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**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking and/or notice of public hearing that appeared in the **Federal Register** on Wednesday, January 6, 1999 (64 FR 805), announced that a public hearing was scheduled for Thursday, April 8, 1999, at 10 a.m., in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is proposed regulations under section 7701 of the Internal Revenue Code. The public comment period for these proposed regulations expires on Tuesday, April 6, 1999. The outlines of topics to be addressed at the hearing were due on Thursday, March 18, 1999.

The notice of proposed rulemaking and/or notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Tuesday, March 30, 1999, no one has requested to speak. Therefore, the public hearing scheduled for Thursday, April 8, 1999, is cancelled.

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*Chief, Regulations Unit Assistant Chief Counsel (Corporate).*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[FRL-6319-2]

RIN 2060-AH67

### Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** EPA is seeking comments on a variety of options for establishing an allowance allocation system to control the U.S. consumption of class II controlled substances, the hydrochlorofluorocarbons (HCFCs), in accordance with U.S. obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol). Under the Protocol, the United States is obligated to limit HCFC consumption (defined by the Protocol and this notice

as production plus imports, minus exports) under a specific cap, which will be reduced in a step-wise fashion over time. To ensure that the U.S. does not exceed this internationally mandated cap, EPA is presenting many options for establishing a future HCFC allowance allocation system. EPA is considering, among other things, an option where the allowance system would become effective only under certain conditions, i.e., once a specified percentage of the current U.S. HCFC cap has been reached or exceeded.

**DATES:** Comments on this advanced notice of proposed rulemaking must be received on or before June 4, 1999.

**ADDRESSES:** Comments on this advance notice of proposed rulemaking should be submitted in duplicate to: Air Docket No. A-98-33, U.S. Environmental Protection Agency, 401 M Street, SW., Room M-1500, Washington, DC 20460. The Docket is located in Room M-1500, First Floor, Waterside Mall at the address above. The materials may be inspected from 8 am until 4 p.m., Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

**FOR FURTHER INFORMATION CONTACT:** Vera Au, EPA, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205-J), 401 M Street, SW., Washington, DC 20460, (202) 564-2216 or the Stratospheric Protection Hotline at (800) 296-1996.

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#### I. Background

##### A. Montreal Protocol on Substances that Deplete the Ozone Layer

Signatory countries that are Parties to the international agreement called the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol), during their second meeting in London in 1990, identified hydrochlorofluorocarbons (HCFCs) as transitional substitutes for chlorofluorocarbons (CFCs) and other more destructive ozone-depleting substances. At the Parties' fourth meeting in Copenhagen in 1992, a detailed phaseout schedule for HCFCs (listed in Annex C, Group I of the Protocol) was created. At this fourth meeting, the Parties to the Protocol established a freeze level (a cap) on the consumption of HCFCs for industrialized countries (Parties governed by Article 2 of the Protocol). Consumption is defined by the Protocol as production plus imports minus exports. The cap on HCFC consumption for industrialized countries went into effect on January 1, 1996, and was derived from the formula of 3.1 percent (reduced to 2.8 percent at the seventh meeting of the Parties) of a Party's CFC consumption in 1989, plus the Party's consumption of HCFCs in 1989. This formula puts the current U.S. cap for HCFC consumption at 15,240 ODP-weighted metric tons. The Parties to the Protocol then created a schedule for the gradual reduction and eventual phaseout of the consumption of HCFCs by 2030. The Copenhagen Amendments to the Protocol call for a 35 percent reduction of the cap in 2004, followed by a 65 percent reduction in 2010, a 90 percent reduction in 2015, a 99.5 percent reduction in 2020, and a total phaseout in 2030. The U.S. must, at a minimum, comply with this phaseout schedule under the Protocol.

EPA was petitioned to phase out the most ozone-depleting HCFCs first. Upon

analyzing this approach, EPA determined that the U.S. could in fact meet, if not exceed, the required Montreal Protocol reductions by the specified dates. Therefore, the U.S., as authorized under the Clean Air Act, is implementing a different phaseout schedule, carried out on a chemical-by-chemical basis for HCFCs (58 FR 65018), which will meet or exceed the Montreal Protocol reductions required. U.S. implementation of the HCFC phaseout is described below in parts I.B and I.C of this notice.

#### *B. Title VI of the Clean Air Act Amendments of 1990*

The Clean Air Act Amendments of 1990 (CAA or the Act), under Section 605(c), originally required the Administrator to promulgate, by December 31, 1999, regulations phasing out the production, and restricting the use of, class II substances (HCFCs), subject to any acceleration of the phaseout of production under Section 606. Section 605(c) further states that the Administrator shall promulgate regulations to ensure that the consumption of class II substances is phased out and terminated in accordance with the same schedule. The original phaseout schedule established in the Act has since been accelerated as authorized under Section 606 and is outlined below in part I.C of this notice.

Section 605 of the Act established the original U.S. phaseout schedule for class II substances. Section 605(a) states that, "Effective January 1, 2015, it shall be unlawful for any person to introduce into interstate commerce or use any class II substance unless such substance: (1) Has been used, recovered and recycled; (2) is used and entirely consumed (except for trace quantities) in the production of other chemicals; or (3) is used as a refrigerant in appliances manufactured prior to January 1, 2020." Section 605(b) states that, "Effective January 1, 2015, it shall be unlawful for any person to produce any class II substance in an annual quantity greater than the quantity of such substance produced by such person during the baseline year. Effective January 1, 2030, it shall be unlawful for any person to produce any class II substance." This phaseout schedule has since been accelerated under authority of Section 606.

Section 606(a) specifically requires the Administrator to promulgate regulations, accelerating the phaseout of production and consumption of ozone-depleting substances, "if (1) based on an assessment of credible current scientific information (including any assessment

under the Montreal Protocol) regarding harmful effects on the stratospheric ozone layer associated with a class I or class II substance, the Administrator determines that such more stringent schedule may be necessary to protect human health and the environment against such effects, (2) based on the availability of substitutes for listed substances, the Administrator determines that such more stringent schedule is practicable . . . , or (3) the Montreal Protocol is modified to include a schedule to control or reduce production, consumption, or use of any substance more rapidly than the applicable schedule under this title."

Thus, Section 606 (a)(3) requires EPA to accelerate the phaseout to conform to any acceleration under the Protocol. In addition, Section 614(b) provides that in the case of a conflict between Title VI of the Act and the Protocol, the more stringent provision shall govern. The Parties to the Protocol, based on scientific evidence that losses of stratospheric ozone were occurring more rapidly than earlier believed, accelerated the phaseout of class I substances and established the phaseout schedule for class II substances at the Fourth Meeting of the Parties in Copenhagen in 1992. Pursuant to authorities provided by Title VI, EPA amended its regulations on December 10, 1993 (58 FR 65018) to provide for these accelerations. Targeting the phaseout set by the Protocol, EPA chose to phase out production and consumption of HCFCs on a chemical-by-chemical basis, beginning with those with the highest ozone depletion potential (ODP). EPA accelerated the phaseout of production and import of HCFC-22, HCFC-141b and HCFC-142b, the three HCFCs with the highest ODPs. Specifically, EPA's rule bans the production and import of HCFC-141b as of January 1, 2003. The production and import of HCFC-142b and HCFC-22 in excess of baseline allowances are prohibited effective January 1, 2010, except for the use in equipment manufactured prior to January 1, 2010. Beginning January 1, 2020, the production and import of HCFC-142b and HCFC-22 are banned. Production and import of the remaining HCFCs, in excess of their baseline production and consumption levels, will be prohibited beginning January 1, 2015, except as a refrigerant in equipment manufactured before January 1, 2020. All HCFCs will be completely phased out by January 1, 2030. EPA did not establish an allocation system for class II substances, as it did for class I substances.

Section 605(d) of the Act speaks to exceptions to the original phaseout schedule for HCFCs. Beginning in 2030, EPA can authorize up to 10 percent of the baseline per year for production of class II substances for medical devices considered essential by the U.S. Food and Drug Administration (FDA) and for which no safe and effective alternative has been developed and approved. EPA can authorize use of these quantities beginning in 2015 as an exception to the use restrictions contained in 605(a). EPA can authorize this limited amount of production and use, to the extent consistent with the Protocol, if FDA, in consultation with EPA, determines that it is necessary for use in these medical devices. In addition, beginning in 2015, and continuing up until 2030, EPA may authorize production of up to 110 percent of the baseline per year solely for export to and use in developing countries (Article 5 countries) that are Parties to the Protocol. This production is intended to be solely for the purpose of satisfying basic domestic needs of the importing developing country. Between 2030 and 2040, no more than 15 percent of the baseline can be produced annually for export to Article 5 countries. Section 605(d) does not permit any production for export to and use in Article 5 countries after January 1, 2040.

Per Section 602(b) of the Act, EPA published a list of class II substances in 40 CFR Part 82, Subpart A, Appendix B. All HCFCs fall into one grouping under class II ozone depleting substances, and, since publication of the initial list, no new class II substances have been added to the list.

Section 602(e) requires EPA to assign numerical values representing the ozone depletion potential (ODP) of all class II substances; and Section 602(e) further states that, "Where the ozone depletion potential of a substance is specified in the Montreal Protocol, the ozone depletion potential specified for that substance under this section shall be consistent with the Montreal Protocol." Annex A of this notice lists the ODPs for all class II substances as currently specified by the Protocol. Note that some of the ODPs listed under Annex A vary slightly from those listed under Appendix B to 40 CFR Part 82, Subpart A due to revisions of those ODPs under the Protocol since May 10, 1995. However, because this notice merely seeks comments and presents options, the future final rulemaking for the class II allowance allocation system will amend the list of ODPs currently presented in 40 CFR Part 82. Unless there are future revisions of the ODPs

for class II substances under the Protocol, entities involved in the HCFC market can expect to use the ODPs listed in Annex A of this notice for any ODP-weighted calculations that may be necessary as part of an HCFC allowance system.

Section 607(b) of the Act requires EPA to permit the transfer of any class I or class II allowances, within each group or class, on an ozone depletion weighted basis. In allowing transfers, under Section 607(a) of the Act, EPA must ensure that "the transactions under the authority of this section will result in greater total reductions in the production in each year of class I and class II substances than would occur in that year in the absence of such transactions." In other words, transfers cannot be made at a 1:1 ratio. In the class I regulations, an offset of one percent was required in any transfer to accomplish the environmental benefit required by Section 607. Those transfer requirements are set forth in 40 CFR Part 82, Subpart A, Section 82.12 (60 FR 24970, May 10, 1995). Transfer of class II allowances between entities and interpollutant transfers on an ODP-weighted basis, along with an appropriate offset, are addressed under II.E of today's notice.

Section 616 of the Act states that the U.S. may transfer allowances to another Party, under certain conditions. Few countries currently have a system in place for allocating, trading and expending HCFC allowances. As discussed in today's notice, differences exist between the manners in which the Protocol and the U.S. have structured their respective HCFC phaseout systems. Nevertheless, a trading regime similar to that implemented by EPA for class I international trades (40 CFR 82.9, 82.10) (60 FR 24970, May 10, 1995) could work effectively for class II trades. One possible such system is outlined in II.E.6 of this notice.

Reporting requirements mandated in Section 603 relative to HCFCs are currently in place in 40 CFR 82.13(n). Additional reporting requirements will likely accompany the implementation of a class II allowance allocation system.

## II. Options for Establishing an HCFC Allowance System

Section 607 of the Act requires EPA to issue allowances for the production

and consumption of class II substances. With this notice, EPA is putting forth options as to how such an allowance system could be established. The allowance system must ensure that U.S. consumption of class II substances does not exceed the cap agreed to under the Protocol (currently at 15,240 metric tons but will be reduced over time).

For the class I substances, EPA considered many methods for achieving the required reductions that were agreed to under the Protocol. The approaches distinguished between economic incentives and engineering controls or bans. EPA concluded that the most equitable, least costly and easiest system to administer for achieving the Protocol's required reductions for class I ozone-depleting substances was a marketable allowance system. EPA established such a system. The system proved highly successful and by January 1, 1996, the production and import of class I substances were completely phased out (but for narrow exemptions granted by the Parties to the Protocol) with minimal economic impact.

Unlike the class I allowance system, however, EPA is considering an approach whereby an allowance system for class II substances would only become effective if a certain threshold (i.e., a certain percentage of the total U.S. cap for class II substances) were reached or exceeded.

### A. Allowance Allocation System to Control HCFC Consumption in the United States

#### 1. Type of Allowances

a. *Production Allowances and Consumption Allowances for Class I Controlled Substances.* Under the control system for class I substances, EPA created a unit of measure called an allowance (see 40 CFR 82). An allowance, for a class I substance, represents the marketable rights and privileges granted to a company to produce or import a specific quantity of that class I substance. Under the class I allowance program, there were two types of allowances: production allowances and consumption allowances. One allowance in the regulatory program for class I substances was equal to one kilogram of either production or consumption of a substance, depending on the type of allowance.

Under the class I phaseout regulations, a company was required to expend both production and consumption allowances to be able to produce. To be able to import a class I controlled substance, a company was required to expend consumption allowances (See 40 CFR 82.4). After proper documentation was presented to EPA reflecting an export of a class I controlled substance, consumption allowances were refunded or returned to the exporting company (See 40 CFR 82.10).

b. *Options for Allowances for Class II Controlled Substances.* EPA is considering, and seeking comment on, the following options for class II allowances. One option for a class II allowance system would be to follow the structure established for the class I substances. To produce, a company would expend both production allowances and consumption allowances for a specific quantity of a class II controlled substance. To import, a company would expend consumption allowances for a specific quantity of a class II controlled substance. An exporter of class II substances would be able to obtain consumption allowances by providing documentation indicating the quantity of substance exported abroad.

A second option for a class II allowance system would be to operate the system using only one kind of allowance, which could be applied equally for production, imports and exports. This means that such an allowance (hereafter referred to as "class II allowance") could be applied to any element of the formula for consumption (consumption = production + imports - exports). Producers and importers alike would be allocated class II allowances according to baseline calculations. To produce, a company would expend class II allowances for a class II substance. To import, a company would expend class II allowances for a class II substance. Upon export, a company would receive class II allowances for the quantity of a class II substance exported. Essentially, allocation and expenditure of allowances under this system would differ from the class I system in that only one allowance would be allocated and expended for production. For example:

Activity	Class I allocated/expended	Class II allocated/expended
Production .....	production & consumption .....	class II allowance.
Import .....	consumption .....	class II allowance.
Export .....	consumption returned .....	class II allowance returned.

## 2. Unit of Measure for Allowances

Allowances can be accounted for in a variety of ways. They can equal any quantity one assigns to them, calculated by any workable measure. In the class I allowance system, EPA assigned each allowance a value of one kilogram of a class I substance. To produce or import, allowances were expended similarly, by kilograms. Since each chemical has its own ODP, any trades that took place between class I chemicals took into account the difference in ODPs, weighting the resulting allowances accordingly.

Due to the aforementioned differences in ODPs among chemicals, another possible measure for an allowance is an ODP-weighted unit (ODP x kilogram), tied to no specific chemical. EPA is considering, and seeking comment on, both an absolute allowance allocation by kilogram (which is chemical-specific) and an ODP-weighted allocation system (which is also allocated in kilograms but not chemical-specific). With this notice, EPA is exploring both options but attempts below to illustrate what the advantages and disadvantages of each system may entail.

*a. Absolute Kilogram Allowances on a Chemical-by-Chemical Basis.* One option for assigning a value to class II allowances would be to allocate them on an absolute quantity (kilogram) basis, as was done in the class I allocation system. In such a system, one kilogram of an HCFC would correspond to one allowance. In this absolute system, one would track the production, import or export of a specific chemical on a kilogram basis.

If trades were to occur between different class II substances in a system where one allowance equals one kilogram, any difference in ODP between the substances would have to be factored into the exchange, as was done with transfers and trades among class I substances (See Section 607(b)(1) of the Act). A brief example of such transfers is described below, but further options related to, and a more thorough explanation of, transfers are discussed in part II.E of today's notice.

To better illustrate how an absolute allowance system would function, take for example, Company A, which produced 1000 kilograms of HCFC-141b and 550 kilograms of HCFC-22 in its baseline year. Under an absolute allowance system, Company A would be allocated 1000 allowances for HCFC-141b and 550 allowances for HCFC-22. To produce 70 kilograms of HCFC-141b, 70 allowances would be subtracted from 1000, leaving Company A with 930

kilograms or allowances of HCFC-141b. If Company A wanted to produce more than 1000 kilograms of HCFC-141b, it could trade with another holder of HCFC-141b allowances or transfer its own HCFC-22 allowances to HCFC-141b allowances, taking into account the difference in ODP between the two substances. In this case, if Company A wanted to produce 200 additional kilograms of HCFC-141b, it could, through an intra-company transfer, shift the appropriate number of HCFC-22 allowances that, accounting for ODP differences, would represent the equivalent of 200 HCFC-141b allowances. Therefore, Company A would exchange 400 HCFC-22 allowances to add 200 HCFC-141b allowances, since the ODP of HCFC-22 is 0.055 and the ODP of HCFC-141b is 0.110. Similarly, Company A could have purchased 200 allowances of HCFC-141b or 400 allowances of HCFC-22 from some other allowance holder.

It is important to note what would occur under an absolute allowance system when various phaseout dates become effective. In 2003, for example, when the ban on production and importation of HCFC-141b takes effect (See 40 CFR section 82.4), entities with HCFC-141b baseline allowances, measured in kilograms, would no longer be authorized to produce or import HCFC-141b. Essentially, these entities would receive zero percent of their baseline allowances on January 1, 2003. The same would occur when other individual phaseout dates (e.g., for HCFC-22 and HCFC-142b in 2010) become effective.

In 2004, under the Protocol, the U.S. is required to reduce its current HCFC consumption cap (15,240 ODP-weighted metric tons) by 35 percent. At this time, every entity still holding HCFC baseline allowances may receive 65 percent (or 35 percent less) of their remaining HCFC baseline allowances.

Administratively, an absolute allocation system based on kilograms may be advantageous for its simplicity. Both for the regulated entities and EPA, an absolute system would afford greater ease, clarity, and predictability. Holders of absolute allowances would report their transactions in kilograms of each chemical. To determine future regulatory actions, EPA needs to keep a running tab on market supply and demand of the various chemicals. EPA is much better able to track which companies are expending which allowances for which chemicals if EPA carries out the calculations involving trades and expenditures, and then tracks the absolute quantities of each chemical.

EPA is also obligated to report to the United Nations Environment Programme (UNEP) annually on U.S. production and importation on an absolute basis for each individual substance. Producers and importers have been operating and reporting under the class I absolute allocation system for many years, and are familiar with the necessary calculations, reporting forms, and tracking requirements. Therefore, any additional administrative burden of adopting a similar system for class II substances may be minimal for the regulated community. Consistency between the class I and potential class II systems would present a significant advantage. Under an absolute system, flexibility would not be compromised, due to the trading opportunities that can be established. EPA requests comment on the advantages or disadvantages of an absolute allocation system.

*b. ODP-Weighted Allocation.* Another means of allocating allowances is through an ODP-weighted system, whereby each allowance holder's allocation would be calculated according to the numerical value of the ODP associated with each chemical in the allowance holder's baseline year(s). In this case, the ODP weight of each HCFC becomes the meaningful variable and companies would be allocated an aggregate number of ODP-weighted (ODP x kilogram) units. For example, a company that produced 1000 kilograms of HCFC-142b in the baseline year(s) would be allocated 65 ODP-weighted allowances because HCFC-142b has an ODP of 0.065. Likewise, if this same company imported 1000 kilograms of HCFC-22 during the baseline year(s), they would also be allocated 55 ODP-weighted allowances (HCFC-22 has an ODP of 0.055). Thus, the company would have a total of 120 ODP-weighted allowances. The company would be able to expend the 120 ODP-weighted allowances by producing or importing any class II controlled substance or combination of class II controlled substances that it chooses, as long as the weighted total (kilogram x ODP) does not exceed the number of allowances. For example, the company could expend all of the 120 ODP-weighted allowances to produce 2,181 kilograms of HCFC-22. Alternatively, the company might expend the 120 ODP-weighted allowances to produce 6,000 kilograms of HCFC-123 (ODP = 0.02), or 1,091 kilograms of HCFC-141b (ODP=0.11). Under this system, intra-company transfers would not be necessary; inter-company trades would be in increments of ODP-weighted units.

The ODP-weighted allowance system may be viewed as more advantageous to regulated entities. Altering patterns of production and importation in response to market changes could be done more easily, and the offset required for intra-company transfers under an absolute kilogram allowance system would not apply, simply because there would be no actual transfer of allowances within a company where ODP units are concerned. The offset would still apply to inter-company trades because allowances would in fact be trading hands.

Under an ODP-weighted allowance system, however, complex calculations would be necessary by the reporting companies to arrive at the total quantity of class II substances produced or imported during the reporting period. For each chemical, the number of kilograms would have to be multiplied by its ODP and compared to the number of ODP-weighted allowances. Blends would present an additional complication by requiring a calculation of the percentage of each HCFC in a substance (e.g., R-401A), at each applicable ODP, and including that in the total reported ODP produced or imported for a quarter.

When the first phaseout date becomes effective in 2003 for HCFC-141b, under an ODP-weighted system, an entity participating in the HCFC-141b market would no longer receive the amount of ODP-weighted allowances associated with that entity's ODP units of HCFC-141b produced and/or imported in the baseline year(s). The same would be true for subsequent phaseouts. Complications come into play, however, when ODP-weighted allowances have been transferred on a permanent basis; that is, when a company actually trades baseline allowances. Where baseline trades (discussed more in part II.E.4 of this notice) have been made, adequately tracking ODP-weighted class II substances from one holder to another becomes very difficult. This is extremely important at each phaseout, to determine who holds the baseline allocation of the chemical being phased out.

EPA seeks comments on the viability of an ODP-weighted allowance system as presented above. Though presented as a possible option, EPA recognizes the many difficulties that could emerge with an ODP-weighted system (e.g., monitoring chemicals that have been produced or imported with traded allowances; reporting to UNEP the absolute quantities of all class II substances in kilograms). An ODP-weighted allowance system would also

possibly be in conflict with Section 605(b)(1) of the Act, which states that, "Effective January 1, 2015, it shall be unlawful for any person to produce any class II substance in an annual quantity greater than the quantity of such substance produced by such person during the baseline year." This is because ODP-weighted allowances could be shifted within a company and thus allow that company to produce a greater quantity of a class II substance than in its baseline. (Such an intra-company transfer of allowances is discussed below in part E of this notice.)

#### *B. Method for Distributing Allowances*

EPA is required, under Section 607 of the Act, to issue allowances for the production and consumption of class II substances. There are a variety of methods for allocating allowances and EPA seeks comments on these options. First, EPA is considering allocating allowances for the full time period until the complete production and importation phaseout for all class II substances (currently 2030), taking into account both accelerated phaseouts for individual chemicals (e.g., those for HCFC-141b, HCFC-22 and HCFC-142b) and the step-wise reduction of the consumption cap as mandated under the Protocol. This allocation of allowances was the method followed in the regulatory program for class I substances. For class I substances, a quantity of allowances was allocated to listed companies as a baseline in the **Federal Register**. Allocating allowances for the full time period until a particular phaseout date provides certainty and stability for the market. Assuming the regulatory program includes smooth procedures for trading allowances, the full-term allocation of allowances establishes the basis for a "marketable permit" system.

The second option being considered is a system for re-calculating and re-allocating allowances on a "rolling basis." This would essentially move the baseline forward in time so that the baseline would always be the most accurate reflection of the current HCFC market. Under this option, EPA would review data on the production, import and export of HCFCs on some periodic basis, establish a new baseline for each entity, and re-allocate the allowances accordingly. A re-allocation of allowances may require an amendment to the original list in the regulation of entities with their respective baseline allowances. Alternatively, an administrative mechanism could be established to re-allocate allowances automatically at regular intervals.

However, if the regulatory system includes smooth procedures for trading allowances, shifts in demand and changes in market share could be addressed by individual companies, thus obviating the need to re-allocate allowances. Identifying the appropriate length of time for periodic review and re-allocation of allowances would be important, especially given both the existing phaseout schedule for specific HCFCs and the step-wise reduction of the HCFC consumption cap over time. Likewise, the length of time for periodic re-allocation of allowances may depend on the definition of a trigger mechanism for making the final rule effective, which is discussed in II.H of this notice. For example, instead of establishing specific years for the re-allocation of allowances (e.g., 2000 and 2002), the re-allocation could be linked with the trigger mechanism, so that re-allocation of allowances would occur, say, 2 years and 4 years after the allowance system becomes effective.

A final option would involve allocating allowances on a year-by-year basis. However, this would generate a large administrative burden for both EPA and those who produce, import and export HCFCs. The ability of those producers, importers and exporters to plan for the longer term would also be hampered.

EPA is seeking comments on all of the aforementioned options for distributing allowances.

#### *C. Establishing an Equitable Baseline for Distributing Allowances*

In developing the regulatory program for class I controlled substances, EPA collected information on the amounts of each class I substance produced, imported and exported during a given calendar year. EPA collected the data by publishing two notices in the **Federal Register** under authority of Section 114 of the Act (52 FR 47489 (December 14, 1987) and 55 FR 49116 (November 26, 1990)). The data requested from U.S. companies included reports on production runs, quantities of feedstock chemicals used in production, bills of lading, invoices, and other documents for a specific calendar year. The data submitted to EPA was used to assign company-specific production and import rights (allowances) to companies.

EPA is considering, and seeking comment on, many options for establishing a baseline for HCFC allowances. Consistent with the procedures associated with class I controlled substances, EPA will likely use historical information regarding a

company's activities to establish the baseline for class II allowances. EPA is considering following the same procedures used for establishing the baseline for class I controlled substances, including the publication of a Section 114 notice requesting specific information.

Options for establishing the actual baseline allowances for class II controlled substances are represented by a spectrum of choices, including using historical information from one year, from an average of multiple years, or using a formula for combining multiple years. At the extremes, EPA is considering historical information from 1989 or 1997, and many variations in between. EPA believes that the process of establishing the baseline should take into account, inter alia, the agreements by the Parties to the Protocol to control and phase out class II substances, the signing of the Clean Air Act Amendments of 1990 into law, the publication of regulations under Title VI of the Act governing the phaseout of class II substances, and the development of the current HCFC market in the U.S. EPA is seeking comments on the various options discussed below, as well as any other ideas for establishing an allocation baseline.

One option EPA is considering for establishing the baseline for class II controlled substances is historical information from one year. Collecting documents and information from companies for one year of activity would be less of an administrative burden for both EPA and the companies than if EPA were to collect information for more than one year. Another option EPA is considering is using data from multiple years to establish the baseline for class II substances. EPA is considering using historical information from consecutive years and averaging the data. EPA is also considering averaging historical data from non-consecutive years to establish the class II baseline. Calculating baseline allowances for class II substances by using a weighted average of multiple years is also being considered. For example, using a number of either consecutive or non-consecutive years within the time frame 1989–97, EPA would first calculate the production and importation for each. Then, after deciding upon the relative importance of each of those years regarding production and importation quantities, EPA would weight each year accordingly and make the baseline calculation to reflect the weighted average of those years. Once the option for determining the baseline is chosen,

EPA believes that steps to ensure accuracy of historical data will be of utmost importance. Any baseline calculation involving multiple years will have to be reconciled with the definition of "baseline" in Section 601(2) of the Act, which states that the term "baseline year" means "a representative calendar year \* \* \* in the case of any class II substance."

Another option EPA is considering for establishing a baseline is to use different years for establishing each HCFC's individual baseline. As an example, EPA might consider using one particular year (or years) to establish the baseline for HCFC-141b and a completely different year (or years) for establishing the baseline for HCFC-22 and HCFC-142b. In this example, EPA might consider using yet another year (or years) for establishing the baseline for all remaining HCFCs. Using this type of approach, and linking it with the options discussed above, EPA might choose the average of multiple years for one HCFC and a formula for establishing the baseline for another HCFC.

It is important to note that, under any scenario, when the phaseout date for HCFC-141b is reached in 2003, all HCFC-141b consumption (production + imports – exports) will cease. Those who did not participate in the HCFC-141b market will not be affected in 2003. However, those who did participate in the HCFC-141b market—through, for example, producing or importing HCFC-141b—would no longer receive any allowances associated with their historic HCFC-141b activity, and thus any authorization to produce or import HCFC-141b. Likewise, any company that, through a baseline trade, received allowances associated with historic HCFC-141b would no longer receive any allowances associated with the baseline trade in 2003.

In 2004, when the Protocol requires that the HCFC consumption cap be reduced from its current level by 35 percent, all remaining allowance holders may be affected. At that time, all allowance holders may receive up to 35 percent less of their remaining HCFC baseline allowances (all HCFC allowances minus HCFC-141b allowances).

#### *D. Percentage of Allowances Distributed Under U.S. HCFC Consumption Cap*

EPA is considering, and seeking comment on, whether to allocate the total number of allowances (the total quantity of ODP-weighted HCFC consumption) available to the U.S. under the cap as established by the

Montreal Protocol. As discussed in part I.A of this notice, the current U.S. cap for HCFC consumption is 15,240 ODP-weighted metric tons, based on the formula of 2.8 percent of CFC consumption in 1989 plus the consumption of HCFCs in 1989. Today's notice considers an allocation of allowances equal to 100 percent of the 15,240 metric tons. This would, however, in the event of some violation of the allowance system, provide no cushion for error, thus risking violation of the U.S. cap. This risk could demand that EPA request information and monitor more often and in greater detail.

EPA is also considering, and seeking comment on, an allocation of some percentage less than the full quantity of the cap. In this scenario, consideration is given to potential violations of the allocation system by leaving enough unallocated class II allowances to cover any overage. In this case, the U.S. would not violate the cap as a consequence of a violation of its allocation system. EPA is seeking comment on the necessity of providing a safe buffer below the HCFC cap; the percentage to be allocated if less than 100 percent is warranted; and on the possible size of errors in the reporting of production and import data that could occur in a control period.

Related to the discussion above is the issue of how to allocate the remaining class II allowances falling between the U.S. cap (potentially allowing for some margin of error) and the selected baseline (discussed in II.C of this notice). For example, if the year 1996 were chosen as the baseline, this would represent about 82 percent of the U.S. cap, thus leaving open the question of how to allocate the remaining 18 percent, and if all of the remaining 18 percent should be allocated. This remaining percentage, or a lower percentage that would provide for a margin of error, could simply be added to the allocated baseline allowances, to be distributed on a pro rata basis. The entire amount, then, would be allocated in the form of allowances to those companies that participated in the HCFC market in the baseline year(s). Such a system would provide certainty in how the allowances would be allocated.

Depending on the baseline year(s), another possible option would be to allocate some portion of the remaining percentage (in our example some portion of the 18 percent) to those companies whose historic HCFC activity is not well represented by the baseline year(s), such as new companies that may have entered the HCFC market after the baseline year(s).

### *E. Transfers of Class II Allowances*

In establishing the regulatory allowance program for class I controlled substances, EPA included provisions that permitted the transfer of allowances. The provisions for trades and transfers of class I allowances are in § 82.9, § 82.10, § 82.11 and § 82.12 of the final rule published in the **Federal Register** on May 10, 1995 (60 FR 24970). Today's notice describes the many different types of transfers permitted for class I allowances, as well as other variations. EPA is seeking comment on how these variations and options could apply to the transfer of class II allowances.

Under the current class I regulatory program, EPA is required to process the transfer of allowances within three working days from when EPA receives the request for an inter-pollutant or inter-company trade. Companies fax the request for a trade to EPA and within three working days EPA faxes a reply showing the new balance of unexpended allowances (See 40 CFR 82.12(a)(1), (b)(4)).

#### 1. Transfers Within Groups of Class II Substances

To facilitate transfers among class II substances, EPA is permitted, under Section 607(b)(3) of the Act, to establish groups of class II substances. Under such a framework, inter-pollutant transfers of allowances would be limited to chemicals within an assigned group. Class I controlled substances are listed in the Act in groups, and inter-pollutant transfers of class I allowances are restricted to the specific groups. For example, CFC-11 and CFC-114 are listed in the Act as being in class I, Group I and all the halons are listed in class I, Group II. Inter-pollutant transfers of allowances can occur among CFCs in Group I and among halons in Group II, but transfers of allowances cannot occur between the two groups. One option for class II substances might be to establish class II groups based on each chemical's ODP. Another option might be to establish class II groups based on the U.S. phaseout dates for class II substances. EPA requests comment on the concept of grouping class II substances and the possible groupings themselves.

#### 2. Inter-Pollutant Transfers

Section 607(b) of the Act states that inter-pollutant transfers shall be permitted. An inter-pollutant transfer is the transfer of an allowance of one substance to an allowance of another substance on an ODP-weighted basis. As an example, under the class I system, a

company would transfer allowances for CFC-12 to allowances for CFC-115, taking into account ODP differences between the two chemicals. If a company wanted to transfer 1000 kilograms of their CFC-12 production allowances to CFC-115 production allowances, paperwork would be submitted with the following calculation: the 1000 kilograms of CFC-12 allowances are multiplied by the ODP of CFC-12 (1.0) and then divided by the ODP of CFC-115 (0.6), yielding 1667 kilograms of new CFC-115 production allowances. Inter-pollutant transfers are sometimes called intra-company trades because a company might shift allowances internally from one substance to another to react to shifts in demand. Inter-pollutant transfers of allowances were fairly common for class I controlled substances. There were more than 40 inter-pollutant transfers for class I substances each year from 1992 through 1995.

For class II substances, an example of an inter-pollutant transfer would be a transfer of 10,000 kilograms of HCFC-142b allowances to HCFC-141b allowances, which would result in 5,909 kilograms of HCFC-141b allowances because of the adjustment for the ODPs of the two chemicals (which does not take into account the required offset for transfers as discussed in II.E.7 of this notice). If the class II allowance system were to distribute allowances on an ODP-weighted basis, however, there would be no need to include provisions for inter-pollutant transfers.

#### 3. Inter-Company Transfers

Another example of trades of class II allowances that EPA must permit under Section 607(c) of the Act are inter-company transfers. Inter-company transfers are trades of allowances, for the same substance, from one company to another company. Under such a system, Company A would simply transfer its allowances of a class II substance to Company B who wishes to have more allowances of that particular class II substance.

#### 4. Inter-Pollutant Transfers Combined With Inter-Company Transfers

Both inter-company and inter-pollutant transfers could be combined in the same transaction for class I controlled substances, and EPA is considering allowing the same combined system for class II substances. As an example of how this worked under the class I system, Company A would trade 35,000 kilograms of CFC-11 allowances to Company B who

needed allowances to produce CFC-115. In the information submitted to EPA, the two companies would agree that Company A would deduct 35,000 allowances for CFC-11 from its balance and Company B would receive 58,333 kilograms of CFC-115, due to the ODP difference between the two chemicals. (An additional one percent offset would also be required in this calculation as discussed in II.E.7).

Under this combined system for class II substances, a company that wishes, say, to increase its production of HCFC-141b before the 2003 phaseout could (1) re-distribute its own allowances that have been allocated for another class II substance to HCFC-141b (an intra-company/inter-pollutant transfer); (2) purchase more HCFC-141b allowances from another company (an inter-company transfer); or (3) purchase more allowances from another company of a substance other than HCFC-141b (an inter-company/inter-pollutant transfer). Any inter-pollutant transfer would account for differences in ODP.

#### 5. Transfers of Current-Year Allowances

EPA is considering approaches for permitting transfers of current-year allowances for class II controlled substances. A transfer of current-year allowances means the allowances being traded can only be expended for production or import in that specific control period, or calendar year. Transfers of current-year allowances do not change the quantity of actual baseline allowances assigned to a company. A trade of current-year allowances is a one-time trade, only reflected in a company's balance of allowances for that control period in which the trade occurs. Trades of current-year allowances were permitted in the class I regulatory program. From 1992 to 1995, many companies took advantage of the opportunity to trade current-year allowances for class I controlled substances. As an example, a company might make an inter-pollutant trade from their unexpended CFC-11 allowances to their CFC-114 allowances in order to respond to greater market demand for CFC-114 in that particular year. Another example would be Company A purchasing allowances from Company B, because Company A wants to import CFC-113 sometime during that control period. EPA seeks comment on current-year allowance transfers.

#### 6. Permanent Transfers of Baseline Allowances

EPA is considering the merits of permitting transfers of baseline allowances for class II substances. A



transfer of baseline allowances is a permanent shift of some quantity of a company's baseline allowances to another company. The permanent nature of the transfer of baseline allowances makes the trade different from the transfer of current-year allowances. For example, Company A could have produced 1,000 kilograms of HCFC-22 in the baseline year(s), and would therefore receive either 1,000 baseline allowances (for the kilogram-based system) or 55 ODP-weighted baseline allowances (for the ODP-weighted system). Company A could in turn permanently trade away these baseline allowances to Company B. In all subsequent years, Company A's quantity of baseline allowances would permanently be reduced, while Company B's quantity of baseline allowances would permanently be increased.

To implement the current U.S. phaseout schedule for class II controlled substances, it may not be possible to allow permanent transfers of baseline allowances if the type of allowance chosen is an ODP-weighted unit, as described in part II.A.2.b of this notice. Under the U.S. phaseout schedule for class II substances, the consumption of chemicals with the highest ODP is eliminated first. To efficiently eliminate the consumption of a specific chemical, such as HCFC-141b, under a possible program using ODP-weighted allowances, a company would no longer receive, in 2003, the portion of its allowances attributable to its historic consumption of HCFC-141b. Under this scenario, a company would not be able to make a permanent trade of a quantity of ODP-weighted allowances because the permanent transfer of ODP-weighted allowances would not be linked to a specific chemical, unless there were groupings of HCFCs according to their phaseout dates or unless historical consumption would determine deduction of allowances at a particular phaseout. Alternatively, regardless of whether or not baseline trades with ODP-weighted units are made, the historic baseline ODP-weighted amount for a given chemical could be deducted in the relevant phaseout year (e.g. 2003 for HCFC-141b). EPA seeks comment on the merits of baseline trades in general, and on the compatibility of baseline trades with kilogram-based allowances versus ODP-weighted allowances.

#### 7. International Trades of Current-Year Allowances

Under the Protocol, international trades are recognized as a part of a process called "industrial

rationalization." In Article 1 of the Protocol, industrial rationalization is defined as "the transfer of all or a portion of the calculated level of production of one Party to another, for the purpose of achieving economic efficiencies or responding to anticipated shortfalls in supply as a result of plant closures." International trades of production are permitted under the Protocol so companies can consolidate the manufacturing of a chemical in order to be able to achieve economies of scale as demand shrinks.

The Protocol includes the following language in Article 2, paragraph 5 bis: "Any Party not operating under paragraph 1 of Article 5 may, for one or more control periods, transfer to another such Party any portion of its calculated level of consumption set out in Article 2F [pertaining to HCFCs], provided that the calculated level of consumption of controlled substances in Group I of Annex A [CFCs] of the Party transferring the portion of its calculated level of consumption did not exceed 0.25 kilograms per capita in 1989 and that the total combined calculated levels of consumption of the Parties concerned do not exceed the consumption limits set out in Article 2F. Such transfer of consumption shall be notified to the Secretariat by each of the Parties concerned, stating the terms of such transfer and the period for which it is to apply."

International trades of production allowances are permitted under EPA's current regulations for class I controlled substances (40 CFR 82.9(c)). The procedures for international trades involve more review than the procedures for inter-pollutant and inter-company trades.

For class II substances, the implementation challenge of paragraph 5 bis of Article 2 in the Protocol is that "consumption" is a formula (production + imports - exports). Pursuant to a decision by the Parties, the Protocol language in paragraph 5 bis of Article 2 clearly restricts the U.S. from trading away HCFC consumption to another Party. The U.S. per capita consumption of CFCs in 1989 was 1.28 kilograms, well above the 0.25 kilogram per capita limit for transferring HCFC consumption. However, the Protocol language allows the U.S. to potentially receive a transfer of HCFC consumption from another Party. Only two non-Article 5 Parties, Norway and Poland, had a per capita consumption of CFCs in 1989 less than 0.25 kilograms. Thus, these are the only non-Article 5 Parties from whom the U.S. could potentially receive a transfer of HCFC consumption.

We must therefore consider the likelihood of such international trades, and whether or not the establishment of provisions for class II international trades is warranted.

If EPA were to create provisions for class II international transfers, the options for such trades would be intimately linked to the type of allowance chosen for the final program, as discussed in part II.A.1 of this notice. If EPA were to choose a program with both production and consumption allowances (as in the class I system), it would be easier to limit international trades to just production by following the model already established for class I substances. If, on the other hand, EPA were to choose a program with class II allowances (which could apply to production, imports and exports), EPA would have to ensure that such allowances are used for production only and not for import.

Alternatively, EPA may choose to establish a special type of allowance to represent production rights received from an international trade. EPA seeks comment on allowing international trades of HCFC allowances and how they should be administered.

#### 8. Offset for a Transfer of Allowances

The final aspect of trades of class II allowances considered in today's notice is the manner of achieving greater total reductions than would occur in the absence of a trade, as required in Section 607(a) of the Act. EPA believes that the offset required by Section 607 of the Act is only for inter-pollutant and inter-company transfers. In the allowance program for class I substances, an offset was not included in international trades.

Section 607(a) states that, "transactions under the authority of this section will result in greater total reductions in the production in each year of class I and class II substances than would occur in that year in the absence of such transactions." For the class I allowance program, EPA adopted a one percent offset, deducted from the transferor's allowance balance, for all inter-pollutant trades and all inter-company trades (40 CFR 82.12(a)(1)(i)(H), 82.12(b)(4)(i)(F)). However, for inter-pollutant trades combined with inter-company trades, only one offset is applied to the transfer of allowances. For class II controlled substances, EPA is considering re-examining the quantity of offset assessed in a transfer of allowances. Because the class II substances are less ozone-depleting than class I substances, EPA may consider a smaller offset for



trades of HCFC allowances. EPA requests comment on the degree of offset to apply to domestic trades of class II substances.

#### *F. Conditions Under Which a Control System Would Become Effective*

As mentioned in the background section of this notice (part I.B), EPA is mandated under the Act to promulgate regulations by December 31, 1999, to administer the phaseout of class II controlled substances. By this time, EPA intends to have in place an allowance system based on the options, or some slight variation thereof, discussed throughout this notice. However, EPA is considering an approach, whereby the allowance system would not go into effect unless a certain percentage of the U.S. cap for class II controlled substances were to be reached or exceeded.

It is possible that U.S. HCFC consumption levels will remain within a safe buffer of the current cap as agreed to under the Protocol, and thus never activate the allowance system. In 2003, under the U.S. accelerated phaseout for individual class II substances, HCFC-141b will be phased out. An allowance allocation system may not be necessary to phase out HCFC-141b. In 2004, however, at which time the U.S. is required under the Protocol to reduce its current HCFC consumption cap by 35 percent, an allowance system will likely be necessary to ensure U.S. compliance with the Protocol. Consequently, EPA should select a default date before 2004 when the allowance allocation system would become effective, in the event that the allowance system is not in place before that default date. EPA is seeking comments on the most appropriate timing of a default date for the system to become effective.

The rationale for an approach that would condition the onset of an allowance system upon reaching an established percentage of the U. S. cap set by the Montreal Protocol would be to avoid premature government intervention in the HCFC industry. Therefore, the threshold must be set at a level where the implementation of EPA's allowance system would be deemed necessary to ensure that the U.S. complies with its cap for class II substances. Furthermore, having the allowance system in place with a set threshold for implementation will provide the regulated community with a relatively predictable regulatory structure.

EPA is considering, and seeking comment on, the appropriateness of such an approach, the percentage of the

U.S. cap for class II controlled substances that would trigger the onset of the allowance system, the time span and type of data used to calculate whether or not the percentage has been reached or exceeded, and the amount of time deemed appropriate for implementation of EPA's allowance system once the threshold has been reached or exceeded.

EPA is considering a range of percentage options that would trigger the onset of the allowance system. A low percentage would possibly mean that EPA's implementation of its allowance system occurs with a relatively long lag time (e.g., more than one year), whereas a higher percentage may require swift implementation (e.g., within one year or less). EPA is concerned that a percentage threshold set too high could threaten U.S. compliance with its cap for class II controlled substances, given the delays inherent in data collection and the need for some transition time between reaching the percentage and implementing the allowance system.

The trends that the data on class II consumption (discussed below) reveal, combined with the percentage threshold, may also influence the speed with which EPA implements its allowance system. For example, if class II reporting data reveal that the threshold has been, or will be, surpassed by an amount considered "too close" to the cap, then EPA may implement its allowance system within a shorter time frame; likewise, if the threshold were surpassed by an amount considered to be within a secure buffer of the cap, EPA could implement its allowance system with a longer delay.

EPA must decide on the time span and type of class II data used to determine U.S. class II consumption levels relative to the selected percentage. EPA currently receives quarterly data on production, importation and exportation of class II substances as required under Section 603 of the Act. In order to assess meaningful trends and levels of class II consumption relative to the selected percentage, EPA is considering, and seeking comment on, a variety of ways of using this quarterly data for that purpose.

Under the Protocol and the Act, compliance for class II substances (i.e., consumption relative to the cap) is measured against the calendar year. Therefore, aggregating four quarters of quarterly data (an annual sum) serves as a convenient method to determine class II consumption levels relative to the cap, and thus the selected criteria for

initiating the allowance system. This would represent one possible option for calculating class II consumption levels relative to the selected criteria. Another option would be to use a rolling sum in determining compliance with an established threshold, based on submitted data for four or possibly more consecutive quarters, which could include quarters from two calendar years. The rationale for using four or more consecutive quarters is to avoid seasonality effects, or trend biases, which individual quarterly data could bring. If a number other than four quarters were used, the appropriate weighting would have to be given to each quarter so that their sum would be the equivalent of a 12-month period. If five consecutive quarters were used, for example, each quarter would be scaled to represent one fifth of the 12-month period.

### **III. Other Regulatory Options for Controlling HCFCs**

To ensure that the U.S. adheres to its phaseout schedule for class II controlled substances, EPA has options of pursuing, if necessary, other means to contribute to the control HCFC of consumption of class II substances. The discussion below pertains to current labeling program, SNAP program and the non-essential products ban, and potential amendments to those regulations. These options address the use of HCFCs rather than their production, import and export, which an allowance system would directly control. EPA is seeking comment on using any of these options discussed below in controlling HCFC consumption, either in combination with an allowance system, each other, or on its own.

#### *A. Labeling*

As an additional means of discouraging use of class II substances, so as to ensure that the U.S. does not exceed its cap for class II substances under the Protocol, EPA is considering and seeking comment on the required use of labels on products containing or manufactured with class II substances. According to Section 611 of the Act, such labels would read as follows: "Warning: Contains/manufactured with [insert name of substance], a substance which harms public health and environment by destroying ozone in the upper atmosphere."

According to Section 611(c) of the Act, "After 30 months after the enactment of the Clean Air Act Amendments of 1990, and before January 1, 2015, no product containing

a class II substance shall be introduced into interstate commerce unless it bears the label [referred to above] if the Administrator determines, after notice and opportunity for public comment, that there are substitute products or manufacturing processes (A) that do not rely on the use of such class II substance, (B) that reduce the overall risk to human health and the environment, and (C) that are currently or potentially available.” Section 611(d) of the Act contains the same requirements for products manufactured with class II substances. Beginning January 1, 2015, all products containing or manufactured with a class II substance must bear the specified label regardless of whether the Administrator has made a determination regarding the availability of substitutes (§§ 611(c)(2) and 611(e)(5)). Therefore, the issue upon which EPA is requesting comment is whether EPA should, prior to January 1, 2015, require labels on certain products containing or manufactured with class II substances.

#### *B. SNAP Approval and Restrictions*

Section 612 of the Act requires EPA to promulgate rules making it unlawful to replace any class I or class II substance with any substitute substance that may present adverse effects to human health or the environment, where EPA has identified an alternative to such replacement that “(1) reduces the overall risk to human health and the environment; and (2) is currently or potentially available.” In accordance with Section 612 of the Act, and under the Significant New Alternatives Policy (SNAP) program, EPA publishes lists of acceptable and unacceptable substitutes for class I and class II substances. In some SNAP sector end-uses, class II substances have been listed as acceptable substitutes. Class II substances are viewed by the Agency as transition chemicals that facilitate the transition out of more harmful class I chemicals. Since 1994, availability of zero-ODP alternatives has increased in a number of end-uses. It is therefore possible that existing SNAP determinations allowing HCFC end-uses could be revised to make them unacceptable for use. This could happen through three mechanisms.

First, EPA could receive a petition from a company to add a substance to or delete a substance from the SNAP list of acceptable and unacceptable alternatives (See Section 612(d)). Second, EPA could receive notification from a company before introduction of a substitute into interstate commerce for significant new use as an alternative to

a class II substance (See Section 612(e)). Finally, EPA can initiate changes to the SNAP determinations independent of any petitions or notifications received. Such changes could be based on new data either on additional substitutes or on characteristics of substitutes previously reviewed.

EPA solicits comments on the possibility of controlling HCFCs through SNAP determinations.

#### *C. Nonessential Product Ban under Section 610*

Section 610(d) of the Act prohibits the sale, distribution, or offer for sale or distribution in interstate commerce, of certain nonessential products that contain or are made with class II substances. EPA is authorized to grant exceptions to the ban under certain conditions. Since the issuance of the final rule providing exemptions from the statutory Class II nonessential products ban, EPA has received information, including information on new substitutes for making certain products, indicating that it may be necessary to reconsider the continued appropriateness of those exemptions. The Agency also is aware that since the issuance of that initial final rulemaking, there has been further substitution away from ozone-depleting substances in aerosols and pressurized dispensers. EPA is currently reviewing information concerning the aerosol products and pressurized dispensers that were given exemptions in the December 1993 rulemaking. In particular, the Agency is evaluating whether there are technologically available substitutes for the HCFCs used in these products. When EPA completes its evaluation of the existing exemptions for HCFCs, if appropriate, the Agency will issue a notice of proposed rulemaking. Potentially removing some of these products from the current exemptions to the nonessential product ban could provide some further assurance that the U.S. would not exceed its cap for class II substances under the Protocol.

### **IV. Administrative Requirements**

#### *A. Executive Order 12866*

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is “significant” and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The E.O. defines “significant regulatory action” as any regulatory action (including an advanced notice of proposed rulemaking) that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or,

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

It has been determined by OMB and EPA that this action is a “significant regulatory action” under the terms of Executive Order 12866 and is therefore subject to OMB review under the Executive Order. This notice was reviewed by OMB and changes recommended by OMB have been made and documented for the public record.

#### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

EPA determined that the members of the regulated community that may be directly affected by this rulemaking are generally not small businesses. Small governments and small not-for-profit organizations would not be subject to the options in today’s notice. The options discussed in today’s notice are directed to large, multinational corporations that either produce, import, export, transform or destroy ozone-depleting chemicals covered by this notice. The options discussed in this notice, therefore, will not have a significant economic impact on a substantial number of small entities.

#### *C. Applicability of Executive Order 13045: Children’s Health Protection*

Executive Order 13045: “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be “economically significant” as defined under E.O. 12866, and (2) concerns an

environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This notice is

not subject to E.O. 13045 because it presents options to implement a previously promulgated health or safety-based Federal standard, which in this case would be the accelerated phaseout schedule for HCFCs (58 FR 65018).

#### *D. National Technology Transfer and Advancement Act*

The National Technology Transfer and Advancement Act of 1995 (NTTAA), § 12(d), Pub. L. 104-113, requires federal agencies and departments to use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a

means to carry out policy objectives or activities determined by the agencies and departments. If use of such technical standards is inconsistent with applicable law or otherwise impractical, a federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies if the head of the agency or department transmits to the Office of Management and Budget an explanation of the reasons for using such standards.

This advance notice does not mandate the use of any technical standards; accordingly, the NTTAA does not apply to this advance notice.

#### ANNEX A: OZONE DEPLETION POTENTIALS FOR CLASS II SUBSTANCES AS CURRENTLY LISTED UNDER THE MONTREAL PROTOCOL\*

Dichlorofluoromethane (HCFC-21) .....	0.04
Monochlorodifluoromethane (HCFC-22) .....	0.055
Monochlorofluoromethane (HCFC-31) .....	0.02
Tetrachlorofluoroethane (HCFC-121) .....	0.01-0.04
Trichlorodifluoroethane (HCFC-122) .....	0.02-0.08
Dichlorotrifluoroethane (HCFC-123) .....	0.02
Monochlorotetrafluoroethane (HCFC-124) .....	0.022
Trichlorofluoroethane (HCFC-131) .....	0.007-0.05
Dichlorodifluoroethane (HCFC-132b) .....	[reserved]
Monochlorotrifluoroethane (HCFC-133a) .....	0.02-0.06
Dichlorofluoroethane (HCFC-141b) .....	0.11
Monochlorodifluoroethane (HCFC-142b) .....	0.065
Hexachlorofluoropropane (HCFC-221) .....	0.015-0.07
Pentachlorodifluoropropane (HCFC-222) .....	0.01-0.09
Tetrachlorotrifluoropropane (HCFC-223) .....	0.01-0.08
Trichlorotrifluoropropane (HCFC-224) .....	0.01-0.09
Dichloropentafluoropropane (HCFC-225ca) .....	0.025
Dichloropentafluoropropane (HCFC-225cb) .....	0.033
Monochlorohexafluoropropane (HCFC-226) .....	0.02-0.10
Pentachlorofluoropropane (HCFC-231) .....	0.05-0.09
Tetrachlorodifluoropropane (HCFC-232) .....	0.008-0.10
Trichlorotrifluoropropane (HCFC-233) .....	0.007-0.23
Dichlorotetrafluoropropane (HCFC-234) .....	0.01-0.28
Monochloropentafluoropropane (HCFC-235) .....	0.03-0.52
Tetrachlorofluoropropane (HCFC-241) .....	0.004-0.09
Trichlorodifluoropropane (HCFC-242) .....	0.005-0.13
Dichlorotrifluoropropane (HCFC-243) .....	0.007-0.12
Monochlorotetrafluoropropane (HCFC-244) .....	0.009-0.14
Trichlorofluoropropane (HCFC-251) .....	0.001-0.01
Dichlorodifluoropropane (HCFC-252) .....	0.005-0.04
Monochlorotrifluoropentane (HCFC-253) .....	0.003-0.03
Dichlorofluoropropane (HCFC-261) .....	0.002-0.02
Monochlorodifluoropropane (HCFC-262) .....	0.002-0.02
Monochlorofluoropropane (HCFC-271) .....	0.001-0.03

\*According to Annex C of the Protocol, "Where a range of ODPs is indicated, the highest value in that range shall be used for the purposes of the Protocol. The ODPs listed as a single value have been determined from calculations based on laboratory measurements. Those listed as a range are based on estimates and are less certain. The range pertains to an isomeric group. The upper value is the estimate of the ODP of the isomer with the highest ODP, and the lower value is the estimate of the ODP of the isomer with the lowest ODP."

#### List of Subjects in 40 CFR Part 82

Environmental protection, Allowances, Administration practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Montreal Protocol, Production, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: March 29, 1999.

**Carol M. Browner,**  
*Administrator.*

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#### LEGAL SERVICES CORPORATION

#### 45 CFR Part 1635

#### Timekeeping Requirement

**AGENCY:** Legal Services Corporation.

**ACTION:** Proposed rule: Republication.

**SUMMARY:** This proposed rule would revise the Corporation's timekeeping rule to require recipient attorneys and paralegals to provide the date as well as