FOOD MARKETING INSTITUTE

February 14, 2011

Submitted Electronically

The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Protection of Stratospheric Ozone: Amendments to the Section 608 Leak Repair Requirements

Docket ID No. EPA-HQ-OAR-2003-0167

On December 15, 2010, the Environmental Protection Agency (EPA or Agency) published in the Federal Register for comment a proposed rule which would amend the leak repair regulations promulgated under Section 608 of the Clean Air Act Amendments of 1990 (the "Proposed Rule).[1] The Proposed Rule lowers the leak repair trigger rates, changes certain definitions and imposes a new follow-up verification test and three strike rule for commercial refrigeration and comfort cooling appliances among other things.

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the request of EPA for comments on the Proposed Rule. FMI's comments will focus on changes to definitions in current regulations, the follow-up verification test requirement, the three strikes rule and new recordkeeping requirements.

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than

[1] 75 Fed. Reg. 78558 (December 15, 2010).

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50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

I. Background

Properly Working Equipment is Essential to Success

Properly functioning commercial refrigeration equipment is essential to the success of food retailers and wholesalers. The industry takes the utmost care to prevent leaks in commercial refrigeration equipment. Retailers and wholesalers go to great lengths to detect and repair leaks as quickly as possible. The bottom line is that refrigerant leaks are bad for business. Retailers and wholesalers do not have an incentive to let them continue without repair.

First, leaks may result in temperature increases in cases and boxes which leads to loss of product and creates food safety hazards. Second, when cases and boxes are out of service, fewer perishable products can be stored or offered to consumers, imposing significant costs and inconveniencing shoppers. Third, loss of the refrigerant itself is costly to firms in the industry.

Refrigeration Systems are Monitored Vigilantly

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. As commercial refrigeration is the lifeblood of the industry, retailers and wholesalers vigilantly watch refrigeration systems for signs of leaks. For example retailers today monitor case temperatures at store locations remotely for signs of anomalies. The temperature of cases on store floors may be monitored from a central location tens, hundreds or even thousands of miles away. When an anomalous temperature is detected, it is investigated, and a technician is sent to diagnose and repair the equipment if necessary. Not only are temperatures monitored constantly, retailers and wholesalers also deploy leak detectors near critical points in a system. Similarly, these detectors may be monitored remotely with an alert sent to a central location when refrigerants are detected. Refrigerant levels are checked remotely as well.

The supermarket industry goes to these great lengths to monitor refrigeration systems not because of regulatory mandates, but rather, because they wish to provide consumers with the safest and freshest food possible. Also, the industry recognizes the importance of environmental sustainability and views leak prevention as one way to make stores more environmentally friendly.

Voluntary Initiatives

FMI has had a long history of addressing leak issues and our Energy and Store Development Committee has—and continues to play a key role—in establishing best practices for the industry. The industry also values its partnership with EPA in the GreenChill program. We believe voluntary partnerships like GreenChill and the implementation of industry best practices are achieving many of the goals EPA seeks to attain in the Proposed Rule.

We believe that these means, rather than burdensome regulations, are the way to move forward in continuing to reduce the emissions of ozone-depleting substances (ODS).

II. Regulatory Analysis: E.O. 13563, §7617 and the RFA

In Executive Order 13563, President Obama ordered that:

> Our regulatory system . . . must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. . . As stated in (Executive Order 12866) . . . each agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs. . . (and) tailor its regulations to impose the least burden on society.[2]

EPA has additional obligations to consider less burdensome regulatory alternatives. Pursuant to 42 USC §7617, the Administrator is required to consider in this rulemaking:

> the costs of compliance with any such standard or regulation, including the extent to which the costs of compliance will vary depending on . . . the development of less expensive, more efficient means or methods of compliance with the standard or regulation. . . the effects on competition of the standard or regulation with respect to small business; the effects of the standard or regulation on consumer costs . . .

In addition to §7617, EPA is required to consider the impact of the Proposed Rule on small businesses and assess less burdensome alternatives pursuant to the Regulatory Flexibility Act (RFA).[3] The Administrator has certified that the Proposed Rule will not have a significant economic impact on a substantial number of small entities. This is simply not the case. As explained later, the Proposed Rule will have a very significant impact on thousands of small business grocers, costing them hundreds or thousands of more dollars per repair. EPA has failed to meet its obligations under the RFA. The Agency must conduct a proper initial regulatory flexibility analysis which fully considers the impact of the Proposed Rule on small firms and considers less burdensome alternatives.

[2] Executive Order 13563 (January 18, 2011).
[3] 5 U.S.C. §601 et seq.

FMI believes that if EPA follows the recommendations contained within these comments it will develop a regulation in a manner consistent with the principles articulated by President Obama in E.O 13563. Our recommendations will result in less expensive and more efficient means of compliance for small and large firms as the Administrator must consider under §7617 and the RFA.

III. Proposed Revisions to the Leak Repair Regulations

FMI understands the stated intent in the Proposed Rule is to break the cycle of repeat repairs and recharges on a refrigeration appliance. This is discussed extensively in the preamble, and made clear by the following items in the proposed amendments:

- The inclusion of the word "all" in §82.156(i) & 82.156(j) regarding leaks to be repaired in an appliance with a leak rate in excess of the trigger rate
- The requirement for leak verification testing in §82.156(i)(2) & 82.156 (j)(2)
- The three-strike rule §82.156 (i)(4) & 82.156 (j)(4)

Definition of Appliance

FMI believes that the definition of "appliance" in the Proposed Rule is overly broad, and places an undue and unnecessary burden on owners/operators of systems typical of those found in a supermarket. This burden makes the Proposed Rule inconsistent with E.O. 13563.

EPA defines both "Comfort Cooling Appliance" and "Commercial Refrigeration Appliance" in §82.152.[4] The definitions are vague, but would seem to regard a supermarket system in its entirety as a single appliance. The implication of this in implementing EPA's remedy to retire or retrofit an "appliance" with a leak rate exceeding 20% and failing the three strike rule would be to replace or retrofit all cases, unit coolers, condensers, compressor systems and interconnecting piping that comprise the full system. We consider this to be an unduly burdensome and wasteful remedy. This is especially true when considering a typical supermarket scenario where the failed portion of the system might be a discrete piece of equipment (e.g. an air-cooled condenser) that may be of much older vintage than other fully functional and compliant parts of the system that had been replaced in a recent remodel.

[4] *Comfort cooling appliance* means any air-conditioning appliance used to provide cooling in order to control heat and/or humidity in facilities such as office buildings and computer rooms. *Commercial refrigeration appliance* means any refrigeration appliance used to store perishable goods in retail food, cold storage warehousing, or any other sector requiring cold storage. Retail food includes the refrigeration equipment found in supermarkets, grocery and convenience stores, restaurants, and other food service establishments. Cold storage includes the refrigeration equipment used to house perishable goods or any manufactured product requiring refrigerated storage.

We see two options for addressing the concern over the present definition:

One option would be to somewhat broaden the definition of component, and alter the regulations such that they would impose the follow-up verification test requirement and the retire option to failed components rather than the whole appliance.

A proposed broader definition for "Component" reads as follows:

> "A factory-made assembly or device that serves a single, or limited, function as part of a Comfort Cooling or Refrigeration Appliance"
>
> "This definition is intended to include, but not be limited to, evaporators, condensers, refrigerant compressors, refrigerant control valves and piping in a self-contained appliance, or refrigerated merchandising or storage fixtures, unit coolers, air-handlers, condensers, heat exchangers, condensing units, compressor systems and refrigerant piping that interconnects two factory-made assemblies or devices located remotely from one another in a field-erected system."

With this definition, we believe the Agency's intent is satisfied by revising §82.156(i)(4) and §82.156(j)(4), among others, to limit the "retire" option to a component rather than the complete appliance. It is FMI's intention that this broader definition of Component only be incorporated in conjunction with these additional revisions to the regulations.

The second, and our recommended option, would be to constrain the definition of appliance with more technically precise language that doesn't capture a field-erected, supermarket type, system in its entirety. We see this as the most straight-forward approach, though additional revisions to the regulations would be necessary (e.g. leak rate definition, §82.156(i), §82.156(j)) so that the use of the newly defined terms would not alter the intent of the regulations.

Our proposal for new definitions follows. These require the definition of a new term "Engineered System." An Engineered System is typical of those systems used in the supermarket industry. These definitions borrow some language from ASHRAE,[5] which is generally recognized by governments and regulatory agencies as the authoritative source of standards for the industry.

- A proposed alternate definition for "Commercial Refrigeration Appliance" reads as follows:

  "A factory-made assembly of refrigeration Components that function to extract heat from or reject heat to a space or substance, or to compress a refrigerant vapor, for the purposes of

[5] American Society of Heating, Refrigerating and Air Conditioning Engineers

storing perishable goods in retail food, cold storage warehousing, or any other sector requiring cold storage."

"This definition is intended to include, but not be limited to, self-contained refrigeration equipment, and remote refrigerated merchandising or storage fixtures, unit coolers, condensers, condensing units and compressor systems used in an Engineered System."

- A proposed alternate definition for "Comfort Cooling Appliance" reads as follows:

  "A factory-made assembly of refrigeration Components that function to control air temperature and/or humidity in facilities such as office buildings and computer rooms."

  "This definition is intended to include, but not be limited to packaged indoor or outdoor air-conditioning units, and air-handlers, condensers, condensing units and compressor systems used in an Engineered System."

- A proposed alternate definition for "Component" reads as follows:

  "A factory-made assembly or device that serves a single, or limited, function as part of a Comfort Cooling Appliance, Refrigeration Appliance or Engineered Refrigeration System."

  "This definition is intended to include, but not be limited to, evaporator, condenser or heat recovery heat exchangers, refrigerant compressors, refrigerant control valves, or refrigerant piping that interconnects two components located remotely from one another in a field-erected Engineered System."

- A proposed new definition for "Engineered System" reads as follows:

  "A field-erected refrigeration or comfort cooling system comprised of multiple appliances or Components interconnected by refrigerant piping, forming a closed circuit in which refrigerant is circulated between one or more evaporators and a central condenser"

The above definitions would allow owners/operators of engineered systems to implement the "retire" option for a three-strike failed appliance (e.g. refrigerated merchandiser, condenser, etc) rather than the entire system.

Follow-up Verification

Contrary to EPA's expectations, FMI believes that a follow-up verification as defined in the proposed amendments would have almost no value in reducing refrigerant emissions. This

amendment would require that the effectiveness of repairs made at a specific leak site be validated by test (e.g. soap bubbles, electronic leak detection, etc) within 30 days, but no sooner than 24 hours after the repair is made. It would be an extremely rare event for the repair of a specific leak site, having passed a verification test immediately following the appliance's return to normal operating characteristics and conditions, to subsequently fail within the presently prescribed follow-up window.

A technician's reputation is on the line with every service call. Retailers and wholesalers do not tolerate shoddy work. Technicians know that if their repairs fail regularly, they will lose the business of retailer or wholesaler. Firms in the industry expect the job to be done correctly the first time.

The 24 hour waiting period proposed by the Agency for the follow-up verification does essentially nothing to reduce ODS emissions, yet it imposes a very large cost on food retailers and wholesalers.

It is important to view the philosophy of the Proposed Rule in other contexts. Say for example, the Proposed Rule applied to the cars of Americans. After the repair of every leaky hose and blown gasket, Americans would be required to take their cars back to the garage or dealership the next day or sometime within the next month to have the hose or gasket checked. The burden would vastly outweigh any benefit accrued to society.

FMI does not oppose EPA's proposed amendment to extend the follow-up verification test requirement to commercial refrigeration appliances; however, we believe the test should be able to be conducted at any point an appliance has returned to normal operating characteristics and conditions within 30 days of the date of the repair, rather than imposing a 24 hour waiting period before such test may be conducted.

For the owner/operator of a supermarket system, providing access to a repair site often means removing perishable product from a merchandising fixture. The service cost of a follow-up inspection, the cost of store labor and the cost of lost revenue that results from removing saleable product from a merchandising fixture are far in excess of the benefit gained by imposing a 24 hour waiting period for a follow-up verification test.

The typical service call for a technician lasts about 4 hours, and often they are significantly longer. It is essential for EPA to contemplate that a technician in many circumstances may have to drive an hour or two to visit a store location, and then an hour or two back.
Thousands of small, independent retailers are located in small towns that do not have resident certified refrigeration technicians. For many of these retailers, the closest technician may be a six hour or more drive away. These retailers face challenges in getting technicians to drive vast distances to make a repair in the first place. Requiring these retailers to bring a technician back to

check on a previously made repair will be nearly impossible. If the Agency decides to promulgate the follow-up verification requirement as written in the Proposed Rule, under these circumstances a retailer would effectively be forced to pay a technician to stay overnight to comply with the 24 hour waiting period.

With contractor rates averaging $90 to more than $100 an hour, the follow-up verification requirement will cost retailers and wholesalers hundreds or thousands of dollars more for each leak repair in addition to the costs of lost revenue and store labor described above. Pulling a case for repair requires significant amounts of store labor. If the 24 hour waiting period is implemented, it is likely that retailers will leave a case pulled for that entire period, which not only leads to lost revenue, but inconveniences consumers. Small businesses will bear a significant share of this burden. The economic analysis conducted for the Proposed Rule has failed to contemplate the costs of the 24 hour waiting period for the follow-up verification test.

FMI believes that a follow-up verification test as specified would have a very significant cost—far in excess of the incremental benefit—and a cost not adequately contemplated by EPA.

A proposed alternate definition for Follow-up Verification Test reads as follows:

"A test that validates the effectiveness of repairs within 30 days of the appliance's return to normal operating characteristics and conditions"

Availability of Records

Clarification of the recordkeeping requirements of §82.166 is requested to confirm that full system charge, leak rate calculations, leak verification tests, etc, summarized or transcribed from original service records and available on-site in electronic format, is acceptable to EPA, provided that the source documents can be made available to EPA within some reasonable period of time (e.g. 30 days). Requiring the maintenance of paper records would be unnecessarily burdensome.

Retrofit/Retire Requirements

If EPA does decide to move forward in extending retrofit/retirement requirements to commercial refrigeration and comfort cooling appliances, FMI prefers the second option proposed by EPA that would allow owners or operators to decide on a case-by-case basis if a component or its subassembly requires replacement in order to completely repair the appliance because it will reduce the odds that replacement of a component is required in circumstances where it is not necessary or warranted.

Three Strikes Rule

The Proposed Rule requires the retrofit to a refrigerant or substitute with a lower ODP, or retirement an appliance, if it fails three initial or follow-up verifications during a consecutive six-month period. We have serious concerns with this provision of the rule as written. We believe the three strikes rule should be stricken from the Proposed Rule. However, if EPA does decide craft a final rule with this provision, unless the definition of appliance is significantly changed, as discussed earlier, this provision will impose enormous—and unnecessary—burdens on the supermarket industry. Strikes should only be applied and aggregated towards components individually, and not a system in its entirety. For example, three leaks in a particular component or causally related to one component would trigger the requirement to replace that component.

Extension to Repair Timelines

The Proposed Rule grants owners or operators of comfort cooling and commercial refrigeration appliances the same flexibility as owners or operators of industrial process refrigeration appliances when requesting additional time to make repairs due to the unavailability of parts or components or when other applicable regulations make repair within the 30 day timeframe impossible. FMI applauds EPA for granting owners or operators of comfort cooling and commercial refrigeration equipment this additional flexibility.

Seasonal Variances

The Proposed Rule specifies that owners or operators of commercial appliances may take seasonal variances into account in determining the full charge of an appliance. FMI supports EPA for making this change to the existing regulation.

Leak Repair Clock

FMI supports EPA's change to the definition of leak rate whereby the leak repair clock for a leak event is stopped after successful initial verification and follow-up verification and documentation of repairs for all leaks.

Effective Date

Implementing the Proposed Rule will be a very complex undertaking. FMI requests an effective date of 18 months after the date of publication of a final rule in the Federal Register.

FMI appreciates the opportunity to comment on this important matter and looks forward to working with EPA to continue further reducing emissions of ODS.

Sincerely,

Erik R. Lieberman
Regulatory Counsel