Lawyer Insights

EPA Reversal of Refrigerant Requirements Is Good for Cos.

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On March 11, the U.S. Environmental Protection Agency completed an important rulemaking under Title VI of the Clean Air Act Amendments of 1990, revising its requirements applicable to the management of refrigerants in appliances and industrial process refrigeration.

The rulemaking corrects what the EPA states was an incorrect Obama-era interpretation of the Clean Air Act, that would have allowed the agency to issue sweeping and costly regulations for refrigerants that companies had invested in to alleviate the problem of ozone-layer depletion pursuant to the 1987 Montreal Protocol.

Almost immediately after the March final rule came out, legislators introduced bills in Congress to amend the Clean Air Act to provide the authority for the EPA to regulate the new refrigerants and phase them out altogether. These bills have stalled, not only due to the focus on COVID-19, but also due to concerns over the scope of authority the EPA would be given and what role states would play in regulation.

At the core of the controversy is whether the relevant provisions of the 1990 Clean Air Act Title VI amendments gave the EPA the authority to regulate climate change. These provisions were intended to implement the 1987 Montreal Protocol, a global agreement aimed at addressing the depletion of the ozone layer in the earth's atmosphere — but that does not, on its face, address climate change.

The ozone layer is a natural layer of gas in the upper atmosphere that protects humans and other living things from harmful ultraviolet radiation from the sun. Those of us old enough to remember will recall the alarm in the 1980s about the hole in the ozone layer, and the concern regarding aerosol cans that permeated the news cycle at that time.

The 1990 Clean Air Act amendments targeted what are called Class I (generally, chlorofluorocarbons or CFCs) and Class II (generally, hydrochlorofluorocarbons or HCFCs) substances used in certain refrigerants, as these ozone-depleting substances, or ODS, were the culprits in ozone layer depletion that the amendments were trying to combat.

Implementing these requirements successfully, the EPA ensured the phase-out of production of CFCs and HCFCs — the Class I and II substances. And, as required by Clean Air Act Section 608(a), the provision at issue in the new EPA rulemaking, the agency created a leak detection and repair program to make sure that if equipment was experiencing meaningful leaks of refrigerant, the leaks would be fixed in a timely manner to protect the stratospheric ozone layer.

Beyond the refrigerator in your kitchen and your home air conditioner, refrigeration equipment and effective refrigerants are important to our way of life in that they ensure the quality of manufactured products and processes, like plastics, printing, semiconductors, chemical, electronics and

pharmaceuticals. They are also important in other applications, like the baking and dairy industries, where they prevent harmful bacterial growth in food and milk as it heads to market.

In a perfect world, refrigerant would never actually enter the environment, but simply recirculate in the equipment itself. Large cooling equipment for a manufacturing plant can cost millions of dollars, so changing it over can be quite a costly endeavor, which is passed on as increased costs of goods for consumers.

With the phaseout of the ODS, Class I and II refrigerants were replaced with a different class of substitute chemicals, called hydrofluorocarbons, or HFCs. HFCs are not ozone depleters, but they do have global warming potential — i.e., they are greenhouse gases — so if released, they could exacerbate climate change.

Enter manufacturers of a new generation of refrigerants (and refrigerant equipment), which are purported to have the double benefit of not being ozone-depleters and having lower global warming potential. Manufacturers of these refrigerants petitioned the EPA to revise its regulations and to mandate the use of these new products.

And in 2015, the EPA proposed a regulation to regulate the HFCs just as stringently as it had regulated class I and class II refrigerants, a regulation the EPA finalized at the end of the Obama administration in 2016. It did so over the objections of numerous commenters who explained that regardless of whether controlling the HFC substitutes would be good policy, the statutory provision the EPA was relying on did not provide authority to regulate based on global warming potential, but rather was limited to ozone-depleting potential, and HFCs don't fit that criterion for regulation.

The EPA's new rule, while retaining numerous protections, makes clear that Congress did not authorize the regulation of these substitutes for Class I and II chemicals. The statutory language at issue specifically states that Class I and II substances — as ozone depleters — are to be subject to a comprehensive leak detection and repair program. However, it does not mention substitutes for those chemicals.

The EPA cites to both the text and structure of Section 608 in support of that conclusion, noting that while it did mention substitutes in other subsections of Section 608, it specifically declined to do so for the leak program. As the EPA puts it in the final rule:
If Congress had intended to convey authority to the EPA to promulgate the same, full set of refrigerant management requirements for substitutes as for ODS, it is reasonable to expect that Congress would have expressly included substitutes in sections 608(a)(1) or (2), as it did for section 608(c)—but it did not.

So what's at stake from an administrative law perspective? It is possible that certain participants in the rulemaking process leading to the final rule will seek to challenge it in court, claiming that the EPA did, in fact, have statutory authority to regulate these substitute substances.

The problem with what the EPA did in 2016 was that it interpreted a statutory provision directing it to establish a comprehensive leak repair program for Class I and II substances as being ambiguously silent on whether a comprehensive leak repair program was allowed for other substances. If Congress's failure to explicitly authorize regulation of one substance when it explicitly mandates it for another constitutes

ambiguity that gives an agency carte blanche to regulate, that is a very broad reading of the cases giving deference to administrative agencies, and would substantially diminish Congress's role.

Thus, the principle at stake here goes well beyond refrigerant regulation. For that reason, it will be useful to watch any litigation over this final rule, in view of the broader principle of whether a lack of explicit authority can be read by an agency to mean that the statute is ambiguous and gives that agency a roving license to regulate as it sees fit.

The EPA's new final rule states that it will stick to the statutory language, and in the scheme of regulation, companies should generally favor that outcome, even those who might have benefited economically from the 2016 final rule. In the meantime, legislation has been introduced seeking to provide the EPA with the authority to regulate HFCs that Section 608(a) did not provide back in 1990.

The bills currently introduced would also go even further, creating a new phase-down requirement and additional requirements. Engaging in the legislative debate is exactly what should happen here — rather than shoehorning in a new and costly program that Congress plainly did not authorize back in 1990.

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