

**OPENING STATEMENT OF
ELLEN COOPER, ASSOCIATE COUNSEL
BUREAU OF LEGAL AFFAIRS
NEW YORK CITY DEPARTMENT OF SANITATION**

PUBLIC HEARING ON RULES GOVERNING THE RECOVERY OF REFRIGERANTS.

**THURSDAY, FEBRUARY 13, 2014
10:00 A.M. TO 12:00 P.M.
125 WORTH STREET, ROOM 330, NY, NY 10013**

Good morning and welcome. My name is Ellen Cooper. I am Associate Counsel with the Bureau of Legal Affairs at the New York City Department of Sanitation. Thank you for attending the Department's hearing this morning.

The Department is conducting this hearing in accordance with the requirements of the City Administrative Procedure Act. The purpose of this hearing is to receive comments from the public on the Department's proposed rule on the recovery of refrigerants. The Department published the proposed rule in the *City Record* on December 30, 2013. It also electronically transmitted copies of the rule to all New York City local elected officials, all fifty-nine community board managers, several media organizations in the City and interested parties.

The Department's authority to promulgate this rule is found in sections 753 and 1043(a) of the New York City Charter and section 16-485 of the New York City Administrative Code.

Local Law 69 of 2013 -- as now set forth in Chapter 4-E of Title 16 of the New York City Administrative Code -- makes original equipment manufacturers ("OEMs") responsible for the lawful recovery of refrigerants from their refrigerant-containing appliances when their appliances are discarded by residents. Despite this requirement, the Department will continue to provide its own refrigerant removal program in which OEMs can participate for a fee. OEMs can also choose to establish their own recovery program or participate with other OEMs in a refrigerant recovery program. The fee imposed by this rule will allow the Department to recover a portion of the program costs incurred through servicing OEMs' appliances.

The purpose of the proposed rule is to carry out the requirements of Local Law 69 of 2013 by establishing the requirements for OEMs' refrigerant recovery programs for appliances that are being disposed of by "residential generators" in the City of New York. A "residential generator" is any person, entity, agency, or institution in the city of New York that receives solid waste or recycling collection service from the department.

Specifically the proposed rule:

- Establishes the registration requirements for OEMs of refrigerant-containing appliances.
- Requires that OEMs indicate whether they plan to establish their own refrigerant recovery program, participate with other OEMs in a refrigerant recovery program, or have their appliances serviced by the Department's refrigerant recovery program.
- Establishes the fee that an OEM must pay if refrigerant is removed from an OEM's appliance by the department.
- Establishes annual reporting requirements for any OEM who establishes its own refrigerant recovery program or participates with other OEMs in a refrigerant recovery program, and;
- Establishes violations and fines for failure to comply with certain requirements of the proposed rule.

This proposed rule also repeals the current Chapter 17 of Title 16 of the Rules of the City of New York, which relates to the collection, recycling and reuse of electronic equipment, because the local laws that authorized Chapter 17, Local Laws 13 and 21 of 2008, were preempted by New York State law through Chapter 99 of 2010.

You may present an oral statement or submit written comments concerning the proposed rule. Please sign in at the entrance of the room if you wish to present an oral statement today. We have been accepting written comments on the proposed rule since their publication in the City Record and will continue to do so through the close of business today.

The Department will make available a copy of all written comments received by the Department, together with a summary of the comments received at today's hearing, for viewing on its website next week.

The Department will carefully consider all the comments it receives through the close of business today. Additionally, due to the inclement weather, the Department will be scheduling a second hearing to allow interested parties who were unable to attend today's hearing the opportunity to comment. Following the second hearing and consideration of all comments received, we will issue a final rule and publish it in the City Record. The final rule will then become effective thirty days after publication.

Beginning with elected officials, I will be calling those of you who wish to speak this morning in the order in which you have signed in. When you speak, please state your name and affiliation. Also, please speak slowly and clearly so that the court reporter can understand and accurately record your statement. We also ask that you limit your statement to five minutes.

I will begin by asking _____ to speak first.



1111 19th Street NW > Suite 402 > Washington, DC 20036
t 202.872.5955 f 202.872.9354 www.aham.org

February 13, 2014

Via E-mail

New York City Department of Sanitation
125 Worth Street, Room 710
New York City, NY 10013

nycrules@dny.nyc.gov

Re: Proposed Rule on Recovery of Refrigerant - *Proposed Chapter 17 of Title 16 of the Rules of the City of New York*

Dear Department of Sanitation:

The Association of Home Appliance Manufacturers (AHAM) would like to comment on the Proposed Rule on the Recovery of Refrigerants. AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

Throughout the City Council's consideration of Local Law 69 AHAM has maintained its position and so informed the New York City Department of Sanitation (DSNY) that the law – and therefore, the proposed regulations issued thereunder, are unfair, arbitrary, not properly based in New York law and violative of the New York and federal constitutions. This has required AHAM reluctantly to file a lawsuit in federal district court in Manhattan to block the law's implementation. A ruling on the merits of some of AHAM's claims is expected in the next few months. However, we will focus our comments here on the concerns regarding the proposed rule.

OEM Refrigerant Recovery Plan

We have been clear that we do not believe that as the law is structured that the alternative OEM Refrigerant Recovery Plan is a serious, viable option. If a brand owner or OEM provides its own recovery plan, the proposed rule states that DSNY will provide a list of these programs on its

website. AHAM supports DSNY listing OEM or any alternative programs, such as Con Ed's, on its website, but recommends that alternative programs, if any exist, also be highlighted upfront in all city and DSNY publications and communication vehicles, including but not limited to when a person calls 311. Many people will call 311 and if alternative programs are not promoted by DSNY, many people would not be aware of the additional options, including the possibility to receive a \$50 rebate from ConEd.

The rule states that OEMs may establish their own plans to retrieve refrigerant from a home, but may not include curbside collection. This onerous restriction is yet another barrier to manufacturers developing its own plan. DSNY at minimum should be required to notify and inform OEM recovery programs of all corresponding refrigerant recovery requests.

Further, in Section 17-02(a) and 17-04(a), the appliance is not owned by the OEM or brand owner so the use of the term "their appliance" is inappropriate and inaccurate. The appliances impacted by this proposed rule are appliances made by or branded by an OEM or brand owner. The regulations should be modified in this respect.

Low Global Warming Refrigerants

The U.S. Environmental Protection Agency (EPA) and the Canadian Standards Association have recently approved the use of Isobutane as a refrigerant. Isobutane is not an ozone depleting substance (ODS) and has a very low global warming potential (GWP), so low in fact, that EPA has proposed that Isobutane be allowed to be vented into the atmosphere.¹ Even before EPA finalizes this rule, DSNY should recognize the clear evidence that Isobutane is not a contributor to global warming and exclude refrigerator-freezers containing this refrigerant from the curbside extraction program and adjust the fee proposal to remove any such fees even if the City takes the gratuitous step of recovering this refrigerant.

Definition of Residential Generator

The definition of residential generator includes "any person, entity, agency or institution in the city of New York that receives solid waste or recycling collection service from the department." This definition is too broad and could include commercial businesses because they are "entities" that could receive collection services from DSNY. Also, DSNY needs to revise the proposed regulation to exclude appliances from commercial generators that may be left on the curb.

Reimbursement

DSNY should reimburse brand owners and manufacturers if DSNY's system to recycle appliances is found to be out of compliance with federal, state or city laws and regulations. For example, according to DSNY's own records from 2010 to 2012, 67,261 units had refrigerant removed and 15,084.70 pounds of refrigerant were collected (Note: DSNY's data is inconsistent in this area. According to DSNY's information sent pursuant to our Freedom of Information Law request, the number of appliances serviced and gas removed is 67,261, or 63,572. However, according to the Mayor's Management Report the number is 70,760). These data show that, on average, only 0.22 pounds (or 3.6 oz.) of refrigerant are being removed per appliance. This collection rate is worrisome because it appears that DSNY is only collecting

¹ Docket ID No. EPA-HQ-OAR-2012-0580, Proposed Rule regarding Revision of the Venting Prohibition for Specific Refrigerant Substitutes (Fed. Reg., April 12, 2013, page 21871)

about 25% of the refrigerant normally found in the units being serviced. There should be additional clarification in any invoice that DSNY sends to an OEM showing how much refrigerant was extracted (especially in the colder temperatures), what type of appliance, and what type of refrigerant, so the public and manufacturer can verify that the proper amount was removed. DSNY should be held accountable and manufacturers should not pay for a program that intentionally or not does not effectively recover refrigerant. Otherwise, frankly, the fictitious “service” to manufacturers is even more fanciful.

DSNY should also inform the brand owner or manufacturer how the compressor oil was disposed of and if it was disposed of prior to the appliance being crushed. This additional information from DSNY would provide an important check for DSNY on the compliance of their program and provide manufacturers with assurance that they are paying the DSNY for a proper extraction of refrigerant and disposal of substances of concern.

DSNY has Failed to Justify the Cost Basis of the \$20 “Fee”

The proposed rule would require manufacturers or brand owner to pay \$20 for each of their appliances serviced by DSNY. This amount is the same for every unit regardless of the services provided by DSNY or the product’s refrigerant. As AHAM has stated on numerous occasions, DSNY’s practice of removing refrigerant at the curb is extraordinarily inefficient and unique to the City’s program. Clearly, the cost to remove refrigerant varies based on factors such as product type, refrigerant type, the condition of the unit, ambient air temperature at the time of extraction and even the unit’s position relative to the ground.

For example, refrigerant will be at a lower pressure and becomes heavier as the temperature drops. At colder temperatures, the pressure of some refrigerants may even drop below atmospheric pressure, which means the sealed system is not sufficiently pressurized to effectively extract the refrigerant. Also, as the temperature drops, refrigerant will convert from gas to liquid, making it virtually impossible for the refrigerant to be properly extracted. Finally, extraction is best performed with the refrigerant-containing unit in the upright condition. Performing the task in any other manner can reduce the likelihood of full extraction. With older heavier appliances, however, DSNY employees will likely be forced to perform extraction in the position the unit is found at the curbside. Not only do DSNY’s extraction processes pose substantial risk of ineffective refrigerant recapture, it is clear that the fees do not relate in a rational manner to the degree of difficulty or labor of the “services” claimed to be provided.

There is no supporting documentation in the proposed rule for how the \$20/unit cost is determined. Without such documentation, DSNY will be unfettered in its ability to impose fee increases. Without an understanding of the basis for DSNY’s fee demands, manufacturers will not be able to take steps to manage exposure to the fee or plan for future financial impacts. Without a transparent and open process into how the \$20/unit cost is determined, the public will be unable to understand or know what the City is doing and/or to scrutinize the appropriateness of its actions.

AHAM’s concern is not without justification. It was only after filing a Freedom of Information Law request that it obtained any operating cost information. The information that was provided raises questions regarding DSNY’s cost calculation. For example, the calculation includes

“Direct Personal Services Costs” of 10 Sanitation Workers, 2 Auto Mechanics and 2 Clerical Aides. DSNY informed AHAM and the City Council that all the sanitation workers are “certified.” But these employees do not need to be certified and manufacturers should not be charged for the added cost of salaries based on unneeded certification. DSNY also stated in the information it released that 44.55% of these employees time is devoted to the extraction of refrigerant. That seems too high by our calculations and is nowhere substantiated. Before the City Council, DSNY stated that employees made an average of 30 refrigerant-removal stops per day. If one employee can make 30 stops per day and 10 are making these stops, on average 300 stops can be made per day. In 2012, based on information provided by DSNY 17,761 appliances were “serviced and gas removed.” This can be accomplished, on average, in 59 days (17,761 appliances in a year/300 stops per day). Therefore, 59 days is only 24% of the work days in a year assuming 3 weeks of vacation and holidays. Hence, the “Total Direct PS Costs” should be \$333,000 and 3.36 FTEs (not \$618,000 and 6.24 FTEs) and costs attributable to “Function Direct OTPS” should be \$41,755 (not \$77,500). As a result, the Total Direct Costs should be reduced from \$710,000 to \$390,000. DSNY should amend the regulations to provide for an annual report to the public on the costs of operations, number of units serviced, amount of refrigerant recovered.

DSNY is also receiving revenue from the sale of refrigerants removed from old units. The costs passed on to manufacturers should reflect savings or cost avoidance from this revenue to the department. There is no mention in the proposal of this offset. Indeed, it may be that the appliance recovery operations are net revenue gainers.

The regulations are also unclear as to who would be responsible for paying DSNY. The proposed rule states that the “department will charge OEMs,” but “OEM” is ill-defined. The proposed rule defines “Original equipment manufacturer” (“OEM”) as a brand owner or a manufacturer. The proposed rule tries to clarify this ambiguity by stating that “[I]f the department is unable to find the brand name, the department shall seek to bill the OEM who manufactures or has manufactured the appliance. . .” DSNY needs to clarify in the rule the process how manufacturers can dispute if wrongfully billed for a unit that they did not manufacture. This will help avoid confusion and non-uniform and arbitrary billing practices.

Request for Delay of Implementation

For all the above the above reasons, AHAM respectfully requests that DSNY postpone the implementation date of July 1, 2014, by a minimum of six months. DSNY has not provided the public with a schedule for promulgation of this rule and it is impractical for manufacturers who must comply with this regulation to have sufficient time to evaluate the final rule. Additional time would also allow DSNY to evaluate its methods for tracking refrigerant recovery to ensure the billing and compliance process is fair, timely and transparent.

Other Concerns

In 17-03(b)(2), a mandated election between improper and unsuitable options is a violation of First Amendment rights. OEMs would not be voluntarily entering into any contract with DSNY. If OEMs do not make an election, they should not be subject to a penalty for failure to register in 17-06(a). In addition, OEMs should not be required to “opt in” to a DSNY program that may not be properly extracting refrigerant.

In 17-03(b)(3), OEMs should be required to list only refrigerant-containing brands, not all brands. Also, this section uses the term "owned by the OEM." This term should be clarified to state "currently owned by the OEM".

In Section 17-04(a), this section should make clear that DSNY will fully publicize an OEM plan. This section should state that anybody who calls DSNY or signs up via its website will be referred to an OEM program. This section should revise "who contact the department to arrange for the department's recovery of refrigerants" to "who request the department to arrange for the department's recovery of refrigerants".

In Section 17-04(b), the proposed rule states the "department will seek to bill the OEM whose brand name appears on the appliance sold, offered for sale or distributed in the city." DSNY should clarify how the department will determine if a unit was sold, offered for sale or distributed in the city, and how this information will be shown on an invoice to an OEM.

In Section 17-04(c), the proposed rules states that DSNY will provide a list on its website, but more detail is needed to understand if the information will be readily available to a visitor to the department's web page.

AHAM appreciates the opportunity to comment on the proposed rule and is available to discuss this matter further.

Sincerely,



Kevin Messner
Vice President, State Government Affairs



701 Pennsylvania Avenue, NW • Suite 750 • Washington, DC 20004

LUKE M. HARMS
Manager, Government Relations

January 14, 2014

New York City Department of Sanitation
125 Worth Street
Room 710
New York, NY 10013

VIA EMAIL: nycrules@dsny.nyc.gov

RE: Comments for the record on Proposed Rule for Local Law 69

To Whom it May Concern:

Whirlpool Corporation ("Whirlpool") appreciates the opportunity to submit comments on the New York City Department of Sanitation ("DSNY") proposed rule for Local Law 69 of 2013. Whirlpool is a leading manufacturer and marketer of major home appliances and markets *Whirlpool*, *Maytag*, *KitchenAid*, *Jenn-Air*, *Amana*, *Brastemp*, *Consul*, *Bauknecht* and other major brand names to consumers in nearly every country around the world.

Whirlpool takes its environmental responsibility seriously, with a record that clearly demonstrates a sustained commitment to developing more resource efficient appliances and encouraging responsible recycling. The accomplishments of the major appliance industry speak for themselves. Major appliance electrical usage has decreased 50 to 70 percent in the past 15 years and water usage has decreased by 64 to 73 percent over the same period. Because of our industry's efforts, U.S. consumers have saved over \$11 billion in electrical utility costs from their major appliances in the past 10 years. Additionally, our industry has consistently attained a recycling rate of approximately 90 percent for major appliances – a success driven by the shared responsibility of retail partners, manufacturers, recyclers and local governments.

Whirlpool was actively engaged with DSNY, the New York City Council and the Office of the Mayor throughout the legislative process, during which we provided constructive recommendations for improving the proposed law and attempted to understand the rationale for the legislation. After numerous discussions, we unfortunately were unable to arrive at a consensus position and the city council proceeded to adopt Local Law 69, which exceeds the city's police powers and violates the U.S. and New York constitutions, despite our strong opposition. Reluctantly, our industry through the Association of Home Appliance Manufacturers, has filed a lawsuit in the federal district court in Manhattan to block the law's implementation. While DSNY cannot satisfactorily address most of our concerns within the parameters of Local Law 69, we respectfully ask for the following modifications to the proposed regulation:

DSNY should provide viable option for manufacturer-run programs

Local Law 69 prohibits manufacturers from removing appliances from the curbside. Furthermore, the law holds manufacturers captive to the city's program for appliances the city services, regardless of whether manufacturers have registered refrigerant recovery programs, as there is no legitimate opt out and manufacturers would have no access to appointment requests made by residential generators. While the rule cannot address the curbside removal ban, DSNY can modify the rule to ensure full transparency and to provide manufacturers with a credible option to opt out if an OEM refrigerant recovery program is established. Additionally, DSNY should delay the implementation of Local Law 69 or

DSNY
Comments on Proposed Rule for Local Law 69
January 14, 2014

waive manufacturer fees by a minimum of two years to provide manufacturers adequate time to evaluate the final rule and to put in place the necessary infrastructure and management organization to operate an OEM refrigerant recovery program, if established.

§17-04 (b) – Suggestions for improvements to billing process

To bill an OEM, DSNY shall provide an itemized list of serviced products to the OEM, including date of service, brand name, product type, serial number, name of person/entity requesting the service and recovery location/address.

§17-04 (c) – DSNY fees should not apply to OEMs who establish refrigerant recovery programs

If an OEM refrigerant recovery program is established, the manufacturer or manufacturers participating in such program(s) shall not be subject to fees for the removal of refrigerants by DSNY. Instead, inquiries to DSNY, whether by telephone, in person, online or by any other means, should be redirected to the corresponding OEM refrigerant recovery program. If DSNY services in error a product subject to an OEM refrigerant recovery program, no fee should be applied to the OEM for the servicing of such appliance.

DSNY should also clarify that OEM refrigerant recovery programs that remove appliances from residential generators' residences that comply with applicable laws concerning refrigerants would comply with the proposed rule.

Due process

To ensure due process, DSNY should only apply fees to appliances that were sold or transported into the City of New York after Local Law 69 came into force.

Annual reporting

DSNY shall publish at least once annually a report including the following: (1) the number of inquiries from residential generators to DSNY for refrigerant recovery from appliances sorted by appliance type, (2) the number of appliances serviced by DSNY by appliance type, (3) the number of appliances collected by DSNY by appliance type, (4) the number of appliances serviced by each OEM refrigerant recovery program by appliance type, (5) the number of appliances collected by each OEM refrigerant recovery program by appliance type, (6) a profit and loss statement of the refrigerant recovery program, (6) a summary of income derived from sale of recovered refrigerants and recyclable appliance materials, (7) program summaries of new OEM refrigerant recovery programs or changes to OEM refrigerant recovery programs, and (8) a summary of operational efficiencies achieved by the DSNY refrigerant recovery program.

We thank you for your careful consideration of these comments.

Sincerely,



Luke M. Harms
Senior Manager, Government Relations