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PERSPECTIVE

Clearing the air on criminal enforcement of hydrofluorocarbon importation laws

By Davina Pujari,
Christopher Rheinheimer
and Molly Calhoon Silva

The Biden Administration's focus on climate change mitigation is showcased in a prosecution recently announced by the U.S. Attorney's Office, Southern District of California against Michael Hart, who is accused of smuggling HCFC-22, a hydrochlorofluorocarbon (HCFC), into the United States. This is the first time an individual or entity has been charged with illegally importing HCFCs or hydrofluorocarbons (HFCs) in contravention of the American Innovation and Manufacturing (AIM) Act of 2020.

Chlorofluorocarbons were the original chemicals used to make refrigerants, foams, and aerosols. Chlorofluorocarbons were harmful to the ozone layer and were replaced by HCFCs beginning in the late 1980s. HCFCs also have the potential to deplete the ozone layer, but to a lesser extent. In the 1990s, HFCs were introduced as an even better alternative, as they do not deplete the ozone layer. However, HFCs still have a high global warming potential.

Congress has enacted several laws to protect the planet from the harms of HCFCs and HFCs. The AIM Act of 2020, a short but powerful section of the Consolidated Appropriations Act of 2021, is one such law. It was enacted to give the EPA the power to enforce a transition from HCFCs and HFCs



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to newer technologies with lower global warming potential. This transition is in line with the United States' implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer. In 2022, the United States ratified the Kigali Amendment to the Montreal Protocol, which requires countries like the United States to cut their HFC consumption 85% by 2036.

The EPA chose to implement a phaseout approach, initially under the Clean Air Act and now under the AIM Act of 2020, that elimin-

ated usage of the most harmful HCFCs and HFCs first. The phaseout began slowly and is still ongoing for some HFCs. Consumption allowances were allotted to manufacturers and importers of HCFCs and HFCs to decrease production and consumption levels over time until each material is fully phased out. The first material, HCFC-141b, was phased out in 2003, followed by HCFC-225ca/cb in 2015 and HCFC-22 in 2020. The phase out is not a ban on using the phased-out HCFCs; the law allows

for servicing of equipment that uses the HCFCs if the material was produced prior to the phase-out date.

Because equipment remains in service that requires these phased out HCFCs, especially HCFC-22 which is the most-used HCFC in the United States, the EPA recognized that this phaseout in particular could incentivize illegal importation of HCFC-22. This has led to a greater emphasis on preventing illegal importation of substances under the AIM Act of 2020.

While the charges against Hart under 18 U.S.C. Section 545 for Importation Contrary to Law are the first time criminal charges have been filed using the AIM Act of 2020, it is not the first time the Act has been enforced. The EPA has issued civil penalties against several HFC importers for violations of 40 C.F.R. Section 84.5(b) under which they imported HFCs without properly expending consumption allowances. The EPA's interim penalty policy for these improper importations is set at \$1 per kilogram of material imported, which has led to total civil penalties ranging from just \$960 to \$41,566.

In contrast, Hart is faced with maximum criminal penalties of 20 years in prison and a \$250,000 fine for smuggling under criminal statutes. But the difference here is the importers who were fined followed the customs laws, obtaining customs entry numbers for the HFCs they attempted to import. They only failed to follow proper reporting procedures regarding the allotment of consumption al-

lowances from the EPA. Hart, on the other hand, is accused of intentionally concealing HCFC-22 under a tarp in his vehicle, without following customs laws. So while the underlying reason for the illegality of importing HFCs remains the same, the method of importation is why Hart is facing a much

harsher penalty than the importers civilly sanctioned by the EPA.

Importers should not be concerned that Hart's arrest marks a shift in the typical enforcement approach under the AIM Act. There is no indication of any shift by the EPA in the collaborative nature with which importers and the EPA

have been working towards the shared goal of reducing HFC use. What is being signaled here, however, is that there is no leniency for black market importation and sale of HFCs. Those who are following both the EPA and Customs and Border Patrol's guidelines should remain in the clear.

Davina Pujari is a partner, **Christopher Rheinheimer** is special counsel, and **Molly Calhoon Silva** is an associate at WilmerHale LLP.

