New Civil Liberties Alliance

April 1, 2025

VIA EMAIL AND U.S. MAIL
Hon. Lee M. Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
Zeldin.Lee@epa.gov

Re: Executive Order 14219 – Unconstitutional Deficiencies in the AIM Act Climate Cap-and-Trade Program

Dear Administrator Zeldin:

RMS of Georgia, LLC d/b/a Choice Refrigerants ("Choice") writes to highlight EPA's duty to list the unconstitutional cap-and-trade program under the American Innovation and Manufacturing Act of 2020 ("AIM Act"),[1] and EPA's implementing regulations codified at 40 C.F.R. Part 84,[2] on the list that President Trump has required agencies to provide to the Office of Information and Regulatory Affairs ("OIRA") by April 20, 2025, pursuant to Executive Order 14219, *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*.[3]

As summarized below and in greater detail in Choice's briefing in its petition for review pending before the D.C. Circuit,[4] the AIM Act unconstitutionally transferred legislative power to the EPA in contravention of the U.S. Constitution's separation of powers, and EPA's regulations based upon this improper delegation have substantially intruded upon Choice's liberty interests. EPA's regulations thus fall within the scope of Executive Order 14219.

BACKGROUND

Choice is an American small business based in Alpharetta, Georgia, which manufactures and sells a U.S.-patented proprietary line of refrigerants for the air conditioning and refrigeration sector.

[1] 42 U.S.C. § 7675(e)(3) (2020).
[2] *Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years*, 88 Fed. Reg. 46,836 (July 20, 2023) (codified at 40 C.F.R. pt. 84).
[3] Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 19, 2025).
[4] *RMS of Georgia, LLC v. EPA*, No. 23-1263 (D.C. Cir. filed Sept. 14, 2023).

Prior to the AIM Act, Choice pioneered environmentally preferable hydrofluorocarbon alternatives that helped EPA implement its phase-out program for ozone-damaging refrigerants under the Montreal Protocol treaty. The cap-and-trade program created by EPA pursuant to § 7675(e)(3) of the AIM Act is now outlawing an increasing amount of Choice's proprietary products.

The AIM Act and EPA's implementation of its cap-and-trade rule at 40 C.F.R. Part 84 have undercut Choice's business in the following ways:

- The AIM Act restricts Choice's patented products by imposing an overall cap and requiring quota allowances that restrict Choice's manufacturing activities;
- Instead of fully crediting Choice with allowances, EPA allocated a significant portion of Choice's allowance quota to a Chinese-owned company that infringed Choice's patents by illegally importing a counterfeit version of Choice's proprietary refrigerant (that company also cheated U.S. customs duties which the government failed to effectively enforce). This decision in essence rewarded intellectual property theft and directly contradicts the AIM Act's explicit goal of supporting American innovation;[5]
- In addition, EPA diverted a significant portion of Choice's allowance quota to a company that facilitated import paperwork for refrigerant deliveries to Choice's Alpharetta manufacturing facility, instead of recognizing Choice's manufacturing position in the market;
- As a result, Choice received some 30% fewer allowances than its pre-AIM Act market share warranted, forcing Choice to reduce its manufacturing;[6]
- In addition to shortchanging Choice directly, EPA issued allowances based on "promoting equity" to persons that the agency claimed faced market barriers including due to "systemic racism."[7] This standard was not authorized by statute and directly undermined reliance interests and market competition based on merit. The allowances set aside for new market entrants were taken from manufacturers such as Choice.

THE AIM ACT'S UNCONSTITUTIONAL DELEGATION

The AIM Act was enacted by Congress outside of regular order in a midnight omnibus appropriations bill on December 27, 2020. The bill phases out the use of HFC refrigerants through a cap-and-trade program.[8]

However, the statute abdicates Congress's constitutional duty to legislate and instead hands off legislative discretion to EPA to dismantle the entire refrigerant industry and hand out the pieces as EPA wishes. The statute provides *no standards*, *factors*, or *constraints* to guide the EPA's allocation of cap-and-trade allowances.[9] This deficiency grants the EPA unchecked discretion to reshape the $28

[5] *Hydrofluorocarbon Blends from the People's Republic of China: Final Scope Ruling*, 85 Fed. Reg. 34,416 (June 4, 2020).
[6] *Phasedown of Hydrofluorocarbons: Notice of 2024 Allowance Allocations*, 88 Fed. Reg. 72,063 (Oct. 19, 2023).
[7] *Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program*, 86 Fed. Reg. 27,150, 27,177 (proposed May 19, 2021).
[8] 42 U.S.C. § 7675(e)(2)(C).
[9] *Id.* § 7675(e)(3) (directing EPA to implement phasedown "through an allowance allocation and trading program" without criteria).

billion U.S. refrigerant market[10] by establishing the criteria for picking winners and losers among existing market participants, a power that is reserved exclusively to Congress under Article I of the Constitution.[11] The long-standing nondelegation doctrine recognizes that our constitutional order prohibits Congress from transferring its legislative authority to agencies without an "intelligible principle" to guide their actions.[12] The AIM Act's carte blanche authorization for the EPA to decide which entities receive allowances, to determine market shares, and to redefine the competitive landscape of the HFCs industry is a legislative function reserved exclusively for Congress and accountable elected representatives. Thus, the AIM Act itself, as well as EPA's implementing regulations, are unconstitutional and should be reported on the OIRA list.

Even worse, exploiting this grant of legislative power, EPA has unilaterally adopted extra-statutory criteria for allowance distribution. In addition to the points above, EPA repurposed the Greenhouse Gas Reporting Program ("GHGRP"), an unauthorized climate program designed solely for emissions tracking under 40 C.F.R. Part 98,[13] as the sole basis for determining cap-and-trade allocation eligibility. By transforming a reporting mechanism into a market-shaping standard, EPA has functionally legislated a new eligibility test never envisioned nor authorized by Congress.[14]

The EPA has admitted and indeed exulted in its unchecked discretion. On multiple occasions the EPA stated that it possesses "considerable" and "significant" discretion, going so far as to boast that this discretion allows it to "determin[e] how to establish the allowance program and how to allocate allowances in that program"[15] underscoring the boundless statute's constitutional infirmity.[16] EPA put its words into action, exercising its "discretion" to use racial set-asides, to reward foreign infringers at the expense of U.S. patent holders, and to base allocations on irrelevant paperwork filings rather than actual American manufacturing, amongst other questionable decisions.[17]

EPA'S OBLIGATIONS UNDER EXECUTIVE ORDER 14219

Executive Order 14219 § 2(a)(ii) mandates that agencies identify and report regulations that rely on unconstitutional delegations of legislative power:

> Sec. 2. Rescinding Unlawful Regulations and Regulations That Undermine the National Interest. (a) Agency heads shall … initiate a process to review all regulations … for consistency with law and Administration policy. Within 60 days … agency heads shall … identify the following classes of regulations: (i) unconstitutional regulations and regulations that raise serious constitutional difficulties, such as exceeding the scope of the power vested in the Federal Government by the Constitution; [and] (ii) regulations that are based on unlawful delegations of legislative power; … (c) Within 60 days … agency heads shall provide to [OIRA] a list of all

[10] U.S. Int'l Trade Comm'n, *Hydrofluorocarbon Blends and Components from China*, Inv. No. 731-TA-1279 at 11 (2016).
[11] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).
[12] *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (Gorsuch, J., dissenting).
[13] 40 C.F.R. § 98.1 (2021) (stating that GHGRP was established for the purpose of "collecting accurate and timely greenhouse gas data to inform future policy decisions").
[14] *Phasedown of Hydrofluorocarbons: Response to Comments*, 86 Fed. Reg. 55,116, 55,142 (Oct. 5, 2021).
[15] *Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program*, 86 Fed. Reg. 27,150, 27,166 (proposed May 19, 2021).
[16] *Id.*, 86 Fed. Reg. 55,142 (Oct. 5, 2021).
[17] U.S. Const. art. I, § 1; *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting) ("Only the people's elected representatives may adopt new restrictive laws").

> regulations identified by class as listed in subsection (a) of this section. (d) The Administrator of OIRA shall consult with agency heads to develop a Unified Regulatory Agenda that seeks to rescind or modify these regulations, as appropriate.[18]

Because § 7675(e)(3) of the AIM Act abdicates to EPA unchecked legislative discretion over allowance allocations without any statutory principles or constraints, it falls squarely within the reportable category and must be included in the list of regulations the EPA submits to OIRA by April 20, 2025. While EPA cannot remedy the constitutional faults in the AIM Act, Choice requests that EPA put an end to the harm caused by its implementation of the AIM Act by reviewing and revising the 2024 Framework Rule and eliminating inappropriate allocation decisions that have disadvantaged U.S. innovators and interfered with reliance interests, particularly those of small businesses and American innovators such as Choice.

CONCLUSION

EPA's administration of the AIM Act has disadvantaged American businesses in violation of both statutory purpose and constitutional principles. We urge EPA to fulfill its obligations under Executive Order 14219 by formally assessing and reporting these deficiencies and reconsidering its rulemaking to align with congressional directives, and, in turn, the constitutional separation of powers.

Thank you for your prompt and careful attention to this matter.

Respectfully,

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[18] Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 19, 2025), § 2(a)(ii).