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Subject: FYI
REASONS TO SEEK REHEARING OF THE HFC CASE.PDF

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Industry perspective:

- The majority of industry affected by the HFC rule support maintaining the rule for reasons of regulatory certainty, to preserve national uniformity, and to discourage state action.

- American firms have invested heavily in the transition to HFC alternatives. No equipment manufacturer challenged the rule.

- The timelines in the EPA rule are, in the main, workable for industry. EPA staff have indicated willingness to discuss adjustments for particular uses where the case is made.

- The EPA rule operates as a practical preemption. The Clean Air Act does not preempt any state from adopting its own use-by-use HFC regulations. No state has done so yet, but without the EPA rule California, New York, and possibly a dozen other states are likely to enter the field, creating a difficult patchwork for industry.

- Industry supports the Kigali HFC amendment to the Montreal Protocol because it assures that the global industry addresses this problem. The EPA rule preserves the administration's options with respect to that agreement. The reductions from this rule would meet U.S. obligations into the early 2020s, meaning no further EPA rulemaking or new legislation would be needed in this term.

Legal arguments supporting rehearing

- The 2-1 panel decision reverses an EPA rule that this administration defended at oral argument in February. The HFC rule is not included in those that the president or the EPA administrator has proposed to review or revise.

- There are strong legal reasons to seek rehearing by the full D.C. Circuit. The panel majority is on extremely weak ground asserting that the Clean Air Act prevents EPA from regulating HFCs.

- Section 612 of the statute says: "To the maximum practicable extent, [ozone-depleting substances] shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment"

- "Overall risk to human health and environment" is a deliberately broad phrase that includes risks from toxicity, flammability, or environmental effects, and that allows EPA to balance among risks for the greatest overall benefit.

- The statute also directs EPA to list (A) substitutes prohibited for specific uses and (B) substitutes acceptable for specific uses. The statute provides a petition process to keep the lists up-to-date.

- In 2015, EPA moved HFCs from the acceptable list to the prohibited list for specific uses where industry has developed lower-risk alternatives. These alternatives have substantially less, and in many cases virtually zero, greenhouse gas potential.

- The court ruling is contradictory. The panel majority approved of EPA's adding HFCs to the prohibited list because of their greenhouse gases potential. But the majority also says EPA can't make any equipment maker stop using HFCs.

- The majority did so by declaring that "replace" can only mean the one-time replacement of A with B. Under this reading, EPA's authority ended when an equipment maker switched from ozone-depleting substances to a non-ozone-depleting substitute.

- The majority interpreted several dictionary definitions as supporting the one-time-only approach. But the dissenting judge pointed to other dictionary definitions that define "replace" as a continuing process – the replacement of A with B, followed by the replacement of B with C, and so on.

    - Think "sugar substitutes" – saccharin replaced sugar, and later aspartame replaced saccharin. Both are "sugar substitutes."
    - Think "substitute teachers" – when a teacher goes on maternity leave, the student may have a succession of substitute teachers. Each substitutes for the one before, but also for the original teacher.

- The dissent persuasively shows that Congress very likely intended to cover the continuing process of replacement in order to lower overall risk "to the maximum practicable extent" and to promote continuing industry investment and innovation in alternatives.

- At the very least, the dissent shows that "replace" is ambiguous. And since both approaches are reasonable interpretations, the court should have left EPA the leeway to choose between them.

Broader Consequences:

- As explained above, the EPA rules are workable for industry. But the consequence of taking away EPA's (and other agencies') leeway in future cases could be large.

- The decision could significantly hamper this administration's ability to accomplish its priority regulatory and deregulatory objectives.

- In this instance, a conservative panel moved aggressively to block a rule from the prior administration. If allowed to stand, however, the precedent will be used aggressively by liberal judges to block Trump administration rules.

- This could affect the outcome of litigation over revisions or repeals of the Clean Power Plan and the Waters of the United States rule, to give just two examples.

Bottom line:

- The administration should seek rehearing of this case because it would:

    - Meet the reliance, certainty, and uniformity interests of industry.
    - Reduce real health and environmental risks while giving industry a predictable framework for investment, innovation, and job creation.
    - Preserve the administration's leeway to achieve its priorities.