy-Costs-2016.pdf.](https://www.americaspower.org/wp-content/uploads/2016/06/Family-Energy-Costs-2016.pdf)

¹¹ [https://www.nature.com/articles/s41560-020-00763-9.](https://www.nature.com/articles/s41560-020-00763-9)

¹² [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192245.](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192245)

¹³ [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4264980/.](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4264980/)

examination concluded: “Efforts to reduce disparities in heat-related mortality should consider access to [air conditioning].”¹⁴

Increasing the cost of air conditioning, electricity, or refrigeration under this proposed rule will negatively and disproportionately impact the “pollution-burdened, underserved, and Tribal communities” that EPA has been directed to assess, and EPA has completely failed to “consider regulatory options to maximize benefits to these communities.”¹⁵

An interagency commenter suggested that EPA needs to acknowledge “the potential for... particular adverse effects to EJ community” due to the structure of the rule transferring production to some facilities or “chemical manufacturers who reduce HFC production switch to producing chemicals with increased localized effects.”¹⁶ Another flagged a fear that they were “putting a target on the proposed rule as raising more EJ concerns than we expect.” As the Industrial Energy Consumers of America notes, new heat transfer liquid fluids under the proposed rule do not perform as well, meaning “units will have to run harder, using more electricity, thereby increasing electricity costs and accompanying GHG emissions.”¹⁷ While EPA seems to recognize that the response to the proposed rule “may cause or contribute to disproportionately high exposure to certain air toxics in communities adjacent to, or surrounding, that facility,”¹⁸ it fails to heed Executive Order 14008’s call to address “accompanying economic challenges” that result from the rule.

There are additional methodological and procedural defects in EPA’s economic and environmental justice analysis:

- EPA’s selection of its business-as-usual baseline is based on faulty assumptions and represents a thumb-on-the-scales approach to incorrectly credit the rule with benefits. As the White House commented on EPA’s draft Regulatory Impact Analysis: “I am a little concerned about the static nature of the BAU scenario and its core assumptions. It doesn’t include any cost-saving technologies adopted by industry, state action, the influence of global markets/domestic regulations in other countries, or economies of scale as a result of the uptake of alternatives due to these dynamics, and the RIA does not make the case that there is good reason to believe that the effects of the aforementioned issues (not accounted for) would be small. In this particular case, the analysis suggests astronomical benefits, but it seems to me to be worth flagging some broader concerns with the approach to CBA here.”¹⁹
- In interagency presentations, EPA acknowledges a variety of limitations in its environmental justice analysis, including that “smaller producers may be subject to the rule that do not report to EPA.”²⁰
- EPA has failed to analyze the direct and indirect air toxics emissions that will result from the proposed rule.

¹⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3456567/>.

¹⁵ <https://www.epa.gov/newsreleases/epa-administrator-announces-agency-actions-advance-environmental-justice>.

¹⁶ <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0044-0045>.

¹⁷ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0124/attachment_1.pdf.

¹⁸ 86 FR 27204.

¹⁹ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0045/attachment_13.pdf (pg. 11).

²⁰ <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0044-0045>.

- As a recent piece by Dr. Patrick Michaels of CEI and Dr. Ben Zycher of the American Enterprise Institute points out, EPA claims regarding the dramatic environmental and temperature effects of phasing out domestic HFCs are dubious at best.²¹
- EPA appears to have ignored requests from other federal agencies to incorporate an appendix thoroughly explaining why it choose to obscure domestic versus international costs and benefits in manner inconsistent with past practice and executive branch guidelines.²²
- As noted below, EPA used outdated or non-peer-reviewed inputs, including for its emissions inventory, Vintaging Model, and the social cost of HFCs.

EPA Lacks Statutory Authority and Overlap with Unratified Kigali Amendment Creates Substantial Legal Uncertainty

EPA should exercise caution in over-interpreting “the similarities in the text, structure, and function of the production and consumption phasedown provisions of the AIM Act and EPA's program phasing out ozone-depleting substances (ODS) under Title VI of the CAA,” which the Agency cites to argues that it should “build on its experience” to fill gaps in the implementation process.²³ Given the Agency’s recent track record, including its attempt to phaseout HFCs, non-ozone-depleting substances, under CAA Section 612 prior to the AIM Act, EPA should heed the D.C. Circuit of Appeals admonition that “climate change is not a blank check for the President.” As then-Judge Kavanaugh noted: “...EPA may act only as authorized by Congress. Here, EPA has tried to jam a square peg (regulating non-ozone-depleting substances that may contribute to climate change) into a round hole (the existing statutory landscape).”²⁴

These concerns about EPA’s expansive reading of its newfound authority to phaseout HFCs without regard to statutory authority is compounded by the significant uncertainty regarding the proposed rule and future EPA actions and potential ratification of the Kigali Amendment of the Montreal Protocol. As catalogued below, EPA and other agencies are supposedly taking numerous actions, including interagency coordination to prepare and transmit a package, FY2022 budget decision-making, and international negotiating, related to the Kigali Amendment.

While EPA acknowledges “certain marked differences” between the Kigali Amendment and the AIM Act, EPA is putting the cart far before the horse in proposing to implement parts of the agreement prior to Senate consideration or ratification under the U.S. Constitution. For context, the U.S. ratified the Montreal Protocol in 1987, which was followed by implementing legislation through CAA Amendments of 1990, with EPA implementing regulations under CAA Title VI in subsequent years. EPA has not been authorized by Congress to undertake any actions to implement the Kigali Amendment. In this case, EPA is taking proposing action “to ensure the United States would be prepared to comply with the data reporting elements of the Kigali

²¹ <https://www.washingtonexaminer.com/opinion/op-eds/would-a-phaseout-of-hydrofluorocarbons-avoid-half-a-degree-of-global-warming>.

²² https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0045/attachment_12.pdf.

²³ “Given EPA's extensive experience phasing out ODS under similar CAA authority for a regulated community that bears marked resemblance to entities that could be impacted by the rulemaking, reliance on EPA's expertise will help achieve the goals outlined by Congress in implementing the AIM Act.” 86 FR 27154.

²⁴ *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 460 (D.C. Cir. 2017).

Amendment,” including releasing data to the United Nations Environment Programme’s Ozone Secretariat and marking “any data that the Agency is not releasing to the general public for confidential treatment” to be provided to the UN.²⁵

In addition, EPA’s proposed rule under the AIM Act, with “certain marked differences” with the Kigali Amendment, creates massive uncertainty, including for regulated entities which may face multiple different regulatory frameworks in the next few years especially if, as with past international environmental agreements, the U.S. Congress passes implementing legislation. Having already missed the March 28 deadline from President Biden to prepare a transmittal for the U.S. Senate, these actions are fundamentally at odds with the separation of powers and lack EPA lacks statutory authority for these activities. These concerns are underscored by the April 17 issuance of a Joint US-China statement that the U.S. would, in the near-term, “implement the phasedown of hydrofluorocarbon production and consumption reflected in the Kigali Amendment to the Montreal Protocol.”²⁶ In addition to other constitutional considerations, negotiation and issuance of this statement also raises Appointments Clause issues regarding the Presidential Climate Envoy, who has not been confirmed by the U.S. Senate.

EPA is proposing several other actions that lack statutory authority delegated by Congress. For example, EPA has no statutory basis for its proposal to ban disposable cylinders.²⁷ As articulated in comments from the Small Business Administration’s Office of Advocacy,²⁸ the Ohio Manufacturers’ Association,²⁹ and the Heating, Air-conditioning & Refrigeration Distributors International,³⁰ EPA’s decision to ban these cylinders would result in crippling costs for small businesses with little environmental benefit. Similarly, the decision to rely on CAA Title VI reporting and recordkeeping requirements in order “to build on its expertise” is not based in the AIM Act. Furthermore, EPA’s inclusion of environmental justice and other analyses is not grounded in the AIM Act or CAA.

AFP calls for the Agency to withdraw, clarify, and repropose this rule based on its limited statutory authority and the unclear relationship between this proposal and Administration efforts to transmit, seek U.S. Senate ratification, and implement the Kigali Amendment to the Montreal Protocol (including any subsequent implementing legislation). Taking duplicative or unnecessary actions, including to implement a treaty that has not yet been transmitted to the U.S. Senate, clearly exceeds the Agency’s authority. EPA cannot substitute or supplement the limited authority under the AIM Act as a basis for reporting or other activities for the Kigali Amendment, especially since those activities are pursuant to an unratified treaty.

²⁵ 86 FR 27200.

²⁶ <https://www.state.gov/u-s-china-joint-statement-addressing-the-climate-crisis/>.

²⁷ 86 FR 27187.

²⁸ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0142/attachment_1.pdf.

²⁹ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0120/attachment_1.pdf.

³⁰ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0103/attachment_1.pdf.

The Proposed Rule Violates Key Provisions of CAA Section 307(d), EPA Policies, and Other Statutory Requirements

As EPA acknowledges, the AIM Act “states that [CAA] sections 113, 114, 304, and 307 apply to the AIM Act...” and that, accordingly, “this rulemaking is subject to CAA section 307(d)...”³¹ Section 307(d) establishes unique docketing and procedural requirements for this proposed rule, and EPA has violated several key provisions in a way that has harmed public participation in the notice-and-comment, interagency, and scientific advisory process.

CAA Section 307(d)(3) requires that the proposed rule be accompanied by “a statement of its basis and purpose...” which shall “set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the... National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences.” The proposed rule violates this requirement by omitting reports, including any differing recommendations, from the National Academy of Sciences that are pertinent.³²

The Agency obscures the stark differences between EPA’s novel use of a new, non-peer-reviewed social cost of HFCs and recommendations from the National Academy of Sciences regarding the development and use of related social costs of greenhouse gas inputs. While EPA is taking comments on this issue and notes that “The Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) will be taking comment on how to incorporate the recommendations of the National Academies (2017) and other recent science including the advances discussed in the 2021 TSD in the development of the fully updated SC– GHG estimates to be released by January 2022 under E.O. 13990,” that does not satisfy the major procedural and methodological gaps between the proposed rule and the National Academies recommendations and conclusions in 2016 and 2017.³³

³¹ 85 FR 27154.

³² National Research Council, *Toxicity of Alternatives to Chlorofluorocarbons: HFC-134a and HCFC-123*. Washington, DC: The National Academies Press, 1996: <https://doi.org/10.17226/9268>; Project on Stabilization Targets for Atmospheric Greenhouse Gas Concentrations, <https://www.nationalacademies.org/our-work/stabilization-targets-for-atmospheric-greenhouse-gas-concentrations>.

³³National Academies of Sciences, Engineering, and Medicine, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide*, Washington, DC: The National Academies Press, 2017:<https://www.nap.edu/read/24651>; National Academies of Sciences, Engineering, and Medicine, *Assessment of Approaches to Updating the Social Cost of Carbon: Phase I Report on a Near-Term Update*, Washington, DC: The National Academies Press, 2016: <https://www.nap.edu/read/21898/chapter/1>. Examples of major differences: Conclusion 6-1, 2017 (“...the current approach of the Interagency Working Group, uncertainty about future discount rates motivates the use of both a lower 2.5 percent rate and higher 5.0 percent rate, relative to the central 3.0 percent rate.... does not incorporate an explicit connection between discounting and consumption growth that arises under a more structural (e.g., Ramsey-like) approach to discounting.”); Conclusion 2-1, 2017 (“... using a common module—rather than averaging the results from multiple models—can improve transparency and consistency of key assumptions...”); Recommendation 2-2, 2017 (“Key uncertainties and sensitivities, including functional form, parameter assumptions, and data inputs, should be adequately identified and represented in each module.”); Recommendation 2-4, 2017 (“In the first step, the interagency process and associated technical efforts should draw on internal and external technical expertise and incorporate scientific peer review. In the second step, draft revisions to the SC-CO2 methods and estimates should be subject to public notice and comment, allowing input and review from a broader set of stakeholders, the scientific community, and the public. In the third step, the government’s approach to estimating the SC-CO2 should be regularly reviewed by an independent scientific assessment panel to identify improvements for potential future updates and research needs.”)

Additionally, CAA Section 307(d)(3) also requires a summary of “the factual basis,” “the methodology used in obtaining the data and in analyzing the data,” and “the major legal interpretations and policy considerations underlying the proposed rule.” It appears that several related documents have been omitted from the docket for the proposed rule:

- A U.S. Senator identified that, prior to 2019, “EPA conducted a cost-benefit analysis of the Montreal Protocol and the HFC phasedown that I believe shows that the ratification of Kigali will be a benefit to American businesses and American consumers,” noting that “[t]his study has not been released to the public yet.”³⁴ EPA’s response suggests an interagency process to consider legal, policy, and economic considerations related to a phaseout of HFCs. Meeting minutes, draft documents, and other materials from these interagency discussions have been omitted from the docket for this rule.
- Since the beginning of the Biden administration, several other ostensibly interagency activities have been taking place related to the phaseout of HFCs and potential ratification of the Kigali Amendment to the Montreal Protocol.³⁵ Any EPA records related to these efforts – including those that took place during the interagency process for the proposed rule – appear to have been omitted from the docket in contravention of CAA Section 307(d). These activities include President Biden’s January 20 directive in Section 102(j) of Executive Order 14008 to “prepare, within 60 days of the date of this order, a transmittal package seeking the Senate’s advice and consent to ratification of the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, regarding the phasedown of the production and consumption of hydrofluorocarbons”³⁶ and Presidential Climate Envoy John Kerry’s issuance of an April 17, 2021 US-China joint statement committing to near-term actions to “implement the phasedown of hydrofluorocarbon production and consumption reflected in the Kigali Amendment to the Montreal Protocol.”³⁷ In addition, EPA’s Fiscal Year 2022 Justification of Appropriation Estimates for the Committee on Appropriations includes requested funds for both carrying out the AIM Act and implementing the Kigali Amendment.³⁸
- Meeting minutes, materials, draft documents, and other resources related to the Interagency Working Group on Social Cost of Greenhouse Gases and the National Climate Task Force,³⁹ interagency organizations that apparently developed products, including the Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990⁴⁰ and the Nationally Determined Contribution for the Paris Agreement,⁴¹ which are intertwined with the proposed rule.
- An “Advanced Notice of Proposed Rulemaking” discussed in interagency comments on the proposed rule.⁴²

³⁴ https://www.eenews.net/assets/2019/01/29/document_pm_02.pdf.

³⁵ See related milestones with accompanying dates: <https://americansforprosperity.org/wp-content/uploads/2021/06/Biden-Regulatory-and-Energy-Executive-Order-Timeline-6.29.2021.pdf>

³⁶ <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf>.

³⁷ <https://www.state.gov/u-s-china-joint-statement-addressing-the-climate-crisis/>.

³⁸ <https://www.epa.gov/sites/production/files/2021-05/documents/fy-2022-congressional-justification-all-tabs.pdf>.

³⁹ https://cei.org/news_releases/lawsuit-challenges-bidens-national-climate-task-forces-defiance-of-freedom-of-information-act/.

⁴⁰ https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

⁴¹ <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%202021%20Final.pdf>.

⁴² https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0045/attachment_10.pdf.

- Data received but not used in response to the Agency’s notice of data availability as well as the origin of net production numbers.⁴³
- Records of meetings or conversations between U.S. EPA officials and the National Climate Advisor regarding the proposed rule or the Kigali Amendment, including meetings that took place prior to the interagency or public comment periods. For example, senior EPA officials held calls on regulatory topics with the National Climate Advisor, which may be subject to docketing under CAA Section 307(d), in February 2021 (with one EPA-White House meeting held immediately prior to an internal EPA staff briefing on “options selection” for this proposed rule).⁴⁴

The proposed rule also appears to be at odds with EPA policies on peer review, information quality, and scientific integrity. EPA’s Peer Review Handbook clearly identifies what constitutes influential scientific information (scientific information that the Agency “reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.”) and Highly Influential Scientific Assessments (“HISAs” are scientific assessments that “could have a potential impact of more than \$500 million in any year on either the public or private sector” or “is novel, controversial, or precedent-setting, or has significant interagency interest.”). It also makes clear that these influential products should be peer-reviewed.⁴⁵ EPA’s use of a new, non-peer-reviewed social cost of HFCs and a use of outdated inputs in EPA’s Vintaging Model, which has not been peer reviewed since 2017, are influential scientific information or HISAs that provide the basis for hundreds of billions of economic impact for the proposed rule. Neither are listed on EPA’s Peer Review Agenda.⁴⁶ The use of these key inputs is also at odds with EPA’s Scientific Integrity Policy.⁴⁷

In addition, EPA’s certification that the proposed rule will not have a significant economic impact on a substantial number of small entities⁴⁸ is deficient. The Agency’s “Economic Impact Screening Analysis for Proposed Allowance System for an HFC Production and Consumption Phasedown”⁴⁹ fails to evaluate the effects on the suite of entities that this proposed action applies to, including “if you produce, import, export, destroy, use as a feedstock, reclaim, or otherwise distribute HFCs” or “if you use HFCs to manufacture products...”⁵⁰ As the Small Business Administration’s Office of Advocacy notes:⁵¹

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 the diversity of views and effects, Advocacy believes that EPA should be evaluating alternatives for the long-term health of a future market for [HFCs], including minimizing transaction costs and encouraging innovation.

⁴³ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0040/attachment_17.pdf.

⁴⁴ <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-2021-002858&type=request>.

⁴⁵ https://www.epa.gov/sites/production/files/2020-08/documents/epa_peer_review_handbook_4th_edition.pdf.

⁴⁶ https://cfpub.epa.gov/si/si_public_pr_agenda.cfm.

⁴⁷ https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf.

⁴⁸ 86 FR 27205.

⁴⁹ Docket ID: EPA-HQ-OAR-2021-0044.

⁵⁰ 86 FR 27151-27152.

⁵¹ https://downloads.regulations.gov/EPA-HQ-OAR-2021-0044-0142/attachment_1.pdf.

Additionally, EPA's screening analysis methodology incorporates reporting thresholds that fails to account for small entities with a substantial and disproportionate economic impact. Furthermore, EPA provides no justification for its presumption that using small business cost thresholds (one percent and three percent of annual sales)⁵² that have been used in different CAA settings makes sense for this proposed rule. Finally, EPA's claim that the proposed rule includes no enforceable duty on any state, local, or tribal governments and does not have federalism implications⁵³ lacks corresponding analysis and ignores the broader list of potentially affected entities.

AFP appreciates the opportunity to comment, and our activists look forward to consideration of this feedback.

Sincerely,

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⁵² 86 FR 27206.

⁵³ Ibid.