COMMITTEE ON
ENERGY & COMMERCE
CHAIRMAN FRANK PALLONE, JR.

MEMORANDUM

March 10, 2020

To: Subcommittee on Environment and Climate Change Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Subcommittee Markup of H.R. 5544 and H.R. 6160

On **Thursday, March 12, 2020, at 9 a.m. in the John D. Dingell Room, 2123 of the Rayburn House Office Building**, the Subcommittee on Environment and Climate Change will hold a markup on the following bills: **H.R. 6160**, legislation to reauthorize the Chemical Facility Anti-Terrorism Standards (CFATS) program; and **H.R. 5544**, "the American Innovation and Manufacturing Leadership Act of 2020".

I. H.R. 6160, TO EXTEND THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS POROGRAM OF THE DEPARTMENT OF HOMELAND SECURITY

A. Background

Since 2007, high risk chemical facilities have been regulated to address risks under the CFATS Program, implemented by the Department of Homeland Security (DHS). Congress originally created the program through the appropriations process in 2006 and intended to sunset it in 2009.[1] Congress extended the program twice, modifying it in 2014. It is set to expire in April 2020.[2]

The CFATS program requires high-risk chemical facilities (as defined by DHS) to address risk by meeting risk-based performance standards in 18 areas, including securing site assets, preventing theft and diversion, and restricting the area perimeter.[3] Owners of chemical facilities that possess more than a specified threshold of certain "chemicals of interest," must complete a DHS survey known as a Top-Screen. Based on the data from the Top-Screen, DHS determines which facilities are deemed high-risk and thus subject to the program's risk-based performance standards.

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[1] Pub. L. No. 109-295 (2006).

[2] Department of Homeland Security, *Chemical Facility Anti-Terrorism Standards*, 72 Fed. Reg. 17688 (Apr. 9, 2007).

[3] Congressional Research Service, *Chemical Facility Anti-Terrorism Standards* (Mar. 2018) (IF10853).

All high-risk facilities are sorted into four risk tiers, which determine the risk-based standards that must be met. Owners of covered facilities are then required to prepare vulnerability assessments and site security plans (SSP) that meet the performance standards for their assigned tier. As of September 4, 2019, the CFATS program identifies 3,321 facilities as high-risk, with 167 facilities placed in tier 1 (the highest tier), 79 facilities in tier 2, and the remainder in tiers 3 and 4.[4]

B. Legislation

Chairmen Pallone (D-NJ) and Tonko (D-NY) joined Homeland Security Committee Chairman Thompson (D-MS) and others in introducing H.R. 6160, "To extend the chemical facility anti-terrorism standards program of the Department of Homeland Security". The bill provides an 18-month clean extension of the CFATS program.

II. H.R. 5544, THE AMERICAN INNOVATION AND MANUFACTURING LEADERSHIP ACT OF 2020

A. Background

Hydrofluorocarbons (HFCs) are a class of widely used fluorocarbon chemicals. They are used primarily as refrigerants in the heating, ventilation, air conditioning, and refrigeration (HVACR) industry.[5] HFCs are commonly found in commercial and industrial refrigeration and air conditioners, for example. Lower amounts of HFCs are used and contained in other applications, such as aerosols and foams.[6] Much smaller amounts can also be found in fire suppressants and solvents.[7]

HFCs gained widespread adoption in the 1990s as replacements for ozone-depleting substances, such as chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs). Like CFCs and HCFCs, HFCs are potent greenhouse gases, and HFC emissions are growing at a rate of eight percent per year.[8] A global transition away from HFCs, however, is now underway.[9] In 2016, the international community agreed to phase down the production and consumption of

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[4] Email from Legislative Affairs Staff, U.S. Department of Homeland Security, to Minority Staff, House Committee on Energy and Commerce (Sept. 4, 2019).

[5] United Nations Environment Programme, *Fact Sheet 2: Overview of HFC Market Sectors* (Apr. 20, 2015) (conf.montreal-protocol.org/meeting/workshops/hfc_management-02/presession/English/FS%202%20Overview%20of%20HFC%20Markets%20final.pdf).

[6] *Id.*

[7] *Id.*; *See, e.g.*, United Nations Environment Programme, *About Montreal Protocol* (unenvironment.org/ozonaction/who-we-are/about-montreal-protocol) (accessed Jan. 7, 2020).

[8] *See* note 5.

[9] *See* note 7.

HFCs under the Montreal Protocol framework.[10] As the Department of State explains, this "creates market certainty and opens international markets to new technology that is better for the environment, without compromising performance."[11]

American leadership in this transition could create approximately 33,000 new manufacturing jobs in the United States and add $12.5 billion per year to the U.S. economy.[12] The United States' share of the global market for HVACR equipment could grow by 25 percent over current levels and improve the trade balance by increasing exports and reducing imports.[13]

B. Legislation

Chairman Tonko joined Reps. Olson (R-TX), Peters (D-CA), and Stefanik (R-NY) in introducing H.R. 5544, the "American Innovation and Manufacturing Leadership Act of 2020". The bill would phase down HFCs over 15 years by limiting production and consumption of regulated HFCs to 15 percent of baseline levels beginning in 2036.

Section 2 defines numerous terms that appear in the text of the legislation.

Section 3 directs the Environmental Protection Agency (EPA) to publish a list of HFCs that are subject to regulation under the legislation (regulated substances) and includes an initial listing of such regulated substances. It further provides EPA with authority to add additional HFCs to the list of regulated substances, provided they meet specified requirements.

Section 4 requires persons who produce, import, export, reclaim, destroy, use and entirely consume (except for trace quantities) in the manufacture of other chemicals, or use as a process agent, a regulated substance, to report such action to the Administrator. This section also requires persons subject to these reporting requirements to provide the Administrator with specified data relevant to establishing the baseline for the phase down of production and consumption of regulated substances. EPA must promulgate regulations to implement this section within 270 days of the bill's enactment.

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[10] U.S. Environmental Protection Agency, *Stratospheric Ozone Protection: 30 Years of Progress and Achievements* (Nov. 2017) (430-F-17-006). The Kigali Amendment to the Montreal Protocol has been ratified by 91 countries. United Nations Environment Programme, *All Ratifications* (ozone.unep.org/all-ratifications) (accessed Jan. 9, 2020).

[11] U.S. Department of State, *The Montreal Protocol on Substances That Deplete the Ozone Layer* (state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/the-montreal-protocol-on-substances-that-deplete-the-ozone-layer/ (accessed Jan. 9, 2020).

[12] U.S. Chamber of Commerce, *The Kigali Amendment is a Win for the Environment and the U.S. Economy* (uschamber.com/series/above-the-fold/the-kigali-amendment-win-the-environment-and-the-us-economy) (May 8, 2018).

[13] *Id.*

Section 5(a) establishes the formulas for calculating the baselines for the phase down of the production and consumption of regulated substances, based principally on production and consumption of regulated substances in 2011, 2012, and 2013.

Section 5(b) requires EPA to promulgate regulations establishing an allowance allocation and trading program to phase down production and consumption of regulated substances. It further requires EPA to establish annually a quantity of production allowances and consumption allowances that do not exceed specified percentages of the production and consumption baselines, respectively. This section then directs EPA to allocate production allowances and consumption allowances annually or for multiple years at a time. Beginning on January 1 of the year after the regulations are promulgated, section 5(b) makes it unlawful for any person to engage in the production or consumption of HFCs without a corresponding allowance authorizing such production or consumption.

Section 5(c) requires regulations issued under section 5(b) ensure that transfers of allowances will result in a greater reduction in production or consumption, as applicable, than would have occurred absent the transfers. It further limits transfers only between persons subject to the phase down of regulated substances.

Section 5(d) authorizes the EPA Administrator to consider petitions to accelerate the phase down schedule and sets out requirements for such petitions and their consideration. An accelerated schedule would have to be applied uniformly to allocated production allowances and consumption allowances. This section prohibits EPA from accelerating the phase down schedule prior to 2024.

Section 5(e) authorizes essential use exceptions to the phase down beginning in 2034, when production and consumption will be limited to 20 percent of baseline levels. EPA may allocate limited additional allowances in excess of the phase down limits for up to five years if it finds that such excess allowances are exclusively for an application for which there is no substitute available and the available supply of the requisite regulated substance is insufficient.

Section 5(f) authorizes EPA to issue additional production allowances to produce, at a domestic facility, additional regulated substances solely for export and use in a foreign country. Beginning on January 1, 2033, the bill prohibits any person from exporting a regulated substance to a foreign country not identified by EPA as having implemented a phase down of HFCs akin to this legislation.

Section 6 requires EPA to promulgate regulations within 24 months of the bill's enactment to maximize reclaiming of regulated substances, minimize releases of regulated substances from equipment, and ensure safety of technicians and consumers. The section authorizes EPA to include minimum standards and training requirements for technicians in such regulations. The section also directs EPA to consider using any authorities granted by the legislation to increase opportunities for reclaiming regulated substances. In addition, section 6 mandates that any regulated substance that is recovered be reclaimed before it can be sold or transferred to a new owner. Finally, the legislation clarifies that section 6 does not apply to a regulated substance or substitute thereof that is contained in a foam.

Section 7 grants EPA authority to prohibit or restrict the use of a regulated substance in specific sectors or subsectors. It directs EPA to consider exercising this authority in accordance with codified negotiated rulemaking procedures found in the Negotiated Rulemaking Act of 1990. It also allows any person to petition EPA to promulgate regulations pursuant to this section. Section 7 further directs EPA to evaluate the availability of substitutes for regulated substances.

Section 8 authorizes EPA to issue regulations as necessary to implement the legislation. It authorizes the Administrator to delegate authority under this legislation to any officer or employee of EPA. It also mandates that whenever the legislation requires or authorizes the Administrator to act by regulation, the requirements of Clean Air Act section 307(d) shall apply.

Section 9 applies four sections of the Clean Air Act to the bill as if it were included in title VI of the Act: sections 113 (relating to federal enforcement), 114 (relating to inspections, monitoring, and entry), 304 (relating to citizen enforcement), and 307 (relating to administrative proceedings and judicial review).

Rep. Peters will offer an amendment in the nature of a substitute that makes minor revisions based on technical assistance provided by EPA.