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Re: *Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years*, Proposed Rule, 87 Fed. Reg. 66,372 (Nov. 3, 2022), Docket ID No. EPA-HQ-OAR-2022-0430

The Chemours Company FC, LLC ("Chemours") appreciates the opportunity to comment on the Environmental Protection Agency's ("EPA's" or "Agency's") proposed rule to implement the American Innovation and Manufacturing Act ("AIM Act"). Chemours supported Congressional approval of the AIM Act and is pleased that the EPA is moving forward to continue implementation of the 2020 law by furthering the required phasedown of hydrofluorocarbons ("HFCs") in the United States.

Chemours has developed and commercialized a portfolio of low global warming potential ("GWP") products that utilize hydrofluoroolefin ("HFO") technology. HFO-based products, in addition to low GWP HFCs, can provide environmentally preferable and sustainable solutions in multiple end uses that are currently dependent on higher GWP HFCs, including for refrigeration, air conditioning, foam blowing agents and propellants. Chemours' products can therefore help to facilitate the phasedown of HFCs using the allowance allocation and trading program required by the AIM Act in combination with EPA's pending consideration of technology transition petitions.

As summarized in the Introduction to our attached comments, Chemours supports many elements of what EPA has proposed for the 2024-2028 phasedown period, including retention of the allowance allocation methodology contained in the Framework Rule with the small update that EPA has proposed. Chemours also supports many of EPA's proposals regarding the documentation of HFC imports, to modify reporting requirements and to simplify the process for Request for Additional Consumption Allowances. Chemours, however, believes that several improvements and refinements can be made during the public notice and comment process, and we have included several specific recommendations in that regard, including to extend the allowance allocation methodology in the Framework Rule through the full required phasedown of HFCs, *i.e.*, to at least 2036, and to not finalize new daily reporting and recordkeeping requirements.

While Chemours appreciates that EPA is not proposing to sell AIM Act allowances (either through a fee or auction system) in the final rule, EPA should also clarify the limits of its

AIM Act authority. EPA has already received comments on this matter and should not continue to imply that it may have authority to sell allowances when the AIM Act clearly provides for an "allowance allocation and trading program." Similarly, EPA should recognize that the AIM Act is limited to specified regulated substances, limiting any ability for the Agency to address other air pollutants that are regulated under the Clean Air Act or other laws. Chemours also offers comments on several other areas that were partially addressed in the Framework Rule but for which there are remaining issues, including how EPA should address any market share that may have been gained through unfair trade practices.

We want to thank the Agency for its continued work to address HFCs and for the dedication of the staff in meeting aggressive statutory deadlines that were specified in the AIM Act. We also appreciate the Agency's willingness to host various stakeholder meetings and to conduct other outreach regarding its rulemaking efforts. Should EPA have any questions concerning any matter raised in our comments, we would be happy to provide further information consistent with the Agency's obligations under public notice and comment rulemaking procedures.

Sincerely,

Esther Rosenberg, Global Regulatory Advocacy
The Chemours Company FC, LLC

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I. Introduction

The Chemours Company ("Chemours") supported Congressional approval of the American Innovation and Manufacturing Act ("AIM Act") and, in the main, has supported EPA's efforts to implement the new law. Chemours previously supported our country's ratification of the Montreal Protocol and, more recently, the Kigali Amendment to the Protocol. Combined, these treaty commitments reflect global recognition of the public health and environmental need to transition away from both high ozone depleting substances ("ODS") and substances with high global warming potential ("GWP") values.

As the Environmental Protection Agency ("EPA" or "Agency") is well aware, successful implementation of the AIM Act is also a vital component of our nation's economy and our position in the international marketplace for refrigerants, solvents, propellants, foam blowing agents as well as products containing or manufactured using HFCs. While we are still in the initial years of its implementation, when the AIM Act was enacted, Congress predicted substantial gains would be achieved *within* the United States. Domestic employment was projected to expand by an estimated 150,000 direct and indirect jobs and the Act was predicted to result in an additional $38.8 billion in annual domestic economic activity.

On the whole, Chemours believes that the EPA has done a commendable job in implementing the AIM Act to date and in developing the proposed methodology to further implement its provisions in 2024 and later years. We also recognize that the Agency has devoted substantial resources to promulgate the initial regulations in October 2021 – now referred to as the "Framework Rule" – as well as to approve multiple technology transition petitions that same fall, to address allowance allocations for 2022 and 2023 in separate actions, to verify underlying information and data necessary for implementation of the AIM Act and now, to propose continuation of the allowance allocation and trading program along with other regulatory changes.

Chemours supports multiple provisions contained in the proposed rule, including:

- EPA's proposal to maintain the current methodology utilizing the three highest values for years 2011-2019 as the basis for calculating production and consumption allowances that are allocated to historic producers and importers

- EPA's proposed formula to create a "stand in" value for each 2022-2023 new entrant in place of an average of the three highest years of 2011-2019 consumption of regulated substances

- EPA's proposal to require production or importation activity in 2021 or 2022 to qualify for allowance allocation.

- EPA's decision to *not* consider auctions or fees for allowances in any final rule for the 2024 to 2028 "step down" period.

- Finalizing the rule with no additional new entrant pool or set-aside pool.

- Promulgation of a rule that provides at least 5 years of stability for the allocation of production and consumption allowances, thereby facilitating market continuity and business certainty while maintaining environmental benefits.

- EPA's proposal to permit allowance trading or conferral to occur as soon as allowances are issued

- EPA's proposal to require additional data (HTS code, gross weight, net weight, etc.) with regard to advance notification of imports.

- On reporting, EPA's proposal to modify reporting requirements to report name, quantity, and recipient facility for HFCs produced at one facility that are transformed, destroyed or used as a process agent at a different facility.

- EPA's proposals to simplify and streamline the process for Request for Additional Consumption Allowances (RACA), with the exception (noted in our detailed comments) for total flooding fire suppression systems.

At the same time, Chemours believes that EPA's proposed rule may be improved in several areas. Specifically, Chemours recommends that EPA make changes to the rule as proposed on November 3, 2022, including:

- Extend the proposed allowance methodology to cover the entire AIM Act phasedown period from 2024 to 2036.

- Clarify that EPA lacks statutory authority to sell allowances, either through a fee system or through an auction.

- Eliminate any requirements related to daily reporting for U.S. production of regulated substances given that AIM Act allowances are annual and that EPA has sufficient reporting requirements and enforcement authority to ensure compliance.

- Avoid establishing reporting requirements for air pollutants that are not regulated substances under the AIM Act and therefore beyond EPA's statutory authority to regulate as part of any final rule.

- Remove disincentive to allowance transfers by reducing the current 5% transfer offset to, at most, 1%.

- Not finalize permanent label requirements for containers to maintain the flexibility and efficiency needed to manage a container fleet, but instead require that only an importer of record may change the container labels.

- Revise EPA's proposal to define "laboratory testing" as the use of the sampling and testing methodology prescribed by a laboratory that is accredited to ISO 17025 to include AHRI 700 or ISO 9001 certification as acceptable alternatives to ISO 17025 accreditation.

- For HFC import advance notification filing, EPA should clarify that "origin" should be defined and documented as the "country(ies) of manufacture" for regulated substance(s), not the shipment point(s) before entry to U.S.

- For imports, EPA should require random sampling of imports by Customs and Border Protection to confirm that the substance being imported matches what is on the container label (if applicable) and is consistent with description on shipping documents.

- EPA's proposal to require that a certificate of analysis (COA) "accompany" all imports should consider a practical way to digitally connect a COA with an import (e.g., including in ACE document submission) versus physically accompanying the actual container. Chemours also suggests that the COA requirement should not apply to heel returns as those containers holding only residue are not re-analyzed after use at their original export destination.

- While we support EPA proposal to use a standardized heel amount, EPA's proposal) of a 10% default heel should be significantly reduced.

Again, Chemours appreciates the considerable effort that was required to publish the proposed rule in just over a year following publication of the Framework Rule. Given the vital importance of this rulemaking to U.S. producers and importers who must compete in a global market, EPA should make several improvements before any rule is finalized.

II. Chemours Supports EPA's Proposal to Continue Utilizing Historical Data (2011-2019) for Determining Allowance Allocations However EPA Should Extend Methodology to Full Phasedown Period

A. EPA Should Maintain the 2011-2019 "Basis" for Production and Consumption Allowance Allocations

EPA has proposed to "base production allowance allocations on an entity's market share derived from the average of the three highest years (not necessarily consecutive) of production of regulated substances between 2011 and 2019."[1] EPA has also proposed to use the same time period and averaging methodology to calculate consumption allowances.[2] Chemours supports

[1] 87 Fed. Reg. 66,372, 66,377 (Nov. 3, 2022).
[2] *Id.*

these proposals, which essentially reflect the retention of the allowance calculation methodology utilized in the 2022-2023 Framework Rule.[3]

Chemours agrees with EPA that a broad range of years can help to account for market fluctuations that occurred over several years as companies sought to develop and commercialize lower GWP alternatives.[4] While not perfect, this methodology directionally improves the overall "fairness" of the allowances that are allocated. Chemours also agrees with EPA that the steps that have been undertaken to verify the underlying Greenhouse Gas Reporting Program ("GHGRP") data on which allowance allocations are based increases the overall integrity of the allowance allocation process. In addition to the proposed rule to establish allowance allocations for 2022 and 2023, EPA has taken several actions to both verify GHGRP data and put parties on notice of the need to ensure its accuracy.

Finally, as EPA notes, the 2022-2023 allowance system is now operational and there is considerable value in not disrupting the market for allowances by altering the basis on which they are calculated. Such disruption could have a substantial, negative effect on the ability of all entities to transfer allowances (*e.g.*, by creating uncertainty regarding both the near-term and longer-term value of such allowances). These effects could easily overwhelm any perceived "benefit" to be gained by alternative allowance allocations based on other methodologies or metrics. It could also serve as incentive for parties to maximize production and importation of regulated substances in order to build inventory for years where they may receive proportionately less allowances, potentially disrupting a smooth transition to alternatives.

Consequently, EPA should not include more recent data (such as 2020 and 2021 production and imports) in calculating allowance allocations. During this time period, Congress was considering legislation that was ultimately enacted as the AIM Act and EPA was formulating regulations to implement the new law. Specifically, S. 2754, the bill on which the AIM Act is based, was introduced by Senator Kennedy in Congress on October 30, 2019.[5] The final legislation was signed into law on December 27, 2020, as part of the Consolidated Appropriations Act, 2021. Thus, during nearly all of 2020, interested companies and entities were aware that Congress could approve legislation to control the production and importation of HFCs using an allowance allocation and trading system. And during 2021, companies and entities could have taken actions regarding production and importation of HFCs to build HFC inventory prior to the January 1, 2022, effective date, secure in the knowledge that EPA was required to allocate allowances prior to October, 2021.[6] Therefore, actions to produce or import HFCs during 2020 and 2021 should

[3] 86 Fed. Reg. 55,116 (Oct. 5., 2021). As will be noted *infra*, Chemours supports applying this methodology with regard to all allowances, outside of the statutorily-prescribed set-asides for application-specific allowances. *See* 42 U.S.C. §7675(e)(4)(B)(iv); 40 C.F.R. §84.15.

[4] Chemours additionally attaches its comments on EPA's proposed 2021 Framework Rule (Attachment 1) and would point EPA to pages 6-14 of those comments as relevant to the currently proposed rule.

[5] The House of Representatives also considered similar legislation, specifically secs. 9201-9208 of the Clean Economy Jobs and Innovation Act. While differences existed within each bill, the basic structure of the House legislation was comparable to the Senate bill with regard to requiring an allowance allocation and trading program. *See* sec. 9204(b)(1). *See also* H.R. 5544, 116th Congress.

[6] 42 U.S.C. §7675(e)(3).

not be taken into account with regard to establishing the "baseline" amounts from which individual allocation of allowances are made.[7]

In addition, actions that entities may have taken in 2020 and 2021 to help secure additional allowances would not have been taken in an informational vacuum. Both House and Senate legislation that provided for a phasedown in HFCs consistent with the Kigali Amendment, explicitly providing for use of an "allowance allocation and trading program."[8] And both the House and Senate legislation were modeled on title VI of the Clean Air Act ("CAA") which implemented the phasedown and phaseout of ozone depleting substances ("ODS") using an allowance allocation system based on historical production and consumption. While the final details of an allowance allocation and trading system would not be known until EPA promulgated its framework rule in mid-October of 2021, certainly interested parties could reasonably project that actions taken prior to that rule may potentially "qualify" them for the allocation of allowances. EPA's recognition of this dynamic is valid.[9]

EPA should also assess the degree to which higher GWP regulated substances may have been imported during 2020-2021 prior to the prospect of an HFC phasedown based on calculated exchange values equivalent to GWP. Overall, the statutory structure of the AIM Act serves to incentivize reductions in high-GWP HFCs because such substances require the expenditure of more allowances, which in turn are reduced in a stair-step fashion through 2036. But with regard to establishing the total amount of allowances allocated to a recipient, production or importation of higher GWP substances results in relatively more exchange-value weighted allowances. It may therefore be instructive to analyze whether importation of higher GWP substances in 2020-2021 may have been intended to have such a result, as well as any continuing effects from this activity if allowances were allocated to such entities, *e.g.*, ability to continue importation of high-GWP substances.

Finally, EPA should also examine the extent to which any dumping and/or circumvention activities may have skewed the amount of HFCs imported during 2020-2021. As detailed in the December 19, 2022, White Paper on unfairly traded imports of HFCs submitted by Cassidy Levy Kent, LLP, on behalf of the American HFC Coalition. Any party engaging in such activity during the 2020-2021 period (or in prior years) should not be awarded allowance allocations and we would extend this recommendation to also apply to future findings of dumping and/or circumvention.

B. **EPA Should Promulgate Regulations for Entire 2024-2036 Period**

EPA is proposing a methodology to allocate allowances for calendar years 2024-2028, indicating that such an approach is similar to that utilized with respect to the phaseout of class II ODS. In

[7] "Baseline" is placed in quotation marks here to denote that the AIM Act utilizes baselines with respect to the calculation of the *total amount* of allowances allowed for use during the phasedown periods established under the Act. *See* 42 U.S.C. §7675(e)(1). To date, EPA has not described individual entities as possessing "baselines" similar to those utilized during the phaseout of hydrochlorofluorocarbons ("HCFCs") to determine allowance allocations.

[8] *See* S. 2754, H.R. 5544 (116th Congress).

[9] EPA observed that "data from 2021 could be distorted due to an entity's awareness that the AIM Act may be, or had been passed. Data from 2021, in particular, may be skewed given the likelihood of stockpiling in advance of the Framework Rule becoming effective." 87 Fed. Reg. at 66,378.

explaining its rationale, EPA indicates that EPA may potentially consider several factors in the future including "companies entering or exiting the market, corporate mergers and acquisitions, significant quantities of allowances unexpended at the end of the year, and/or supply shortages for specific HFCs."[10] While, as per above, Chemours fully supports EPA's use of GHGRP data indicating production and consumption activity during 2011-2019 period for determining allowance allocations, EPA should: (1) finalize this methodology for the full 2024-2036 phasedown period provided by the AIM Act; (2) clarify the Agency's authority with respect to allowable allowance methodologies.

1. The AIM Act Requires EPA to Establish Allowance Methodology for 2024-2036

The AIM Act provides for a phasedown in production and consumption in several graduated steps.[11] In doing so, EPA is directed to issue a singular "final rule" by December 27, 2020 that provides for the phasedown of the production and consumption of regulated substances "through an allowance allocation and trading program."[12] Separately, EPA is required to determine "[n]ot later than October 1 of each calendar year . . . the *quantity* of allowances for the production and consumption of regulated substances that may be used [pursuant to a mathematical formula contained in 42 U.S.C. §7675(e)(2)(B)]."[13] The AIM Act does not provide any other authority for phasedown regulations or the allowance program.

EPA promulgated, by the statutory deadline, what effectively is a *partial rule* to implement the HFC phasedown for 2022 and 2023.[14] EPA is now proposing to amend that rule to include additional provisions within 40 C.F.R. §§84.9 and 84.11 to address allowance calculations for calendar years 2024 to 2028.[15] But EPA does not gain any additional authority to phase down regulated substances for years after 2023 by being *late* in proposing or finalizing a rule to address mandatory allowance allocations; it is still exerting the same authority.[16] Therefore, in the context of the proposed rule, and as explicitly directed by Congress, EPA should fulfill its statutory duty to promulgate an "allowance and trading program" for the remainder of the

[10] *Id*. at 66,376.
[11] 42 U.S.C. §7675(e)(2)(C).
[12] *Id*. §7675(e)(3) (emphasis added).
[13] *Id*. 7675(e)(2)(B) (emphasis added).
[14] 86 Fed. Reg. 55,116 (Oct. 5, 2021).
[15] Proposed 40 C.F.R. §§84.09(b), 84.11(b).
[16] See *National Petrochemical v. EP*A, 630 F. 3d 145 (D.C. Cir. 2010) ("*NPRA*"). In *NPRA*, the court observed that statutory deadlines for EPA to act "were likely unrealistic" where Congress required a complex new program for renewable fuel to be due in one year. *Id*. at 156. The court then upheld a late, retroactive rulemaking on the basis that EPA did not lose authority to act absent an explicit provision providing for such a result. *Id*. at 158. With regard to the current rulemaking, there is similarly no loss of EPA's authority to act to promulgate a methodology for determining how allowances are to be calculated in future years. But neither does EPA *gain* any authority to reexamine its methodology (or impose fees or an allowance auction) by ignoring the statutory requirement to promulgate a rule to phase down production and consumption of HFC through an allowance allocation and trading program within 270 days of enactment. As noted in *NPRA*, the D.C. Circuit has failed to find authority for the Agency to act in a manner not authorized by Congress. *Id.*, citing *American Petroleum Institute v. EPA*, 52 F. 3d, 1113, 1119 (D.C. Cir. 1995) where the court found nothing in the Clean Air Act allowed EPA to require a percentage of oxygen in reformulated gasoline. See also *West Virginia v. EPA*, 142 S.Ct. 2587 (2022) with regard to the need for "clear Congressional authorization." In the context of the current rulemaking, nothing in the AIM Act allows EPA to sell allowances either directly or through an auction.

phasedown period for regulated substances. Congress provided that such a rule be in place by "270 days after December 27, 2020."[17]

In EPA's 2021 proposed Framework Rule, the Agency indicated that it "intended to fulfill" the AIM Act's statutory directive to "provide for the phasedown of the production and consumption of HFCs through an allowance allocation and trading program."[18] EPA distinguished this directive from the requirement in the AIM Act to "calculate and determine the quantity of production and consumption allowances" for individual years[19] and other requirements of the AIM Act. While EPA indicated that it intended to "revisit how to allocate allowances for 2024 and beyond," the Agency stated that it would undertake additional notice-and-comment rulemaking "to issue allowances for calendar year 2024 *and later years*."[20] EPA, in part, explained that because of the short timeframe Congress allowed the Agency (270 days) to complete a rulemaking, the Agency "focused on what can be implemented in a short timeframe."[21]

Given that EPA focused in 2021 to accomplish the "art of the possible" and to ensure that the AIM Act was operative in 2022, the Agency cannot similarly rely on such rationale within the current rulemaking with regard to fulfilling its statutory duty to promulgate a singular rule "phasing down the production of regulated substances in the United States through an allowance allocation and trading program."[22] And even if the statute did not dictate this result, EPA acknowledges in the proposed rule the continuing relevance of the considerations the Agency examined in the Framework Rule to utilize historic production and consumption during the years 2011 to 2019, among them that the broad range in years accounts for changes in market behavior associated with the Kigali Amendment.[23] EPA also acknowledges the disruption to the market that would occur by taking a different approach to determining allowance allocations. And EPA cites the fact that this allocation system is based on extensive, verified data.[24] All these considerations that are part of the administrative record for this rule point towards finalizing provisions within 40 C.F.R. §§84.09(b) and 84.11(b) that provide for allocations in calendar years 2029 through 2036. And, concurrently, they do not support any allocation period shorter than that which EPA has proposed.

2. EPA Lacks Supportable Rationale to Limit Allowance Allocations to only 2024-2028

EPA indicates that several events might occur in the future, including companies entering or exiting the market, corporate mergers and acquisitions, the existence of unexpended allowances, and supply shortages for specific HFCs that might cause the Agency to change allowance

[17] 42 U.S.C. §7675(e)(3).
[18] 86 Fed. Reg. 27,157 (May 19, 2021).
[19] *Id.*
[20] *Id*. (Emphasis added).
[21] *Id.* at 27,168,
[22] 42 U.S.C. §7675(e)(3). Note that this requirement is entirely separate from EPA ministerial duties pursuant to 42 U.S.C. §7675(e)(2)(D) to calculate the quantity of allowances "not later than October 1 of each calendar year."
[23] 87 Fed. Reg. at 66,377.
[24] *Id.*

allocation methodologies.[25] But these are neither statutory considerations for the allocation of AIM Act allowances, nor does EPA explain how such considerations could or would be utilized in determining the methodology. This rationale is, in effect, mere surmise by EPA of what *might* potentially happen that *might* affect the HFC phasedown at some *potential* time in the future.[26] Such considerations are not a sufficient basis to ignore statutory text and to decline to provide a fulsome allowance and trading program in this rule for the full 2024-2036 phasedown period.

Moreover, Congress granted EPA explicit authority in the AIM Act to adjust the phasedown of production and consumption allowances. Section 103(f) of the AIM Act allows the EPA to promulgate regulations to phase down production and consumption of HFCs on a schedule that is more stringent than the statutory schedule contained in section 103(e)(2)(C) of the Act. In addition, EPA may grant technology transition petitions pursuant to AIM Act section 103(i) that would restrict, fully or partially, the use of HFCs in a sector or subsector. Where Congress has spoken to the issue: first, by creating an allowance system that is based on exchange values and production and consumption baselines for the full phasedown period[27] and second, by defining the circumstances under which EPA has authority to adjust the schedule for phasing down production or consumption of HFCs and/or limiting their use in specific sectors or subsectors, EPA may not assert or imply that it has broader authority to adjust allowances based on unsupported, non-statutory factors.[28]

While it is possible, perhaps even inevitable, that the HFC market will change over the next 12-13 years, this in and of itself also does not justify limiting the allowance allocation methodology to the 2024 to 2028 step down period. If EPA believes it has the authority to adjust allowance methodology to address the various concerns it has expressed in the proposed rule, EPA could seek, at the point in time when such conditions became evident, to exert whatever authority it believes it might have to alter the program. But EPA has not identified such conditions now, undercutting EPA's rationale for limiting the allowance methodology to 2024-2028.

Otherwise, EPA offers the class II ODS program for hydrochlorofluorocarbons ("HCFCs") as an example that, in the Agency's opinion, justifies a shorter allocation framework.[29] But this analogy fails upon closer examination. First, unlike the AIM Act, EPA is not directed by title VI of the CAA to utilize exchange values to establish production and consumption baselines.[30] Rather, with regard to class II ODS, EPA is required to promulgate regulations to "phas[e] out the production, and restricting the use, of class II substances."[31] In doing so, Congress also did

[25] *Id*. at 66,376.

[26] For example, it is unclear how allocating allowances as quantified with respect to exchange values could result in the production of any specific HFCs that may be in "short supply." The AIM Act does not contain any express authority for EPA to require private entities to produce specific HFCs or HFC blends.

[27] Exchange values must be used to establish production and consumption baselines. 42 U.S.C. §7675(e)(1)(D). Allowances are to be calculated based on production and consumption baselines. *Id.*, §§7675(e)(2)(B), (D)(i).

[28] A long-standing cannon of statutory interpretation is that the specific governs the general. See, e.g., *Brown v. Gen Servs. Admin*, 425 U.S. 820, 834 (1976).

[29] 87 Fed. Reg. at 66,376.

[30] 42 U.S.C. §7675(e)(1)(D)(i).

[31] CAA section 605(c).

not specify that such be accomplished through use of an "allowance allocation and trading program"[32]

In addition, with regard to HCFCs, EPA determined through rulemaking to phase out these ODS on a "chemical by chemical" basis, a methodology that is contrary to the AIM Act's requirement to utilize exchange values in calculating production and consumption baselines. In the HCFC phaseout program, EPA employed a "worst first" methodology to phase out HCFCs utilizing an allowance system.[33] This allowance methodology targeted HCFC-141(b) first and HCFC-22 next, leaving other HCFCs unrestricted until subsequent rulemakings. In contrast, nothing within the AIM Act directs or allows EPA to take such a regulatory approach with regard to HFCs. EPA is to calculate all baselines with reference to exchange values and to "use the quantity" of this calculation to determine the quantity of allowances.[34] Thus, simply because EPA promulgated a series of rules to phasedown the production and consumption of HCFCs over time and in accordance with the phasedown periods provided in the Montreal Protocol, does not provide EPA with either authority, direction or a relevant example for the Agency to take a similar approach respecting HFCs.

III. Chemours Supports Other EPA Proposals Regarding Allowance Allocations While Opposing Any Additional Allowance Set-Asides

A. Chemours Supports Use of 2021 and 2022 Activity for Receipt of Allowances and EPA's Proposals Regarding Adjustment of Historical Baselines and Set-Asides

EPA has proposed several amendments and adjustments to regulations affecting the allocation of allowances. First, EPA is proposing to require that an entity have produced or imported HFCs during 2021 or 2022 in order to qualify for the allocation of allowances during the 2024 to 2028 period. Second, EPA is proposing to *not* establish a set-aside pool of allowances for calendar years 2024 to 2028 for application-specific allowance holders, historic importers under the Greenhouse Gas Reporting Program ("GHGRP") reporting threshold and new entrants. Third, EPA is proposing to adjust allowances allocated to existing new entrants to reflect the "step-down" in available allowances in 2024 to 2028. Finally, EPA proposes to adjust AIM Act consumption baselines to address revisions to these baselines due to the correction of the historical data on which these baselines were established. Chemours supports all of these proposals with the exception that EPA's use of 2021 and 2022 activity as qualification for receipt of general pool allowances should be finalized in conjunction with finalizing the proposed allocation methodology for all years 2024 to 2036.

1. Use of 2021 and 2022 Production/Consumption as Evidence of Continued Activity

[32] 42 U.S.C. §§7675(e)(3)(A)-(B).

[33] 85 Fed. Reg. at 15,261 (Mar. 17, 2020), citing 58 Fed. Reg. 15,014 (Mar. 18, 1993), 58 Fed. Reg. 65,018 (Dec. 10, 1993).

[34] 42 U.S.C. §7675(e)(2)(D)(i).

EPA is proposing to "use a fixed set of years (*i.e.*, 2021 and 2022) to determine eligibility for entities to be allocated allowances for calendar years 2024 through 2028."[35] Chemours supports this additional qualification criteria for receiving allowances but consistent with the position stated above, believes the 2021-2022 participation criteria should be used for the allocation of allowances for all years 2024 to 2036.

EPA indicates that the purpose of this requirement is to adjust allowance allocations for entities that may have imported or produced HFCs during the 2011 to 2019 period, but no longer do so and to avoid allocating allowances for entities "that have since ceased operations or transitioned away from HFC production or import."[36] This is a valid perspective; EPA should allocate to entities that continued in the HFC market after Congress approved the AIM Act and the Framework Rule was proposed and promulgated. But as per our comments above, EPA should apply the methodology for determining allowance allocations for the full remaining phasedown period specified in the AIM Act, 2024-2036. In order to promote stability in the allowance market, EPA should not revisit this determination and should allocate allowances accordingly. Revisiting or adding additional criteria for the receipt of allowances would be counterproductive to the goals of ensuring a smooth transition to alternatives and has the potential to cause uneconomic behavior in cases where production and import activity would be undertaken based on the expectation that such behavior could result in additional allowance allocations.

2. No Set-Asides and No New Entrant Allocations

EPA has proposed not to establish a set-aside pool for application-specific allowance holders, historic importers under the GHGRP reporting threshold and new market entrants. Chemours agrees with this proposal and EPA's rationale. As the Agency points out, the first two categories were intended for "entities that may have not known of or fully understood the regulatory system created in the Framework Rule."[37] That is no longer the case. The Framework Rule was published in the Federal Register over one year ago and EPA has conducted additional outreach on its implementation of the AIM Act to interested parties. Thus, the rationale for the original set-aside is no longer applicable.

With regard to new market entrants, EPA is proposing that new entrants that were allocated allowances in 2022 and 2023 will experience an "equivalent reduction in allowances between the 2022-2023 and 2024-2028 timeframes as general pool allowance holders." This reduction would be applied to the amount of new entrant allowances an entity received in 2023. While Chemours objected in 2021 to the creation of any set-aside for new entrants in EPA's development of the Framework Rule, Chemours supports EPA's current proposal to reduce new entrant allowances as consistent with the AIM Act's stairstep reduction in available allowances. Chemours also supports EPA's proposal to not provide *additional* new entrant set-asides for the 2024 to 2028 period. Chemours agrees with EPA that further allocations to entities that have not previously produced or imported HFCs is not consistent with the objectives of the AIM Act. We would

[35] 87 Fed. Reg. at 66,381.
[36] *Id.* at 66,380.
[37] *Id.* at 66,380.

refer EPA to Chemours previously-filed comments with regard to such allocations.[38] Finally, as indicated above, Chemours is supportive of the proposed requirement for recent production or consumption activity in 2021 or 2022 as a qualification to receive allowances in the 2024-2028 period and preferably for the entire 2024-2036 period.

In this regard, however, we oppose any request that EPA establish a set aside pool to be used for Request for Additional Consumption Allowances (RACAs) or to assign allowances in exchange for destruction of HFCs including but not limited to unused, off quality and/or no longer useable HFC inventory or recovered HFCs from existing equipment that was previously produced or manufactured. As EPA noted in the proposed rule, there are several broad policy concerns with such a course of action, including creating an incentive for the export of stockpiled HFCs imported or produced prior to 2022.[39] In this regard, Chemours would also note that in the Framework Rule, EPA finalized regulations providing that destruction is not considered production as long as the HFCs are destroyed within 120 days of being imported[40] or generated.[41] Therefore, in addition to the policy concerns EPA expressed, it would be both illogical and contrary to existing regulations Allowing such allowance allocations would effectively "reward" the importation of excessive amounts of HFCs on the expectation that export or destruction could provide a pathway to capitalize on such actions.

3. Reclaimer Allowances

EPA has indicated that the Agency "does not view issuing allowances to reclaimers that are not eligible based on the methodology EPA is proposing to use for 2024 through 2028 . . . as a meaningful way to increase opportunities for reclamation. . ."[42] Chemours agrees. In addition, there is no indication in the AIM Act that reclaimers – versus producers and importers of HFCs – are within the intended scope of allowance allocations. Reclamation of regulated substances is not addressed within provisions of the AIM Act concerning the calculation of production and consumption baselines nor in the use of these baselines to determine the quantity of allowances available for allocation.

As EPA notes, some reclaimers are already allocated allowances (based on their 2011-2019 history of import activity). This allocation thus serves to address their purported need for allowances – the requirement to blend virgin HFCs as a means to "rebalance refrigerant blends that are slightly off specification after reprocessing recovered refrigerant."[43] In this regard, reclaimers are treated like any other importer or producer of HFCs for purposes of allowance allocations; they would receive allowances based on such production or importation as long as such was reported to the GHGRP. And reclaimers are otherwise treated like any other participant in the market who requires virgin HFCs to produce a product, they may purchase the

[38] See Attachment 1 at 27-29.

[39] 87 Fed. Reg. at 66,397.

[40] 40 C.F.R. §84.25(a)(3)(ii).

[41] *Id*., §84.5(a)(3). 120 days applies where destruction occurs at a different facility from where the regulated substance was produced. For regulated substances destroyed at the facility where they are produced, the time period is 30 days. *Id*. *See also* 86 Fed. Reg. at 55,143.

[42] 87 Fed. Reg. at 66,380.

[43] *Id*.

amount and type of HFCs that are required without having to acquire or retire allowances. Finally, in the Framework Rule, EPA allowed for entities that had been under GHGRP reporting limits to receive allowances and/or for entities to apply for new entrant status. Given these multiple opportunities for reclaimers to qualify for allowances there is no objective need for EPA to create additional, non-statutory carve-outs for reclaimers from the allowances required to be allocated.

4. Adjustment of Consumption Baseline

EPA is proposing to revise the consumption baseline downward in the amount of 3,629,631 MTEVe to reflect an adjustment to the AIM Act consumption baseline based on corrected data. Chemours believes such action is consistent with the Act and that the Agency should make further revisions if there was additional misreporting by any entity. AIM Act provisions with regard to the calculation of allowances are clear and are to be based on mathematical formulas contained in section 103(e)(1) of the Act regarding prior production and consumption of HFCs during 2011 to 2013. To the extent data for the calculation of these baselines is not correct, it must be adjusted to reflect actual production and importation of HFCs during the prescribed baseline periods.

IV. **Chemours Supports EPA's Determination to not Utilize Allowance Fees or Auctions**

EPA states that it "considered charging a fee for allowances or establishing a system to auction allowances" but that it is not proposing to utilize either method for allocating allowances.[44] Chemours supports this determination and, as outlined above, supports retention of the 2011-2019 time period for determining allowance allocations based on the formulas provided within the AIM Act.[45] Chemours also agrees with many of the EPA's expressed policy rationale with regard to not promulgating a fee or auction system – including the additional burdens that would be created by such systems and the added uncertainty with regard to the availability of allowances.

At the same time, reflecting comments that Chemours filed with regard to the Framework Rule, Chemours would note that the AIM Act specifically requires an "allowance allocation and trading program."[46] The AIM Act does not provide EPA with authority to sell allowances, authority that would be intrinsic to any fee or auction system. EPA also cannot point to any statutory authority that authorizes the Agency to either require a fee for an entity to receive allowance allocations or for the Agency to implement an auction system.

In addition, attempting to impose any fee for allowances or facilitating a market price for allowances through an auction mechanism would result in a direct "pass-through" cost that would be borne by American consumers. This additional consumer cost burden was not expected, projected and/or calculated in any economic analysis of the AIM Act. EPA has

[44] *Id.* at 66,379.
[45] 42 U.S.C. §§7675(e)(1)(A)-(C).
[46] *Id.* §7675(e)(3).

repeatedly asserted that such is the result of other allowance programs implemented under the authority of the CAA where allowances must be acquired by obligated parties.[47] In addition, a fee or auction system would have other serious ripple effects because cooling and refrigeration systems (as well as other uses of HFCs) involve critical parts of the U.S. economy extending from commercial and residential uses to vital infrastructure, and to important national security concerns. All of these issues are discussed in more detail below.

Lastly, an auction system could present a national security threat as entities backed by foreign governments could engage in the auction process with intent to manipulate the US supply of HFCs to the detriment of US society, economy and manufacturing base.

A. **The AIM Act Requires an "Allowance Allocation and Trading Program"**

While EPA indicates that it has considered "different allowance mechanisms" and "alternate allocation mechanisms,"[48] EPA is *required* to phase down the production of HFCs "through an allowance allocation and trading program in accordance with [the AIM Act]"[49] and phase down the consumption of HFCs "through an allowance allocation and trading program in accordance with the schedule [providing for percentage reductions in the consumption baseline]."[50] The words of the statute concerning allowances are express and other provisions of the AIM Act cannot be interpreted to reasonably conclude that alternative authority exists that would support the monetary sale of allowances, whether the sale be in the form of a "fee" or monies collected through an auction or other mechanism. The "plain language" of the statute dictates an allowance *allocation* program.[51]

EPA has also not cited any statutory context that would support a fee or auction system. This is in contrast to other provisions of the AIM Act where EPA has relied on such an assessment in interpreting how to apply the Act's provisions.[52] And it is directly contrary to EPA's treatment

[47] One example of this lies with regard to EPA's description of the "pass-through" of allowance costs in the renewable fuel standard program which uses Renewable Identification Numbers ("RINs"). "The degree to which the cost is "passed through" to consumers (RIN cost passthrough) and revenue from RIN sales is used to discount the price of blended fuel (RIN discount) has been a longstanding area of interest, especially since [biomass-based diesel] RIN prices increased dramatically in 2013. EPA first published results of an assessment of obligated parties' ability to "pass through" RIN costs and the impact of RIN prices on the price of blended fuel in a technical memorandum in 2015." Proposed RFS Small Refinery Exemption Decision, EPA-420-D-21-001, December 2021 at 27. In other words, additional costs imposed through the sale of HFC allowances would be "passed through" to other parties purchasing HFCs and ultimately, to consumers. Revenue from a fee or auction would be deposited in the U.S. Treasury and would therefore not offset the increased cost of products to consumers.

[48] 87 Fed. Reg. at 66,380.

[49] 42 U.S.C. §7675(e)(3)(A)

[50] 42 U.S.C. §7675(e)(3)(B), referencing §7675(e)(2)(C).

[51] "Allocation" is "to apportion for a specific purpose or to particular persons of things." "Apportion" is to divide and share out according to a plan; especially: to make a proportionate division or distribution of." *See* www.merriam-webster.com/dictionary. These terms on their face do not include sale or auction.

[52] EPA claims that imposing reporting requirements "no later than 14 days before importation" is "consistent with the reductions established by Congress in the AIM Act." 87 Fed. Reg. at 66,387. In the Framework Rule, EPA also cited the presumption that Congress "is generally presumed to legislative with an awareness of the existing law that is pertinent to enacted legislation" thus making it "reasonable to build on its experience phasing out ODS when developing the AIM Act's HFC allowance and allocation trading program." 86 Fed. Reg. at 55,123.

of HFCs contained in imported products in the Framework Rule. Specifically, in rejecting comments that EPA should regulate the import of both HFCs contained in bulk containers and the same HFCs that are imported into the United States in products, EPA stated that:

> Here, there is no statutory text in the AIM Act – and the commenter was not able to provide any citation to such text – that unambiguously requires EPA to consider imports of products containing regulated substances in the calculation of 'consumption,' in addition to considering the imports of bulk containers.[53]

In the newly proposed rule, there is both "no statutory text" and EPA has not been able "to provide any citation to such text" regarding authority for a fee or auction system.[54] EPA can only consider options for allowances that are within the authority conveyed by the AIM Act.

The legislative history of the AIM Act also does not demonstrate that Congress intended to convey fee or auction authority to EPA and EPA does not cite to any such history.[55] Indeed, any legislative history or intent involving interpretation of the AIM Act in the context of title VI of the CAA runs *contrary* to the interpretation that EPA may impose fees, sell allowances or conduct auctions. Specifically, when Congress provided such authority with respect to ODS, it acted separately to provide such authority to the Internal Revenue Service, not EPA, and this enactment occurred entirely outside of the CAA or any other environmental statute:

> This document contains final regulations relating to the tax on chemicals that deplete the ozone layer and on products containing such chemicals. These regulations reflect changes to the law made by the Omnibus Budget Reconciliation Act of 1989 and the Omnibus Budget Reconciliation Act of 1990. They affect manufacturers and importers of ozone depleting chemicals, manufacturers of rigid foam insulation, and importers of products containing or manufactured with ozone-depleting chemicals. In addition, these regulations affect persons, other than manufacturers and importers of ozone-depleting chemicals, holding such chemicals for sale or for use in further manufacture on January 1, 1990, and on subsequent tax-increase dates.[56]

The excise and floor tax regulations for ODS were promulgated by the IRS through a 1991 rulemaking and are contained in 26 C.F.R. Part 52. And it is notable that EPA neither implements these regulatory provisions nor collects the taxes due.

The reality is that attempting to impose any fee or auction system (raising the price of manufactured products in the United States to consumers) is directly opposite the intent of

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[53] 86 Fed. Reg. at 55,131.

[54] In promulgating requirements for bulk containers, EPA ultimately relied on interpreting "consumption" under the AIM Act and under title VI and the Montreal Protocol in the same way. 86 Fed. Reg. at 55, 131. But this rationale also does not work to support fees or auctions for AIM Act allowances since EPA does not implement or impose either under the authority of the CAA for class I or class II ODS.

[55] Again, this is in contrast to how EPA has interpreted other provisions of the AIM Act. *See* 87 Fed. Reg. at 66,374, n. 3, indicating that "EPA does not believe Congress intended for everyone who charges an appliance or fills an aerosol can with an HFC to expend allowances."

[56] 53 Fed. Reg. at 56,303 (Nov. 4, 1991).

Congress in passing the AIM Act to promote American manufacturing and create jobs.[57] A fee imposed on American producers of HFCs would essentially raise the price of refrigerants, solvents and other substances produced in this country. And imported HFCs would also presumably be subject to such fees or allowance purchase requirements, only serving to raise the price of HFCs within the United States relative to countries outside of the United States. A fee and/or auction system on HFCs would also incentivize production of goods containing HFCs to be shifted outside the US at the cost of US jobs and US manufacturing investment, EPA has provided nothing in the docket which demonstrates how such fees or other receipts – deposited to the U.S. Treasury -- would either promote domestic manufacturing or innovation within the affected sectors of the nation's economy consistent with the purposes of the AIM Act. And any incentive to produce HFCs outside of the United States – in order to *avoid* a fee or auction system -- could affect critical sectors of the U.S. economy, including those related to national defense

B. **The Proposed Rule Does Not Otherwise Support Allowance Fees or Auctions**

As noted above, in the proposed rule, EPA has not cited any statutory authority – either within the AIM Act or through provisions describing the AIM Act's relation to the CAA – that provides authority for the Agency to impose fees directly on producers and importers (or any other party) or to conduct an auction of allowances. This is for good reason. In the past, EPA has disclaimed any such ability under the CAA unless specifically authorized:

> The [Clean Air Act] does not include a broad grant of authority for EPA to impose taxes, fees or other monetary charges specifically for GHGs and, therefore, additional legislative authority may be required if EPA were to administer such charges (which we will refer to collectively as fees). EPA may promulgate regulations that impose fees only if the specific statutory provision at issue authorizes such fees, whether directly or through a grant of regulatory authority that is written broadly enough to encompass them.[58]

The only statutory rationale that EPA has expressed is that a fee or auction may be supportable on the basis of a supposed difference of an 85% phasedown of HFCs under the AIM Act versus a theoretical (and inaccurately portrayed) 100% phaseout of ODS pursuant to title VI of the CAA.[59] But this is, at best, a fatally flawed analogy given that the CAA allows for various exemptions from the 100% phaseout of ODS (meaning it is not a 100% phaseout in reality) and that EPA has never disclaimed authority under the AIM Act to not pursue a phasedown of HFCs that exceeds 85% of baseline given its authorities to both grant technology transition petitions

[57] The AIM Act "will authorize a 15-year phase down [of the use of HFCs], while safeguarding consumers and American manufacturers . . . Investing in next-generation refrigerants will create thousands of jobs, save billions of dollars and safeguard the environment . . . ." *See* https://www.epw.senate.gov/public/index.cfm/2020/12/carper-colleagues-announce-historic-bipartisan-agreement-on-climate-legislation

[58] 53 Fed. Reg. at 56,303 (Nov. 4, 1991).

[59] EPA references this argument in the proposed rule in a footnote. "A key difference between the phaseout of ODS and this program is that consumption and production of HFCs will not be phased out entirely." 87 Fed. Reg. at 66,379, nt. 25.

and to accelerate the phasedown of HFCs.[60] EPA can therefore not utilize this rationale to support a fee or auction system without, at the same time, indicating it *lacks authority* to phasedown HFCs to the 100% or near-100% level. This supposed "justification" for a fee or auction cannot bear the weight of statutory interpretation required to assert non-textual authority for a fee or auction system.

Finally, EPA's reference to the Agency's own experience in implementing auctions (much less that of other agencies, like the Federal Communications Commission who are not referenced within the AIM Act) do not serve to fill this basic statutory gap. First, where EPA has implemented auctions under the CAA, it has done so with explicit statutory authority. For example, auctions are allowed with regard to implementation of the CAA title IV acid rain program.[61] And *States*, not EPA, may include auction of emission rights with regard to state implementation plans that are required for the implementation of national ambient air quality standards.[62] Consumer and commercial products subject to control of volatile organic chemicals may also be regulated through the use of "auctions of emissions rights."[63] In all cases, explicit statutory authorization exists. In direct contrast, title VI of the CAA, on which the AIM Act was modeled, does not include authority for the auction of emission rights or allowances. Any "experience" of EPA or other federal agencies with regard to auctions is irrelevant.

C. **Several Policy Reasons Weigh Heavily Against Allowance Fees or Auctions**

Currently, EPA allocates allowances to historic producers and importers of HFCs who facilitated the transition from high ODS CFCs and HCFCs to lower or zero ODS substances. In many cases, producers of HFCs invested heavily in bringing new alternatives for refrigeration, air conditioning, foam blowing and solvents to market to allow this transition to occur within the timeframes contemplated by title VI of the CAA (and, in many cases, prior to such statutory timeframes). On the whole, producers have also supported the further transition away from HFCs to lower ODS and GWP alternatives as evidenced by the approval of substitutes under EPA's Significant New Alternatives Program.

Producers are also now, by definition, the companies who are most directly affected by the requirements of the Kigali Amendment and the AIM Act, along with those companies that must redesign equipment and products to accommodate new alternatives. Many of these same companies are heavily investing in the development of HFC alternatives, which undermines the perspective that such companies receive allowances "at no cost."[64] In fact, there is a substantial, ongoing cost to remaining an operating business bringing new substitutes to market for the HFCs that are being phased down (or will be completely phased out in the case of at least some end uses through technology transition petitions). In this context, it is highly suspect what policy

[60] Rules promulgated pursuant to AIM Act section 103(f) may take effect after January 1, 2025 that establish a schedule for phasing down production and consumption of HFCs that is "more stringent than the production and consumption levels of regulated substances required under [the table provided for percentage reductions in production and consumption in section 103(e)(2)(C)]."

[61] CAA section 416.

[62] CAA section 110(a)(2)(A), 172(c)(6). EPA may only impose auctions for this purpose where states fail to submit an acceptable state plan. *See* CAA section 303(y).

[63] CAA section 183(e)(4).

[64] 87 Fed. Reg. at 66,379.

goals imposing fees or an auction system for allowances would promote, other than to raise costs and generate revenue for the U.S. Treasury.

EPA cites potential "advantages" to fees or auction systems. These are: (1) returning value to taxpayers; (2) setting a visible price signal; (3) providing useful information for the public and market participants; (4) incentivizing the "highest economically valued use;" (5) addressing challenges for new entrants; (6) ensuring efficient and equitable allocations as market conditions change; and (7) encouraging competition and innovation.[65] While EPA cites some disadvantages to fees or auctions, it tends to ignore the most intrusive and counter-productive result, *i.e.*, artificially raising the price of products relying on HFCs to the consumer. Under any system where allowances must be purchased – rather than allocated as the AIM Act requires – this cost will inevitably be embedded in the cost of products produced with HFCs. Indeed, the "transparency" of what an auction system might provide as to the value of allowances will provide a signal to all actors in the marketplace as to how much such a pass-through cost would be, potentially incentivizing uniform price increases.

These considerations also ignore the fundamental structure of the AIM Act in terms of allowances – it takes substantially more allowances to produce or import a high GWP HFC than it does a low GWP HFC. This factor already provides a powerful incentive for producers and importers and their down-the-value chain customers to move towards lower GWP substitutes as the phasedown percentages become more stringent. Thus, it is entirely unclear what additional "highest economically valued use" would be promoted by EPA selling allowances and why the GHG-weighting of regulated substances in terms of "exchange values" is insufficient for this purpose. Again, EPA provides no supporting analysis of these economic effects in the docket for this rulemaking.[66]

D. EPA Must Consider and Respond to Comments Concerning AIM Act Authority

Section 103(k) of the AIM Act provides that section 307 of the CAA "shall apply to [the AIM Act] and any rule, rulemaking, or regulated by the Administrator pursuant to [the AIM Act] as though [the AIM Act] were expressly included in title VI of [the Clean Air Act]." Section 307(d)(6)(B) of the CAA requires that "[t]he promulgated rule shall . . . be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." This provision applies to the proposed rule.

While Chemours provided extensive comments on EPA's lack of authority to impose a fee or auction system for AIM Act allowances in response to EPA's proposed Framework Rule, EPA did not respond to these comments when it promulgated that rule.[67] EPA further states in this

[65] *Id.*

[66] EPA's citation to the Administrative Conference of the United States analysis of marketable permits addresses only the generalities of market-based systems, not the specifics of the HFC allowance market as currently in effect, or as may be in effect in future years.

[67] Establishing the Allowance Allocation and Trading Program under the American Innovation and Manufacturing Act: Response to Comments, September 2021, EPA-HQ-OAR-202100044-0227 (Response to Comments").

proposed rule that "EPA has considered the advance comments provided on potential methodology for allocation methodologies starting with calendar year 2024 allowances in the development of this proposal . . . EPA is not including those comments in the docket for this rule, does not consider those advance comments to be part of this rulemaking record, and does not anticipate providing any ***further response*** to them."[68] With regard to the Framework Rule, however, EPA did not provide ***any response*** to these comments, stating only that "EPA has reviewed the [information submitted] and is not providing responses, as they are beyond the scope of this initial rulemaking."[69] In view of these statements, Chemours attaches to these comments its previously filed comments regarding the lack of AIM Act authority to utilize a fee or auction system for allowances and would assert that these comments are "significant" within the meaning of CAA section 307(d)(6)(B) and relevant caselaw.[70]

EPA also cannot avoid responding to comments in a proposed rule that specifically raises the issue of allocating allowances through a fee or auction system simply by asserting that it is only inviting "advance comments" on the advantages or disadvantages of fees or auctions. EPA has itself *twice* raised the issue in connection with both the Framework Rule and this proposed rule, establishing that this issue is significant with regard to EPA's implementation of the AIM Act. Indeed, it would be illogical for EPA to solicit comment on multiple occasions regarding "advantages and disadvantages" of an allowance mechanism where the Agency had not considered whether it has, in the first place, any statutory authority to implement such a system.[71] EPA makes no attempt to tie the solicitation of comments to any other purpose (*e.g.,* whether the Agency should seek additional legislative authority from Congress) thus the only purpose of soliciting comments (whether labeled "advance"[72] or otherwise) must be in relation to implementation of its existing AIM Act authority.

V. Chemours Supports EPA's Proposed Clarifications on Allowance Transfers, But EPA Should Additionally Adjust Transfer Offset Downward, Consistent with EPA's Implementation of Title VI of Clean Air Act

EPA has proposed to clarify that entities "may confer or transfer allowances at any point after they are allocated until the allowance expires."[73] Chemours supports this proposal and the associated proposed regulatory language (contained in 40 C.F.R. §84.5(d)). Intrinsic to the operation of a liquid allowance market is the ability to transfer allowances when they are perceived to be in excess of projected requirements or when an entity may project that it needs to acquire allowances to cover intended production/import. These events do not neatly coincide

[68] 87 Fed. Reg. at 66,376 (emphasis added).

[69] Response to Comments at 753.

[70] See *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375, 393-94 (D.C. Cir. 1973). EPA must respond to "material" comments. An agency does not need to respond to every comment, but the opportunity to comment is meaningless if agencies do not respond to substantial points raised by the public. *North Carolina v. Federal Aviation Admin*., 957 F. 2d 1125 (4th Cir. N.C. 1992)

[71] Indeed, EPA claims to have "*considered* charging a fee for allowances or establishing a system to auction allowances." 87 Fed. Reg. at 66,379 (emphasis added).

[72] CAA section 307 makes no distinction as between "advance" or other comments filed during a rulemaking subject to its provisions.

[73] 42 U.S.C. §7675(g)(2).

with calendar years and thus the ability to transfer an allowance that has been allocated, at the point in time when it has been allocated, is essential.

As EPA considers provisions to amend current regulations regarding allowance transfers, EPA should also lower the current 5% offset required for the transfer of HFC allowances to 1% or less. While EPA established the 5% offset requirement in the 2021 Framework Rule, in the proposed rule, EPA proposed to clarify the timing of allowance transfers and is additionally proposing other transfer-related provisions concerning the submittal of importer of record information (specifically, 40 C.F.R. §84.31(c)(9)), requirements related to transfers and those required of repackagers (*Id*., §84.31(k)). A directly related requirement regarding such allowance transfers are the offsets that EPA requires to be "surrendered" to the Agency when a transfer between unrelated parties is made. For inter-company transfers, this offset is currently set at 5% of the amount of allowances transferred.[74] Thus, EPA has effectively re-opened the issue of whether the 5% offset is supportable under the AIM Act and prior precedent.

In the AIM Act, Congress required EPA to implement an "allowance allocation and trading program" and to "permit 2 or more persons to transfer production allowances."[75] While Congress authorized EPA to implement an "enforceable and quantifiable reduction" as part of a transfer of allowances, this amount should not be so high as to inhibit the free-market trading of allowances and changes to the marketplace. The current level of 5% has just this effect.

In the Framework Rule, EPA rejected numerous comments that it received regarding this issue.[76] While indicating that no party had provided specific information that a 5% offset would be" overly burdensome" neither did EPA provide explicit record support for its assertion that a lower offset level would not provide sufficient environmental protection.[77] In this regard, it may be observed that the phase down levels contained in the AIM Act correspond to the phase down requirements for Article 2 parties under the Kigali Amendment. EPA further possesses authority under the AIM Act to limit end uses of HFCs under technology transition petitions as well as to accelerate the phase down of HFCs if statutory pre-requisites are met. Thus, EPA offers no explanation with regard to how it determined that offset levels lower than 5% would be insufficient to obtain the intended environmental results of the AIM Act given the Act's correlation to the Kigali Amendment and EPA's additional authority to exceed the reductions required by the Amendment.

The underlying presumption for EPA's determination of the "reasonableness" of a 5% offset is that it will be applied only once and thus, allows 95% of the allowances held by one party to be used by another.[78] But allowances may be transferred, or need to be transferred, more than once and/or it may be economically desirable to do so. The current 5% offset directionally serves as a substantial barrier to a more liquid market trading of allowances. In this regard, in the proposed

[74] 40 C.F.R. §84.19(a)(1).

[75] AIM Act section 103(g)(2); 42 U.S.C. §7675(e)(2).

[76] EPA did not substantively respond in the Response to Comments document but rather discussed the comments received in the final rule. 86 Fed. Reg. at 55,154-5.

[77] A search of the docket did not reveal a specific TSD regarding the offset level. EPA-HQ-OAR-2021-0044.

[78] "[T]ransferors retain 95 percent of the value of something provided for free if they chose to transfer those allowances." 86 Fed. Reg. at 55,144.

rule, EPA noted that "*[t]ransfers are important for an efficiently functioning market and ensuring the opportunity for full utilization of allowances*."[79] EPA also rejected an option it considered for allocating allowances because it would "disincentivize transfers."[80] The level of the current 5% offset requirement works directly against these expressed goals of facilitating allowance transfers and may be viewed as inherently arbitrary given EPA's limited assessment of this level.[81]

Finally, as Chemours previously pointed out, EPA is selectively relying on implementation of title VI of the Clean Air Act in interpreting and implementing the AIM Act. Within the title VI ODS program, a directly comparable requirement to impose offsets was implemented utilizing a 0.1% offset. Implementation of this low offset level in no way interfered with the implementation of the ODS program or in achieving the goals of title VI. EPA's most recent assessment of the title VI program notes that statutory deadlines for the phaseout of ODS had been met or *exceeded*.[82]

While EPA has not proposed to alter the 5% offset in the proposed rule, given other parts of the proposed rule addressing allowance transfers referenced above, additional proposed restrictions on the availability of allowances, and EPA's indication that the Agency is "concerned about finalizing an allocation methodology that would disincentivize transfers"[83] revising the 5% offset may be viewed as a logical outgrowth of the proposed rule. Additionally, during stakeholder sessions that EPA conducted regarding this rulemaking, the current 5% offset has been identified as an incentive for the importation of HFCs, rather than domestic sourcing. Given this context, Chemours requests that EPA reconsider the 5% offset with a suggested replacement offset level of 1% or less, as part of this rulemaking, or if necessary, as part of a supplemental rulemaking.

VI. Chemours Supports Some Additional Recordkeeping and Reporting Requirements but EPA Should Not Finalize Other Such Requirements as Proposed

A. Chemours Supports Clarifications to "Importer of Record" and Advance Notification Requirements

Chemours supports EPA's clarification of the definition of "importer of record" and further supports utilizing a 10-day advance notification period for maritime shipments and 5-day notice for non-maritime shipments, as EPA discussed in the proposed rule.[84] Given Chemours experience with international shipments, we consider that these periods of time are reasonable.

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[79] 87 Fed. Reg. at 66,379 (emphasis added).

[80] *Id*.

[81] In the Framework Rule, EPA indicated that its analysis of the HCFC market showed that between 5 and 30% of allowances were transferred each year, meaning that a 5% offset would "only" reduce the general pool by 0.25 to 1.5%. Compounded over the 5 years covered by the proposed rule, a similar effect would reduce general pool allowances by 1.25% to 7.5%. This reduction in the general pool of allowances, which would potentially be carried forward into future step-down periods is not *de minimis*; it could substantially restrict access to allowances.

[82] Achievements in Stratospheric Ozone Protection, Progress Report, April 2007.

[83] 87 Fed. Reg. at 66,379.

[84] 87 Fed. Reg. at 66,388.

As a logical outgrowth of EPA's proposed revisions to its regulations regarding the importation of regulated substances, Chemours would further recommend that EPA require that all Advance notification of Import and associated U.S. Customs documents specifically list the name of the Allowance Holder as it appears on EPA's allowance allocations as the "importer of record." If a sub-entity is involved in the shipment, that name should also be listed along with the name of the Allowance Holder. Requiring this additional information would facilitate tracking of compliance for each participant's consumption allowances. And, in the spirit of data transparency, we recommend that Shipper/Importer Names and Location confidentiality be removed for Customs documents covering AIM Act regulated substances as this will also help the industry assist regulators in monitoring for compliance.

B. New "Same Day Documentation of Any Allowance Expended" Requirements are at Variance with the AIM Act, Unnecessary and Overly Burdensome

EPA has proposed to define the term "expend" although this term appears nowhere within the AIM Act.[85] This definition, in turn, is used to support a number of newly proposed recordkeeping and reporting provisions that involve daily accounting of available allowances and when such are considered to have been "expended." These newly proposed requirements, which include a mandate to undertake and report "same day documentation of any allowances expended"[86] are overly burdensome and are not necessary to ensure compliance with the AIM Act phasedown of HFCs.[87]

EPA's explanation for defining "expend" is to "incorporate [a] previously stated interpretation into the 40 CFR part 84 regulatory text."[88] EPA's rationale for this approach is "to ensure no entity is producing regulated substances, in excess of the quantity of unexpended production and consumption allowances."[89] EPA asserts that imposing such daily obligations will promote better accountability and enforcement of the HFC phasedown obligations. Relatedly, EPA also proposes to require that the importer of record be in possession of allowances "at the time of filing their advance report under 40 CFR 84.31(c)(7)."[90] And, in this regard, EPA argues that it is "clear" from the AIM Act definition of "import" and the existing *regulatory* framework that import cannot occur without expending the required allowances.[91]

The AIM Act, however, is not as determinative on this point as EPA represents. While the AIM Act defines "import" the Act provides that "[d]uring the period beginning January 1 of each year . . . and ending on December 31 . . . no person shall . . . produce a quantity of regulated substance

[85] Proposed 40 C.F.R. §84.3.

[86] 87 Fed. Reg. at 66,389.

[87] An additional possible point is that failure to successfully implement same day documentation requirements would itself create and additional potential violation of the AIM Act, *i.e.*, a violation separate and on top of the allowance violation.

[88] *Id*. at 66,384.

[89] *Id*. at 66,390.

[90] *Id*. at 66,384.

[91] *Id.*

without a corresponding quantity of production allowances . . . [or] consume a quantity of a regulated substance without a corresponding quantity of consumption allowances."[92] Under the Act, the EPA Administrator is only required to "ensure that the ***annual quantity*** of all regulated substances" does not exceed production and consumption baselines as multiplied by applicable percentages.[93] In short, there is no statutory requirement that an entity hold allowances at the very moment of production or importation of HFCs. The statute only provides that allowances are required during the year in which production or consumption occurs.

Similarly, the AIM Act requires that "[o]n a periodic basis, to be determined by the Administrator, but not less frequently than annually, each person who, within the applicable reporting period, produces, imports, exports, destroys, transforms, uses as a process agent, or reclaims a regulated substance shall submit to the Administrator a report [that describes the quantity of HFCs involved in these activities]."[94] Again, the AIM Act does not statutorily impose a requirement to either expend allowances or to create and retain records of compliance on a daily basis. Therefore, in attempting to exert such authority where it is not explicitly granted, EPA must have a rational basis for imposing the burden on regulated entities.

In this regard, EPA "expects" that creating this new requirement will have "minimal effect on regulated entities."[95] But it does not appear from information in the docket that EPA has actually attempted to quantify what additional burden would be imposed. EPA also cites individual case examples of the need to determine what calendar year allowances must be used (expended or "retired") with regard to which imports of HFCs when these imports occur towards the end of the year.[96] But how EPA parses these individual issues, however, is not determinative of what compliance and recordkeeping requirements should apply broadly with regard to implementation of the entire Act. Other less burdensome alternatives, such as maintaining the quarterly reporting defined in the Framework Rule, should be considered. It is important to note that the ICR (Information Collection Request) for this proposed rule does not make mention of "same day documentation of any allowances expended" and appears to reinforce maintaining quarterly reporting.

For example, EPA should recognize that HFC manufacturing facilities in the United States are already extensively regulated and EPA already possesses ample authority under the AIM Act to enforce requirements related to allowances. The AIM Act specifically cross-references EPA's federal enforcement authority in CAA section 113.[97] EPA offers no explanation why its authority to issue administrative penalties, orders, bring a civil action or request that the Attorney General commence a criminal action are insufficient to ensure compliance with the AIM Act.[98] EPA also has not explained why its authority with respect to right of entry and access to records is not sufficient to ensure compliance with requirements to not produce or consume HFCs "without a

[92] 42 U.S.C. §7675(e)(2)(A).
[93] *Id.*, §7675(e)(2)(B) (emphasis added).
[94] 42 U.S.C. §7675(d)(1).
[95] 87 Fed. Reg. at 66,390.
[96] These determinations include requiring allowances on the basis of attempting to land in the United States.
[97] 42 U.S.C. §7576(k).
[98] CAA section 113(a)(3).

corresponding quantity of allowances" which are allocated *on an annual basis*.[99] Moreover, EPA makes no attempt to distinguish as between domestic production facilities and HFC produced outside of the U.S. where EPA does not impose similar requirements for daily recordkeeping.

It should also be noted that production allowances are used when a regulated substance is manufactured within a compliance period but may be offset by a regulated substance being produced for destruction or transformation. These actions (production, transformation, destruction) are already being tracked on the required quarterly production reports so EPA is already able to monitor an allowance holder's progress toward use of its annual production and consumption allowances. EPA has not explained why current quarterly reporting requirements, combined with EPA's inspection and enforcement authority are not sufficient to ensure compliance with annual standards. There is no information in the docket which provides an analysis of EPA's "expectation" that because U.S. producers undertake considerable efforts to track production and allowances, imposing additional requirements "would have minimal effect."[100]

US Producers have decades of experience on reporting and record keeping as demonstrated by the successful implementation of the ODS phaseout. The ODS program was successfully managed with the use of quarterly reporting. Given the successful track record of the ODS program, there is no logical reason to suggest a greater burden is needed.

Chemours recognizes EPA's need for information to implement the AIM Act and interest in preventing illegal import of HFCs into the United States. At the same time and as noted above, EPA's enforcement authority in and of itself can effectively serve as a deterrent. Elsewhere in the proposed rule, EPA proposes to include additional required elements in the advance notification of import in support of EPA's real-time review of allowances prior to import.[101] Should an importer violate existing prohibitions, they may be subject to an enforcement action under the Clean Air Act which carries with it the potential for substantial fines. Again, EPA has not adequately assessed the sufficiency of existing enforcement mechanisms under the AIM Act, or identified specific issues with regard to HFCs requiring expansion of reporting and recordkeeping requirements. Nor has EPA addressed the imbalance of recordkeeping and reporting requirements that would apply as between domestic and foreign producers of HFCs and whether there are any available mechanisms to address same apart from requirements imposed on importers.

VII. EPA Lacks Authority Under AIM Act to Require Additional HFC Production Facility Monitoring and Reporting

[99] 42 U.S.C. §7675(e)(2)(A).

[100] 87 Fed. Reg. at 66,390. For example, EPA's Economic Screening Analysis, which examined the effect of the rulemaking on small entities, indicated incorrectly that "[a}ffected entities are not expected to experience any additional compliance or administrative costs associated with reporting and recordkeeping as a result of the rulemaking beyond that assumed in the Framework Rule." EPA-HQ-OAR-2022-0430-0006 at 10. This statement was made despite EPA proposing entirely new requirements.

[101] 87 Fed. Reg. at 66,387.

A. EPA Cannot Use the AIM Act to Require Expansive Reporting of Criteria and Hazardous Air Pollutants Regulated under the Clean Air Act.

EPA is proposing to "build on the one-time reporting requirement [in current regulations] and require annual reporting of the emissions from each facility's HFC production line emission units, specifically HAP, ODS and HFCs.[102] EPA also requests comments on whether it would be appropriate and feasible to require reporting on "each criteria air pollutant, and its precursors, for which EPA has established a National Ambient Air Quality Standard (NAAQS).[103] EPA states that it is considering several options to be included in the final rule, including continuous emission monitoring systems, stack tests, material balance, emission factors, or requirements contained in permits. EPA also seeks comments on whether fenceline monitoring should be required.[104] EPA lacks statutory authority under the AIM Act to finalize any of these requirements.

The AIM Act only contains explicit authority to regulate 18 listed HFCs and additional HFCs that may be listed in the future. The AIM Act contains no reference to hazardous air pollutants (HAPs) or any other air pollutants regulated under the authority of the (NAAQS) or their precursors. In addition, while the AIM Act references other Clean Air Act authorities in subsection (k), any authority conveyed by this provision is constrained by the condition that such authority applies "*as though [the AIM Act] were expressly included in title VI* of [the Clean Air Act]." Therefore, just as EPA has no authority within the AIM Act to impose requirements related to HAPs or NAAQS, neither does EPA possess authority within Title VI of the Clean Air Act to control such air pollutants. Title VI only extends to specifically defined class I and class II ODS.[105] Similarly, EPA lacks authority under the AIM Act to require the reporting of HAPs, criteria pollutants or non-ODS or non-HFC precursors to NAAQS.[106]

In the proposed rule, EPA mistakenly implies that subsection(k) provides that "section 114 of the CAA applies to 'any rule, rulemaking, or regulation' promulgated pursuant to the AIM Act."[107] While EPA notes that section 114 only applies "as though this section were expressly included in title VI of [the Clean Air Act]"[108] the Agency does not discuss how this statutory language acts to explicitly limit the reach of EPA's AIM Act authority. Rather, EPA posits that it may exercise section 114 to "address disproportionate impact associated with the HFC phasedown" without limitation.[109] This is incorrect.

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[102] *Id*. at 66,390.

[103] 87 Fed. Reg. at 66,391-2.

[104] *Id.* at 66,391.

[105] CAA section 602.

[106] "The term 'regulated substance' means . . . a substance listed in the table contained in subsection (c)(1); and . . . a substance included as a regulated substance by the Administrator under subsection (c)(3)." 42 U.S.C. §7675(b)(11). Pursuant to section 103(c)(3) of the AIM Act, EPA may only designate a substance not included on the table of 18 HFCs if that substance is a saturated hydrocarbon with an exchange value greater than 53. To date, EPA has not added any additional HFCs as regulated substances under this provision. See also *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120 (2000). The existence of other legislative acts specifically addressing HAPs and NAAQS bears directly on the issue of whether the AIM Act authorizes EPA to regulate such substances.

[107] *Id.*

[108] 42 U.S.C. §7675(k)(1)(C).

[109] 87 Fed. Reg. at 66,391.

EPA's analysis of its legal authority pursuant to the CAA section 114 cross-reference is not accurate for several reasons. First, as noted above, title VI of the Clean Air Act does not convey authority over HAPs or NAAQS. Second, to the extent that title VI cross-references other authority, it only does so in relation to state laws and the Montreal Protocol.[110] Finally, AIM Act monitoring authority is contained within subsection 103(d) of that Act. This authority extends only to "periodic" reporting to EPA of amounts of *regulated substances* produced, imported, exported, reclaimed, destroyed, or used and entirely consumed in the manufacturer of other chemicals. No other monitoring authority is conveyed to EPA within the AIM Act that addresses either HAPs or NAAQS. EPA may not imply that Congress granted such authority in the absence of an explicit grant of this authority.[111]

On a more fundamental level, however, CAA section 114 contains authority for inspections, monitoring and entry with regard to specific, identified sections of the CAA, *e.g.*, regarding "the development of any implementation plan under section 110 or 111(d)." CAA section 114 is otherwise limited to "carrying out any provision of *this Act*," meaning the CAA.[112] Therefore, CAA section 114 does not extend to the AIM Act as if the AIM Act were specifically referenced or *included within* CAA section 114. The cross reference to CAA section 114 within the AIM Act that EPA cites (subsection (k)) is explicitly constrained, *i.e.*, the section applies "as though [the AIM Act] were expressly *included within title VI* of the Clean Air Act. EPA cannot ignore this statutory language nor read expansive new authority to regulate HFC facilities for non-HFC air pollutants where no such provisions are contained in the AIM Act.

To the extent that EPA attempts to justify any new monitoring and reporting of HAPs and NAAQS as related to the phasedown on HFCs, EPA cites only "policies, regulations and other decisions" as potentially being implicated.[113] It does not cite a basis in law apart from the reference to subsection (k). And EPA's primary rationale is that "data currently required to be submitted to EPA under different authorities are *not detailed or comprehensive enough*."[114] If that is indeed the case, then the proper avenue for EPA to act is within the context of its CAA authorities where such air pollutants are directly addressed, such as sections 107-110 and 112 of the CAA. It is not within the context of the AIM Act, legislation that was explicitly approved by Congress to lie *outside* the confines of the Clean Air Act.[115]

Finally, it may be observed that EPA would be acting to impose new requirements solely on domestic producers of HFCs and not with respect to HFCs produced outside of the United States. Thus, at minimum, EPA must assess the related economic burden of these new requirements – which it has not done – and the impact of such requirements on U.S. manufacturers relative to foreign competitors.

B. EPA Has Not Provided Sufficient Notice of Proposed Monitoring Requirements

[110] CAA section 614, 42 U.S.C. 7671m.

[111] See *West Virginia v. EPA*, 142 S.Ct. 2587 (2022). EPA needs to cite to "clear congressional authorization" for the regulatory provisions is promulgates. *Id*. at 2609.

[112] CAA section 114(a (emphasis added).

[113] 87 Fed. Reg. at 66,390, n. 45.

[114] *Id*. at 66,391 (emphasis added).

[115] The AIM Act amends no pre-existing law.

The proposed rule's sole explanation of new reporting requirements related to NAAQS and HAPs is contained in the preamble to the proposed rule.[116] EPA is indicating that it is proposing "to require annual reporting of the emissions from each facility's HFC production line emission units."[117] While EPA claims to have examined other sources of this data, such as the National Emissions Inventory or Toxics Release Inventory, documentation of this examination is not contained in the docket for this rulemaking to support the Agency's assertion that such data is inadequate. No reference is made to what data may or may not have been examined with respect to NAAQS and their precursors. Most importantly, while EPA indicates that it has considered a range of options, it has not articulated a proposed approach in sufficient detail, nor included any proposed regulatory language to amend 40 C.F.R. Part 84. This constitutes inadequate notice.[118]

A host of other issues are also apparent in this "proposal." EPA does not detail how any requirements may affect other permitting and reporting requirements that are applicable to a source, including the relationship of any proposed requirements to title V of the CAA. In addition, EPA seeks to take comment on "whether data listed in this proposal for additional reporting are already required under different authorities" yet at the same time references that each facility should report "HAP data initially identified in section 112 of the CAA."[119] These statements are contradictory and unclear. EPA also does not explain how it may require, under the AIM Act, data regarding emissions "initially identified in section 112 of the CAA" which provides a "initial list of hazardous air pollutants"[120] for potentially sources that are not subject to CAA section 112 because they are not "major sources."[121]

EPA should recognize that HFC manufacturing facilities in the United States are already extensively regulated and facilities must meet EPA Clean Air Act and Occupational Safety and Health Administration regulations as well as comply with state laws and permits. Prior to attempting to impose new requirements through the AIM Act, EPA must consider how such requirements can provide the necessary data needed to address enforcement concerns without adding duplicative reporting measures. It has not done so in the context of this rulemaking which makes only passing reference to having examined NATA and TRI data.

Finally, EPA indicates that it is seeking comment "to inform what option to finalize in order to allow for effective monitoring . . . that could be relevant if a future rule would be appropriate under the AIM Act, CAA or other authority to address any potential disproportionate impacts associated with the HFC phasedown."[122] The proposed rule, however, is to "amend existing regulations to *implement certain provisions of the American Innovation and Manufacturing Act*, as enacted on December 27, 2020."[123] EPA's failure to propose draft regulatory language,

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[116] 87 Fed. Reg. at 66,390-1.

[117] *Id*. at 66,390.

[118] "All data, information, and documents . . . on which the proposed rule relies shall be included in the docket on the date of the proposed rule." CAA section 307(d)(3). Note: AIM Act section 103(f) references CAA section 307 and the AIM Act does not otherwise contain any authority for EPA to require data regarding non-regulated substances.

[119] 87 Fed. Reg. at 66,391.

[120] CAA section 112(b)(1)

[121] CAA section 112(a)(1).

[122] *Id.* at 66,391.

[123] 87 Fed. Reg. at 66,372 (emphasis added).

conflation of statutory authorities and unclear articulation of its own authority in this proposed rule would render any final rule arbitrary and capricious.

VIII. EPA Should Not Finalize HFC Laboratory Testing and Sampling Requirements as Proposed.

Chemours opposes EPA's proposed language to define "laboratory testing" as the use of the sampling and testing methodology prescribed by a laboratory that is accredited to ISO 17025. Chemours also opposes EPA's suggested use of EPA Method 18 for non-refrigerant HFCs. In response to EPA's request for input on alternative options, Chemours proposes that EPA should also accept testing facility certification to include AHRI Certified Refrigerant Testing Laboratories or those in compliance as described in EPA's Quality Program-Related Regulations with higher-level quality standards which include overarching quality management system standards such as ISO 9001 and ISO/TS 16949. Taking this action would address EPA's desire to confirm that quality management systems are in place for both refrigerant and non-refrigerant HFCs with regard to both manufactured and imported regulated substances.

Chemours manufacturing and packaging sites are ISO 9001 certified which ensures that the sites operate under a standard Quality Management System. These standard Quality Management Systems include site laboratories, including instrument calibration, verification of test methods, QA/QC activities, testing and release of product, in-process testing, and verification of incoming materials. Calibrations are performed per a set calibration schedule with set tolerance limits for each type of instrument. In the instance that a calibration is not within set tolerance limit, a thorough investigation is performed to ensure that finished product quality was not affected. Instrument calibration standards and test equipment must also be traceable to international or national measurement standards per ISO 9001 requirements. Sampling and testing are performed per a set sample schedule for both in-process material and finished product. All analytical methods are validated and based on AHRI 700 test methods for Refrigerants. Test details for each method of analysis are at or above the requirements set forth in AHRI 700. Manufacturing and Sales specifications are documented for each product.

Conversely, Chemours notes that most of the "non-refrigerant" substances cited by EPA for possible analysis using EPA Method 18 are listed in AHRI Standard 34 and already have applicable methods in AHRI 700. For any non-refrigerant HFC produced by Chemours that might not be listed in AHRI 700, ISO 9001 certification confirms that sampling procedures, analytical methods, calibration procedures, manufacturing specifications and sales specifications are documented and followed. Further, EPA Method 18 applies to analysis of gaseous emissions and not pure substances. Chemours additionally notes that not all HFC sales specifications conform exactly with AHRI 700 (*e.g.*, SAE J2776 specifications for automotive HFC-134a allow a higher moisture level than AHRI 700). ISO 9001 tracks conformance with applicable manufacturing and sales specifications for the respective products.

Chemours manufacturing and packaging sites have significant training systems in place for laboratory personnel which ensure the competence of those performing instrument calibrations or QA/QC testing. Per ISO 9001, evidence of competence is retained documented information. And all of the above processes are audited both internally and externally per ISO 9001 requirements.

Therefore, these requirements should be more than sufficient for the purposes that EPA articulates within the proposed rule. EPA has itself recognized that higher-level quality standards include overarching quality management system standards such as ISO 9001 in the documents linked below:

Guidance for Developing Quality Systems for Environmental Programs (epa.gov)

https://www.epa.gov/quality/epas-quality-program-related-regulations

https://www.ecfr.gov/current/title-48/chapter-1/subchapter-G/part-46/subpart-46.2/section-46.202-4

IX. Chemours Supports Other Elements of the Proposed Rule

A. Chemours Generally Supports EPA's Proposals Regarding Request for Additional Consumption Allowances (RACA)

Chemours supports EPA´s intent to simplify and streamline the process for RACA requests. Chemours appreciates EPA's guidance and assistance in trying to resolve issues with RACA processing in 2022 as this was the first year of the program and had some technology challenges and uncertainties related to the documents needed to process submissions.

We believe that EPA's four additional proposed data points[124] can be determined and submitted for standard commercial export shipments by HFC manufacturers. This data may be more challenging to uncover, however, for downstream value-add partners exporting total flooding fire suppression systems ("fire system(s)"). In this situation, the HFC is typically exported as part of a larger package of the fire system, including the bulk system cylinders filled to the required amount with HFCs, system nozzles, detection and control panels, and other mechanical and electrical materials required for the installation of the fire system. These fire system materials are also at times combined with other unrelated materials and products needed by the destination customer. With multiple fire system cylinders containing varying quantities of HFC within a fire system shipment, this can make determining the specific total mass of HFC contained within the shipment difficult to determine from transport documents. Additionally, required confirmation of arrival at destination for fire systems would add significantly to the time required to complete and submit the RACA applications with no benefit for compliance to the AIM Act. Thus, Chemours believes such fire systems should be excluded from the additional documentation requirements that EPA has proposed.

With differing degrees of complexity, EPA should also consider different specific documentation requirements for the three primary means of the RACA request: (1) domestic producers who export bulk material; (2) importers who re-export bulk material; (3), and downstream value-add customers who export bulk materials as part of a fire system package.

[124] Internal Transaction Numbers, conveyance names, IMOs of the vessel carrying the export and container numbers as described. 87 Fed. Reg. at 66,397.

Chemours recommends that EPA modify the RACA application process for reporting exports of HFC blends (e.g., R-407C, R-410A, etc.) to remove the requirement for listing of blend components. Currently, AIM Act import and export quarterly reporting recognizes entries listing commercial HFC blends that have been assigned ASHRAE numbers. However, RACA request submissions ask for the blend to be listed as its HFC components, which has led to processing delays because all accompanying commercial invoice and shipping documents refer to the commercial HFC blend number, not the individual components. Reporting the HFC-containing Blend on the RACA, rather than the components, will match the supporting documentation provided for the RACA and accurately reflect the RACA request.

Finally, Chemours believes that requesting or requiring documentation from the destination country will add significant additional time to the collection of validating documents and RACA submittal, further lengthening the RACA process, rather than streamlining or accelerating it. Therefore, EPA should not finalize any requirements in this regard.

B. Chemours Supports EPA Interpretation of Ship Berthing as Time of Import

While Chemours has noted its disagreement with EPA's proposed requirements for "same day documentation of any allowances expended" requirements above, Chemours does support EPA's clarification with regard to the time of maritime import as constituting the "time of ship berthing."[125] Such an approach is consistent with the time of import for land-crossings and would serve to reduce uncertainty regarding this issue.

X. EPA Should Make Additional Changes in the Final Rule

A. EPA Should not Finalize Labeling Requirements as Proposed

EPA has proposed several changes to the labeling requirements contained in 40 C.F.R. §84.5(i)(1). Specifically, EPA is proposing to require a "permanent label" in place of a "label or other permanent marking" and to add additional specificity regarding labeling requirements.[126] EPA's expressed intent is to avoid an "easy swap out" of labels where an inspection is imminent and to dissuade improper importation of regulated substances. Chemours is sympathetic to EPA's intent to effectively enforce requirements regarding the importation of regulated substances. But Chemours does not believe that requirements for permanent labelling should be ubiquitous and would offer the following comments in response to EPA's request for any implementation challenges that could result from requiring a permanent label.

Chemours believes that permanent labelling on re-useable containers is impractical as the same isotank, tank trailer, ton tank or returnable cylinder can be used across multiple products. For example, when ton tanks or cylinders are returned the heels are often collected, the ton tank or cylinder is evacuated, and the ton tank or cylinder may then be repainted/labelled for a different product. This process is intrinsic to the efficient use of empty ton tank or cylinder

[125] 87 Fed. Reg. at 66,834.
[126] *Id*. at 66,396.

inventory. It allows returned containers to be processed and reused independent of the return and demand rate for each product.[127] The rate that this is necessary varies by product. For example, isotanks or tank trailers may be repurposed less frequently, but this may change as the market transitions to lower EVe products. Chemours repurposed a large portion of its U.S. bulk fleet from HFC-134a to HFO-1234yf when the U.S. automotive industry shifted their new vehicle refrigerant demand to HFO-1234yf. Non-refillable cylinders (type DOT 39) meet the permanent label requirement since these single use cylinders are silk-screened with the name of the product and then placed in a carton also showing the product name. Further, it is important to note that large bulk containers (isotanks, tank trailers, rail cars) do not have an affixed product label, relying instead on stenciling and placarding for product and hazard identification.

Chemours would therefore recommend that EPA not finalize the proposed changes to 40 C.F.R. 84.5(i)(1), but rather continue to review this matter with regulated parties. A blanket requirement to use permanent labels on all containers would result in considerable inefficiencies in the supply system for HFCs and most probably require additional expenditures for new, dedicated containers that could be rendered "obsolete" when market conditions change. EPA should instead engage in a dialogue with industry to help determine options that would ensure ease of enforcement with commercial market realities.

B. Reporting of Regulated Substances for Transformation, Destruction or Use as a Process Agent

We oppose the proposed daily reporting requirements – see comments provided in section VI. B.

C. EPA Should Allow a Standard Presumption for Heels, But It Should be Substantially Lower than 10%, the Correction Period Should Be At Least Three Weeks after Arrival and Its Use Should Not Be Limited

While Chemours supports EPA's proposal to specify requirements for the importation of heels (as clarified in footnote 31 of the proposed rule),[128] Chemours believes that the standard heel assumption should be substantially lower than 10%.

Chemours further recommends that EPA include the option of allowing the Importer of Record to submit an estimate of the quantity of heel imported using the standard heel default assumption, while allowing (but not requiring) that the estimated quantity may be corrected to match the exact amount of the imported HFC heel content within a reasonable period after date of import. It would be Chemours expectation that the standard heel weights for the advance notification filing for imports would primarily be utilized with respect to shipments of heels in ton tanks or cylinders as large containers (isotanks, tank trailers or rail cars) typically have measured weights. Also, while EPA proposes a two-week correction period, it is very unlikely that the smaller packages (ton tanks, cylinders) most likely to use a standard heel assumption

[127] We would note here that disposable cylinders are permanently marked and can only be used once for the product on the label. Since the disposable cylinders cannot be refilled, they provide protection from re-use or cross contamination.

[128] 87 Fed. Reg. at 66,383.

would be returned to the packaging site and weighed within two weeks after port arrival. Chemours recommends that the correction time period be at least three weeks to allow for Customs clearance and transport back to the packaging site. If no correction is submitted, the standard heel quantity assumption would become the official record for purposes of AIM Act requirements related to allowances.

In response to EPA's request for comment on whether to set limits for the number of times an importer could use the standard heel presumption or whether to limit the total quantity that could be eligible in a given shipment, Chemours believes such limits would be impractical and should not be included in the final rule. As noted above, we believe that use of assumed heel weights for import advance notification filing would primarily apply to shipments of heels in ton tanks or cylinders. In this situation, setting a limit on the number of containers or the number of times the presumption could be used could present a problem for some businesses or shipments where numerous small packages are involved. A total quantity limit or a limit on occurrences ignores weight differences between products. Therefore, promulgating a straightforward rule based on a standard heel % of the weight of the amount of that same substance that is typically sold in a "full" container of that size would be the easiest approach to implement, follow and enforce.

D. EPA Should Further Refine Requirements Related to Imports

EPA has proposed several amendments to 40 C.F.R. 84.5 with regard to the prohibitions related to imports. As noted above, Chemours supports requirements for a certificate of analysis but EPA should consider a practical way to electronically connect the COA to the shipment (e.g., including in ACE document submission) versus requiring that it physically accompany the shipment. Further, the analysis requirement at time of import should be focused on organic purity and composition as opposed to meeting the full AHRI 700 standard specification; this will serve to identify the regulated substances contained in the shipment without distracting authorities with less critical analyses such as moisture, residue, NAG, etc. Chemours also suggests that the COA requirement should not apply to heel returns as those containers holding only residue (e.g., those with net product weight less than the standard heel quantity) are not re-analyzed after use at their original export destination. EPA should additionally clarify that for imports, "origin" should be defined and documented as the "country of manufacture" for regulated substances, not the shipment point(s) before entry to U.S. Chemours would also suggest that EPA coordinate with the U.S. Customs and Border Patrol to require random sampling of imports in order to confirm that the substance being imported conforms to what is on the container label and that this is also consistent with relevant shipping documents including the suggested organic purity and composition analyses. Further, Chemours recommends that Shipper/Importer Names and Location claims of confidentiality be removed from Customs documents covering AIM Act regulated substances so the industry can more readily assist regulators and the inter-agency Illegal task force in monitoring for compliance.

XI. EPA Should Consider Additional Changes to the Final 2024-2028 Rule

A. EPA Should Address Market Share Gained Through Unfair Trade Practices

As Chemours indicated in its comments on the Framework Rule, several importers of HFCs produced in China used unfair trade practices to penetrate the U.S. market since 2013. These importers and their affiliates initially imported the most commercially significant HFC products, HFC blends such as R-410A and R-134a,[129] at unfairly low prices. When Commerce issued antidumping orders imposing corrective duties on the unfairly traded HFCs, various importers began circumventing the antidumping orders by importing "unfinished" HFC blends, blending in third countries, or importing unfairly traded HFC components (*e.g*., R-32 and R-125) for blending in the United States. The market share seized by these entities was based on unfairly traded imports that was the direct result of a persistent pattern of dumping, circumvention, and evasion of U.S. law. As a result, the U.S. manufacturers of HFCs suffered declining sales attributable to this conduct up to and during the period of time in which EPA is proposing to use as a basis for allowance allocations. We are again attaching a detailed accounting of these actions to these comments[130] as well as referring EPA to a newly updated analysis submitted into this docket by Cassidy Levy Kent on behalf of the American HFC Coalition .

We support all the recommendations outlined in this updated American HFC Coalition, December 19 report including: EPA should revoke or retire allowances awarded to importers that have been found to engage in circumvention of any of the various antidumping and countervailing duty orders covering HFCs, particularly those importers that continued to circumvent the orders after the AIM Act regulations became effective. EPA failed to respond to detailed comments concerning unfair trade practices in the Framework Rule. Instead, the Agency treated such comments as if they were general criticisms of the Agency's proposed allowance allocation methodology and that information was "unproven" even in the face of actions taken by the U.S. Department of Commerce.[131] Chemours asks EPA to take action regarding this issue either within the context of the pending proposed rule or through a supplemental rulemaking or in actions taken during future allowance allocations.

B. EPA Should Reexamine Issue of Not Requiring Allowances for Imported Products Containing HFCs

The Framework Rule requires allowances only for consumption of "bulk substances" and excludes from the consumption baseline HFCs that are contained in a product.[132] "Bulk" is defined as "a regulated substance of any amount that is in a container for the transportation or storage of that substance such as cylinders, drums, ISO tanks and small cans."[133] Thus, HFCs that are imported into the United States in anything other than a bulk container do not require that an importer hold a consumption allowance.

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[129] See *Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances;* 81Fed. Reg. 42,314 (June 29, 2016) *(Final Determination); Hydrofluorocarbon Blends from the People's Republic of China: Antidumping Duty Order*, 81 Fed. Reg. 55, 436 (August 19, 2016).

[130] A Brief History of Unfairly Traded Imports of HFCs from China, Cassidy Levy Kent, LLP, July 6, 2021 Attachment 2.

[131] *See* RTC at 143. Following extensive comments on anticompetitive behavior, EPA's response consisted of two sentences: "Discussion on how the Agency will determine allowance allocation levels can be found in Section VII.B of the final rule. EPA cannot factor unproven allegations in allocation decisions."

[132] 40 C.F.R. §84.5(b).

[133] *Id*., §84.3.

Chemours filed comments on this issue during the EPA's consideration of the Framework Rule and these are attached.[134] In general, Chemours believes that the concerns it expressed in 2021 are still valid and that EPA should reconsider this discrepancy as between how the Agency treats regulated substances produced in the United States – where EPA defines "production" to effectively includes all HFC produced that are not destroyed or subject to defined exceptions[135] -- versus the importation of products containing HFCs imported into the United States. Not only are allowances not required for the same HFCs contained in products imported into this country as they are for products manufactured with HFCs produced in the United States, but there is little assurance that when HFCs are produced by companies outside the United States, that rigorous accounting for HFC production similar to that applied by EPA for domestic producers is required.

C. EPA Should Consider Only Banning Imports of Filled, Non-Refillable Containers

Chemours filed extensive comments regarding the issue of requiring refillable containers for HFCs in connection with the Framework Rule. These comments are attached and incorporated by reference in these comments.[136] Despite receiving extensive comments concerning requirements to utilize refillable containers for the transport of bulk HFCs into the United States, EPA finalized requirement regarding the use of such containers while delaying the effective compliance date to January 1, 2025.[137] Chemours continues to believe that EPA should not implement a requirement for universal use of refillable containers. Instead, EPA should alter regulatory requirements to only ban the importation of *filled* non-refillable cylinders.

XII. Issues Concerning EPA's Compliance with the Paperwork Reduction Act and the Information Collection Request (ICR) for this Proposed Rule

As mentioned in the Introduction to these comments and throughout this document, Chemours has concerns with several reporting requirements outlined in the proposed rule.

A. Newly Proposed Requirements for Generation, Retention and Reporting of Daily Production and Allowances

EPA has proposed to define the term "expend" and to utilize this term to support recordkeeping and reporting provisions that involve daily accounting of production and allowances that are conveyed on an annual basis.[138] We do not believe that EPA has provided adequate justification for these requirements either within the proposed rule or the Part A Supporting Statement which has been filed in the docket for the proposed rule.[139]

EPA did not require such "same day documentation of any allowances expended" under the previous, successful Clean Air Act program to phase out ozone depleting substances (ODS)

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[134] Attachment 1 at 19-24.
[135] *Id*.
[136] *See* Attachment 1 at 32-38.,
[137] 86 Fed. Reg. at 55,175; 40 C.F.R. §84.5(h).
[138] Proposed 40 C.F.R. §84.3.
[139] OMB Number 2060-0734; EPA ICR Number 2685.03.

which served as a reference point for the AIM Act as enacted. And the previous ICR to implement the AIM Act provided justification for quarterly reporting *only*. Within the current supporting statement for the ICR, EPA offers only that it has authority to require reporting on a "periodic basis" but not less frequently than annually.[140] Additionally, EPA indicates that "less frequent than *quarterly collection* of data would compromise EPA's ability to meet statutory requirements under the AIM Act to monitor production, import, and export of HFCs and hinder EPA's ability to identify violations of the existing regulations"[141] but the statement makes no mention of EPA's justification for or proposal to impose *daily* requirements, nor does EPA appear to have fully analyzed these additional requirements.[142]

The AIM Act provides for annual HFC allowance allocations and U.S. producers and consumers[143] of HFCs must comply with these requirements which apply "[d]uring the period beginning on January 1 of each years . . . and ending on December 31 of the year before the next year."[144] Further, U.S. producers already have significant deterrents for production above the annual allowance levels and may be subject to substantial administrative consequences for misreporting.

As detailed in comments in previous sections, EPA's newly proposed requirements, which include a mandate to undertake and report "same day documentation of any allowances expended"[145] are overly burdensome and are not necessary to ensure compliance with the annual allowances levels in the AIM Act phasedown of HFCs. In addition, this requirement creates unnecessary and disproportionate burdens for U.S. producers vs foreign competition, without corresponding tangible benefits.

B. EPA's Proposal to Require Extensive Monitoring, Recordkeeping and Reporting of Air Pollutants that are not Regulated Under the AIM Act

EPA is proposing to require reporting of emissions from HFC production facilities for air pollutants that are not regulated under the AIM Act but are regulated under authorities contained in the Clean Air Act.[146] These newly proposed requirements do not appear to be contained within EPA's Supporting Statement contained in the docket,[147] nor is it apparent that EPA has: (a) described its authority to collect such data, (b) indicated the practical utility/users of the data, (c) addressed non-duplication, (d) adequately consulted with stakeholders, or (e) examined the

[140] 42 U.S.C.§ 7675(d).

[141] ICR Supporting Statement at 3 (emphasis added).

[142] In the Supporting Statement, references are made to "dated records" within producer recordkeeping requirements. *Id*. at 8. But such requirements are clearly different and not distinguished from EPA's proposal to "*add an obligation to the existing recordkeeping requirements* that producers and importers undertake same day documentation of any allowances expended." 87 Fed. Reg. at 66,389 (emphasis added). This requirement also requires additional certification of this "same day" obligation. *Id.*

[143] "Consumption" is a defined term within the AIM Act and essentially refers to "net imports" of HFCs.

[144] 42 U.S.C. §7675(e)(2).

[145] 87 Fed. Reg. at 66,389.

[146] 87 Fed. Reg. 66,930.

[147] The Supporting Statement references only "regulated substances" which are a term of art in the AIM Act. *See* 42 U.S.C. §7675(b)(11).

effects of less frequent collection.[148] Thus EPA has not justified either its need to collect such information, its statutory authority to do so, or the practical impacts of these novel emission recordkeeping and reporting requirements. Among other issues that we detailed in our comments in earlier sections, these requirements would create burdens for U.S. producers as compared with their foreign competitors.

XIII. **Conclusion**

When Congress approved the AIM Act in the final days of 2020, it assigned EPA a considerable task – to phasedown the production and use of HFCs in the United States using an allowance allocation and trading program. EPA successfully promulgated the Framework Rule in less than a year to meet the ambitious statutory deadline for action. EPA then allocated allowances for 2022 and 2023 on time, in compliance with statutory deadlines and is currently considering various technology transition petitions that have been filed with the Agency.

Now that the initial push to get the AIM Act "off the ground" is over and EPA is considering how to continue the phasedown of HFCs in the next five years, the Agency must carefully consider what actions are in line with the authority conveyed by Congress as well as which regulatory mechanisms are best suited to achieve the goals of the Act. Congress required EPA to implement the phasedown of HFCs using an allowance allocation and trading system based on exchange values, the relative GHG values of HFCs, no more and no less. Congress also expressed the importance of maintaining U.S. manufacturing and innovation in the area of bringing HFC substitutes to market. In determining how to implement the AIM Act's many provisions, EPA should keep these core directives in mind.

Chemours believes that the proposed rule contains important elements to continue our nation's progress in phasing down HFCs and supports many of EPA's proposed changes to the regulations contained in 40 C.F.R. Part 84. EPA has properly proposed to maintain the core elements of the allowance methodology it established in the Framework Rule. And EPA has proposed improvements with regard to the information required for the importation of HFCs, including how such imports are defined and documented. And EPA has learned from experience regarding RACA and proposed important refinements to facilitate successful implementation.

Concurrently in the same proposal, however, EPA should not attempt to exceed the regulatory grasp Congress conveyed to the Agency through enactment of the AIM Act. EPA has articulated no clear statutory basis for an auction or fee system for allowances and, frankly, there is none. EPA has also proposed new reporting requirements that are beyond the authority conveyed by the Act, which is centered on the control of 18 specific HFCs. This is not to say that EPA should not consider the broader impacts of its actions to implement the AIM Act, but that the Agency must always act within the authority conveyed by Congress. Chemours supports timely finalization of a proposed rule that stays within those boundaries.

[148] EPA's Supporting Statement, in all respects, appears to reference only regulated substances under the AIM Act, *i.e.*, 18 statutorily identified HFCs.

Attachments:

Attachment 1: Chemours Filed comments on Framework Rule, including all attachments thereto