



March 25, 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—Supplemental FMI Comments**

**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”).<sup>1</sup>

The Food Marketing Institute (FMI)<sup>2</sup> appreciates the opportunity to respond to the request of EPA for comments on the Proposed Rule. **These comments supplement the comments FMI filed on February 14, 2011.**

## **Proposed Revisions to the Leak Repair Regulations**

### **A. Regulatory Obligations**

EPA has stated the purpose of the Proposed Rule is to break the cycle of repeat repairs and

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<sup>1</sup> 75 Fed. Reg. 78558 (December 15, 2010).

<sup>2</sup> 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 50 countries. FMI’s associate members include the supplier partners of its retail and wholesale members.

recharges on refrigeration or comfort cooling appliances. We agree with the goal of EPA, and have suggested alternatives to the Proposed Rule which will achieve this goal, without placing unnecessary—and very costly—burdens on food retailers and wholesalers. EPA has obligations under E.O. 13563, 42 U.S.C. § 7617 and the Regulatory Flexibility Act<sup>3</sup> to consider less burdensome alternatives and tailor its regulations to impose the least burden on society.

Following the recommendations contained in these comments will allow the Agency to meet its regulatory goals through a less expensive and more efficient means of compliance.

## **B. “Worst Leaker” Provision**

### **1. Definition of Appliance**

EPA has considerable discretion in defining the term “appliance.” The definition of “appliance” is very general in Section 601 of the Clean Air Act:

The term “appliance” means any device which contains and uses a class I or class II substance as a refrigerant and which is used for household or commercial purposes, including any air conditioner, refrigerator, chiller or freezer.<sup>4</sup>

Device is defined by Merriam-Webster as “something fanciful, elaborate or unique in design.”<sup>5</sup> In contrast, a system is defined as a “group of devices . . . forming a network especially for distributing something or serving a common purpose . . . <a heating *system*>.”<sup>6</sup> It is far from clear that the language of §601 obligates EPA to define appliance the way it has in the Proposed Rule. EPA is essentially substituting the word “system” for “device” in the statute. The legislative history does not indicate that Congress meant “system” when it used the term “appliance.”

The definitions EPA has proposed for “Comfort cooling appliance” and “Commercial refrigeration appliance” in §82.152 are similarly vague.<sup>7</sup> However, EPA’s language in the preamble of the Proposed Rule states that it believes these definitions include “all the major components making up the refrigerant circuit . . . including the condenser, compressor rack, receiver, evaporator, filter driers . . . liquid and suction manifolds, display cases, walk-in coolers . . . freezers, field and rack

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<sup>3</sup> 5 U.S.C. §601 et seq.

<sup>4</sup> 42 USCS § 7671.

<sup>5</sup> <http://www.merriam-webster.com/dictionary/device?show=0&t=1300223767>

<sup>6</sup> <http://www.merriam-webster.com/dictionary/system>

<sup>7</sup> *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.

pipings, valves and regulators”<sup>8</sup> and similarly in the case of a comfort cooling appliance the “sum of all of the cooling system’s components.” EPA is thus considering a supermarket system in its entirety as a single appliance. The implication of this is that if a repair of single leaking component fails three verification tests a retailer would be required to replace or retrofit all cases, unit coolers, condensers, compressor systems and interconnecting piping that comprise the full system. As the Proposed Rule has mandated that two tests be conducted for each leak repair, this is not an unlikely scenario. Furthermore, refrigeration and comfort cooling systems are integrated in certain stores, so conceivably a leaking air conditioning component could trigger replacement or retrofitting of all refrigeration components.

FMI believes this is an unnecessarily burdensome—and wasteful—means of achieving the EPA’s regulatory ends. 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.

## **2. Burden Reduction**

A much more cost effective approach would be to require only the problematic component be replaced. Mandating the scrapping or retrofitting of an entire system that could function properly within the leak repair thresholds for many years because of one leaky component imposes enormous costs with very limited benefit.

EPA acknowledges this issue in the rule:

EPA has heard concerns of appliance owners or operators that a requirement to retrofit or retire an entire appliance because it has failed a verification test may not always be practical. Some owners or operators would prefer to have the ability to replace a faulty component before they are required to retrofit or retire an entire appliance. The Agency does not wish to place an undue burden of large scale conversions and retirements upon owners or operators when repair via complete replacement of the leaking appliance component might satisfactorily repair the appliance.<sup>9</sup>

FMI completely agrees with this statement. Unfortunately the Proposed Rule is crafted in such a manner where there will be unnecessary conversions and retirements. For example, say a condenser in a system is leaking, and a technician attempts to repair it. He checks the repair and it fails the initial verification test. Strike one. The next day he works on the condenser again and makes another attempt to repair it. The repair is tested and again fails. Strike two. The retailer decides to replace the condenser with a new device. The replacement condenser is installed the following week and the leak is eliminated. Three weeks later, a valve leaks elsewhere in the system

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<sup>8</sup> 75 Fed. Reg. 78563 (December 15, 2011)

<sup>9</sup> 75 Fed. Reg. 78753 (December 15, 2011)

because of a faulty gasket. The technician attempts to tighten the connections but the leak continues. An initial verification test is failed. If the gasket had been replaced the repair would have held. The whole system must now be retrofitted or replaced because of a faulty gasket.

Under the existing rules the technician could have reexamined the issue and replaced the gasket. Under the Proposed Rule, the whole system must be replaced, at a cost of hundreds of thousands of dollars. Much less costly alternatives, such as requiring the replacement of components that leak repeatedly, rather than requiring the entire replacement of a system, should be incorporated into the Proposed Rule.

FMI believes that components that repeatedly fail verification tests should be required to be replaced.

### **3. Suggested Revisions**

FMI recommends that EPA strike the preamble language regarding the definitions of commercial refrigeration and comfort cooling appliances on page 78563 referenced previously in these comments and make the following changes to the Proposed Rule:

#### **§ 82.152 Definitions**

Replace definition of component with:

*Component* means a factory-made device that serves a single, or limited, function as part of an appliance such as a condenser, evaporator, refrigerant compressor, refrigerant control valve, piping in a self-contained appliance, refrigerated merchandising or storage fixture, unit cooler, air-handler, condenser, heat exchanger, condensing unit, compressor system or refrigerant piping that interconnects two factory-made assemblies or devices located remotely from one another.

#### **§ 82.156 Required Practices**

Strike paragraph (i)(4) and replace with

“(4) Owners or operators of comfort cooling appliances must retrofit the appliance to use a refrigerant or substitute with a lower ozone depleting potential (ODP) in accordance with paragraph (l) of this section, or replace any component, if the component has experienced three failed verification tests within a consecutive six month period.”

Strike paragraph (j)(4) and replace with:

“(4) Owners or operators of commercial refrigeration appliances must retrofit the appliance to use a refrigerant or substitute with a lower ozone depleting potential (ODP) in accordance with paragraph (l) of this section, or replace any component, if the component has experienced three failed verification tests within a consecutive six month period.”

## **C. Follow-up Verification**

### **1. Waiting Period**

The Proposed Rule requires a new follow-up verification test on repairs made to commercial refrigeration and comfort cooling appliances 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 an initial verification test immediately following the appliance’s return to normal operating characteristics and conditions, to subsequently fail within the presently prescribed follow-up window. FMI is not opposed to the requirement that a follow-up verification test be conducted on repairs of commercial refrigeration and comfort cooling appliances; however, we believe the 24 hour waiting period proposed by the Agency should be eliminated.

The 24 hour will not reduce ODS emissions, yet it imposes a very large cost on food retailers and wholesalers. Retailers have estimated that complying with the waiting period requirement will cost them hundreds of thousands of dollars per year.

Small businesses will face particular challenges with this requirement. 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.

EPA must consider that the Proposed Rule will have a very significant impact on many small businesses. EPA has incorrectly certified that the rule will not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act. The Act requires the Agency to conduct a proper Initial Regulatory Flexibility Analysis.

The waiting period will impose environmental costs too. In many circumstances it will double the amount of time technicians spend on the road driving to reach store locations thus doubling the amount of greenhouse gasses emitted by their vehicles for each repair.

In addition, FMI believes EPA should specify in the regulations that the test be conducted by a technician to ensure that it is accurate.

## **2. Suggested Revisions**

FMI believes the Agency should make the following changes to the Proposed Rule:

### **§ 82.152 Definitions**

*Follow-up verification test* means a test conducted by a technician that validates the effectiveness of repairs within 30 days of the appliance's return to normal operating characteristics. Follow-up verification tests include, but are not limited to, the use of soap bubbles, electronic or ultrasonic leak detectors, pressure or vacuum tests, fluorescent dye and black light, infrared or near infrared tests, and handheld gas detection devices.

*Initial verification test* means a leak test that is conducted by a technician as soon as practicable after the repair is completed. An initial verification test, with regard to the leak repairs that require the evacuation of the appliance or portion of the appliance, means a test conducted prior to the replacement of the full refrigerant charge and before the appliance or portion of the appliance has reached operation at normal operating characteristics and conditions of temperature and pressure.

### **§ 82.156 Required Practices**

In paragraphs (i)(2) and (j)(2) strike "but no sooner than 24 hours after the repair and recharge of the appliance" and replace with "repairs."

## **D. 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. It would unnecessarily consume staff time and lead to redundant recordkeeping. Allowing records to be available electronically would lead to environmental benefits by reducing paper consumption.

## **E. Conclusion**

FMI believes that the “Worst Leaker” provision in the Proposed Rule will impose enormous costs on the industry because it will result in unnecessary retirements and conversions of systems in situations where the replacement of one or two components would eliminate leaks. EPA should require that faulty components be replaced in the event of a leak, rather than the retirement or retrofitting of entire systems. This would allow the Agency to meet its regulatory objectives without placing an enormous burden on the industry. EPA should also eliminate the 24 hour waiting period for follow-up verification tests to reduce compliance costs. The waiting period will not result in a reduction of ODS, but it will cost retailers tens to hundreds of thousands of dollars per year. 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,

A handwritten signature in black ink, appearing to read "Erik R. Lieberman". The signature is fluid and cursive, with the first name "Erik" being the most prominent.

Erik R. Lieberman  
Regulatory Counsel