



# National Association of Chemical Distributors

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May 9, 2007

IP/CNPPD/Dennis Deziel  
Mail Stop 8100  
U.S. Department of Homeland Security  
Washington, DC 20528-8100

Re: Docket Number DHS-2006-0073  
RIN 1601-AA41  
Chemical Facility Anti-Terrorism Standards – Appendix A

Dear Mr. Deziel:

The National Association of Chemical Distributors (NACD) is pleased to provide the following comments on the Department of Homeland Security's (DHS) proposed 6 CFR Part 27 Appendix A, Chemicals of Interest (COI).

## Interest of NACD

NACD represents more than 250 chemical distribution companies throughout North America that operate approximately 1,400 facilities and employ over 21,000 people. These companies represent between 80% to 90% of the chemical distribution facilities in the nation and more than 90% of the industry's gross revenue. NACD member companies have established themselves as leaders in health, safety, security, and environmental performance through implementation of the Responsible Distribution Process<sup>SM</sup> (RDP), established in 1991 as a condition of membership in NACD. RDP is a third-party verified management practice. As directed by the Guiding Principles of RDP, by which each NACD member pledges to manage their businesses, NACD members make health, safety, security, and environmental considerations a priority in their planning for all existing and new operations, products, processes, and facilities.

NACD was the first chemical trade association to approve new security measures as part of its management program, the Responsible Distribution Process<sup>SM</sup> (RDP), and has developed a security vulnerability assessment that specifically addresses security issues relevant to chemical distribution facilities. NACD members have invested millions of dollars and substantial resources to safeguard their facilities and the transportation of their products.

## Appendix A – Chemicals of Interest

### Definition of Chemical Facility

In the interim final rule, chemical facility is defined as “any establishment that possesses or plans to possess, at any relevant point in time, a quantity of a chemical substance determined by the Secretary to be potentially dangerous or that meets other risk-related criteria identified by the Department.” This definition raises many questions that directly impact the Appendix A Chemicals of Interest (COI) list and who will be required to complete the Top Screen. The terms “possess” and “at any relevant point in time” raise questions for many chemical distributors about which party(ies) in the supply chain are subject to the requirements.

Many chemical distributors take title to chemicals on the Appendix A list, but do not store the chemicals on-site, either because the chemical is shipped directly to a distributor’s customer from the supplier, or the chemical is shipped to a public warehouse or terminal, which is not owned by the distributor. In the first case, because the Appendix A chemical would not be in the physical control of the distributor, would that distributor be required to fill out a Top Screen? In the latter case, would the chemical distributor who has taken title to the Appendix A chemical be required to fill out the Top Screen, or would this be the responsibility of the warehouse or terminal?

Another complication is that some chemical distribution companies have hub and spoke operations. Through this system, the distributors have main facilities where materials are repackaged, and smaller branch facilities where chemicals are stored and transloaded en route to customers. The inventory quantities in these smaller facilities fluctuate greatly in response to customer demands. Thus, these facilities may move in and out of the world of DHS-regulated facilities. A facility has 60 days to complete and submit the Top-Screen questionnaire after the receipt of threshold quantities of chemicals of interest. It is probable that within that same 60-day window, the regulated material is shipped to customers and is no longer on the premises. Is the facility expected to complete the Top-Screen prospectively? If the facility’s existence in the regulated community is limited to periods of not more than 60 days, is it exempt or regulated?

NACD urges DHS to more clearly define “possess” to clarify whether this means “own” or “in physical control of.” One suggestion is to use the definition of a facility under 40 CFR 370.2 that is used to generate Tier II reports: “Facility means all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). Facility shall include manmade structures as well as all natural structures in which chemicals are purposely placed or removed through human means such that it functions as a containment structure for human use.”

### Any Amount

NACD is concerned about the low threshold quantities for many of the chemicals listed in Appendix A, and is particularly concerned about those where the screening threshold quantity (STQ) is “any amount.” While NACD understands that the substances with “any amount” thresholds are meant to capture those chemicals presenting a theft risk, this approach leaves too

much room for confusion and misinterpretation. Use of the term “any amount” will create a larger burden for both DHS and facilities that would otherwise not be affected by this rule and will divert limited resources away from those facilities that can actually be considered terrorist targets. For example, taken literally, the term “any amount” would capture trace amounts of Appendix A chemicals, often naturally occurring, that exist in commercial preparations of some industrial chemicals. NACD recommends that DHS specify a de minimus level at which these trace amounts within other substances would not be considered chemicals of interest.

NACD encourages DHS to replace “any amount” with a specified quantity approach in which the thresholds reflect what experts believe is an amount necessary to produce an off-site consequence to the public, either from attack or if stolen and turned into a weapon of mass destruction. An example is the approach used in Schedules 1-3 of the Chemical Weapons Convention, wherein the classification is based on the quantities of the substance produced, processed, consumed, exported, or imported commercially for legitimate purposes vs. its use as a weapon itself or use in the manufacture of weapons.

NACD further encourages DHS to consider revisiting the inclusion of certain chemicals on the list as the commercial application of some of them for legitimate use in commerce can exceed the threshold quantity listed. For example, the amount of propane needed to heat a facility and run equipment will exceed the 7500 lb threshold.

Another example of an unusually low threshold is that of acetone at 2000 lbs. This common solvent is available in pure and blended form from paint and hardware stores. When the material is readily available, would someone try to steal the material from a facility? The low threshold for this material will draw a number of retail establishments as well as paint and coating manufacturers into the regulatory loop. Is this what DHS intends?

#### Regulatory Consistency

It is NACD’s understanding that DHS set the STQs for release chemicals at 75 percent of the Environmental Protection Agency (EPA) Risk Management Program (RMP) Threshold Planning Quantity (TPQ) amounts. For clarity and consistency purposes, NACD recommends that the DHS amounts be aligned with the EPA amounts.

#### Mixtures

NACD requests clarification from DHS on how mixtures should be handled. Some of the substances listed in Appendix A commonly exist in mixtures, or blends, of chemicals. These blends many contain both Appendix A and non-Appendix A chemicals. For purposes of determining thresholds, clarification is needed on how these mixtures should be treated. For example, does a facility need to calculate just the amount of Appendix A chemical, or the entire mixture? Also, if a facility has a mixture that contains only a small amount of an Appendix A “any amount” chemical, such as a few parts per million, would Top Screen completion be required?

DHS has verbally indicated that only mixtures that possess the same properties, or release, theft, or weapons of mass effect risks, as the Appendix A chemicals should be subject to the Top Screen. NACD requests that DHS clarify this in writing in order to avoid needless completion of

the Top Screen for facilities that have blends with Appendix A chemicals, but not in high enough solutions to present the same risks as the pure chemicals. DHS should address the question of what de minimus amounts of Appendix A chemicals that exist in mixtures are not of interest. One example of addressing the concern about blends and mixtures can be found in the EPA Tier II reporting mechanism.

#### Ease of Use

NACD recommends that DHS issue the Appendix A list by the Chemical Abstract Service (CAS) numerical sequence in addition to the alphabetical listing. An example is the listing in 40CFR 372.65 which lists the EPA toxic substance items both ways. This may facilitate review by affected parties in the interest of more quickly determining if a facility possesses any of the items on the list, particularly because chemical synonyms are used at times.

#### Conclusion

NACD appreciates the opportunity to provide comments on Appendix A and the Department's consideration of our comments. We look forward to our continued work with DHS in protecting chemical distribution facilities against attack. Feel free to contact us at 703/527-6223 with questions or for more information.

Sincerely,

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