National Association of Chemical Distributors

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February 5, 2007

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Mail Stop 8610
U.S. Department of Homeland Security
Washington, DC 20528-8610

Re: Docket Number DHS-2006-0073
RIN 1601-AA41

The National Association of Chemical Distributors (NACD) is pleased to provide the following comments regarding the Advance Notice of Rulemaking by the U.S. Department of Homeland Security to promulgate regulations for the security of certain chemical facilities.

NACD represents more than 250 chemical distribution companies in the United States and Canada, which 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℠ (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 place health, safety, security, and environmental considerations a priority in their planning for all existing and new operations, products, processes, and facilities.

The membership includes small businesses as well as regional and national companies. Handling, storing, repackaging, and transporting hazardous substances is an integral part of the chemical distribution business. In 2005, NACD members made 6.5 million chemical distribution shipments, were responsible for 46 billion pounds of delivered product, and drove 172 million miles while distributing chemicals. Most NACD members deal in domestic trade within the U.S., and some are also involved in various import and export trade.

COMMENTS BY THE
NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS
REGARDING THE U.S. DEPARTMENT OF HOMELAND SECURITY'S ADVANCE NOTICE OF RULEMAKING SEEKING PUBLIC COMMENT ON PROPOSED TEXT FOR INTERIM FINAL REGULATIONS FOR THE SECURITY OF CERTAIN CHEMICAL FACILITIES
[Docket No. DHS – 2006-0073]
RIN 1601 – AA41

Summary of NACD's Comments
The National Association of Chemical Distributors (NACD) believes that the Department of Homeland Security's (DHS) approach to implement Section 550 of the Homeland Security Appropriations Act of 2007 is reasonable and will result in meaningful protections for chemical facilities that present a "high level of security risk." We commend the Department for its willingness to work with NACD and with the industry in general to propose regulations that address relevant security concerns while maintaining the intent of the Act.

Our comments focus on the following areas of the Advance Notice of Rulemaking (ANRM):

- Subpart A – General.
- Subpart B – Chemical Facility Security Program.
- Subpart D – Other.
- Preamble: E. 4. – Guidance Regarding Site Security Plans.

Subpart A – General.
Section 27.100. Definitions.
NACD supports the proposed definition of a "chemical facility." We recommend, however, that DHS narrow its definition by stating that possession means "on-site possession." Some chemical distribution companies take possession of chemicals before they store them on-site. Some distributors "possess" chemicals, meaning they take title to the chemical, but do not store chemicals on-site, either because the chemical is shipped directly to a distributor's customer from the chemical supplier or the chemical is shipped to a public warehouse or terminal, which is not owned by the distributor. If DHS does not better define possession, it may likely place chemical distribution companies with no facility or with no chemicals on-site in a high-risk tier. 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, structure, and other stationery 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."

Subpart B – Chemical Facility Security Program.

Section 27.200. Information regarding security risk for a chemical facility.

NACD supports the use of an on-line screening tool similar to RAMCAP's Top-screen process to assess the level of potential damage that could be caused in the event of an attack against a particular facility. Some NACD members have had experience with the Top-screen and RAMCAP processes through DHS's Comprehensive Review program and reported to us that the use of the Top-screen process for assessment purposes was positive overall. Nevertheless, we believe that if additional questions that are outside the scope of questions that currently exist in the RAMCAP Top-screen are added to a Top-screen process adopted by the Department, the tool may become too arduous.

We recommend that DHS allow submitters to provide a range, either in pounds or gallons, when answering questions regarding threshold quantities of chemicals that the Department wants to know are present. Chemical distributors' inventories vary, both in type of chemical and in quantity, and are dependent upon customer demand. Some products are seasonal and are present only during certain times of the year or in varying quantities throughout the year.

Secondly, we suggest that DHS consider including in its guidance how submitters enter information about chemical mixtures and/or blends. Many chemical distributors conduct blending operations on-site. An example of addressing the concern about blends and mixtures for reporting purposes can be found in the Tier II reporting mechanism. If DHS uses a drop-down menu with which to select certain chemicals, we will need to know how blended products should be included in this portion of the Top-screen. Another issue is that once a "hazardous" substance is blended or mixed, the properties of concern may no longer apply.

Thirdly, we recommend that DHS consider how chemical distribution facilities that either do not own a facility but store chemicals in a public warehouse or terminal or that own a facility but store some chemicals in such warehouses or terminals report this information in the Top-screen process. Our concern is that DHS will assume that data about chemicals possessed by a distribution facility are located at the address used by the submitter completing the Top-screen. Guidelines should be similar to the ones used by the Environmental Protection Agency for similar situations.

Fourthly, we recommend that facilities completing the Top-screen be allowed to provide information about their customers as an *option* but not as a requirement. We do not see a need for the Department to obtain this information for the purposes of screening facilities. Additionally, despite the protections that the Department is proposing to place on the data, we are uncomfortable with requiring companies to provide this sensitive and proprietary information. We support DHS's proposal to collect data on "major uses" as more important than "major customers" and believe that use data is sufficient enough for the Department to determine potential supply chain impact(s) if a facility is attacked.

Lastly, NACD recommends that if a facility conducts the screening process, either voluntarily or by compulsion, and is screened out of coverage from the regulation, DHS should notify the facility in writing confirming that the facility is not considered to be "high risk."

Section 27.205. Determination that a chemical facility "Presents A High Level of Security Risk."

NACD supports DHS's proposal to create risk-based tiers for chemical facilities that are determined to present "a high level of security risk" based on information made available to the Department about chemical facilities. We urge the Department, however, to scrutinize data about facilities that qualify as "high-risk" by consulting with such facilities. In other words, DHS should conduct an extra step—consultation with each facility that is deemed "high-risk"—and avoid using the Top-screen process as the only method to certify a facility's placement within a tier. For example, it is plausible for a facility to be screened in as "high risk" based on the type of chemicals and/or inventories it has with little attention given to the facility's attractiveness as a likely target. Tier determination should not be based on a single factor such as product/volume. For example, proximity to population is also a key factor that should be considered. Tiering should be the result of the sum of the whole, with each individual facility being assessed upon all parts of the process: location/proximity, target access, target attractiveness, product volume and hazard risk, consequence, and efforts/planning conducted by the facility to mitigate. Consultation with "high risk" facilities will help DHS to confirm that its data collection is correctly placing facilities in the appropriate tier.

Section 27.215. Vulnerability assessments.

NACD supports DHS's proposal to accept vulnerability assessments conducted by covered facilities and commends the Department for accepting existing methodologies instead of requiring only one model over all others. NACD developed a methodology for chemical distribution because existing methodologies do not specifically address all of the security issues that are relevant to chemical distribution facilities. We believe that the most prevalent models are focused on assessing vulnerabilities at chemical producing facilities and are not altogether useful to chemical facilities that store and/or transport non-bulk chemicals.

NACD urges DHS to be flexible when accepting methodologies and avoid blindly accepting only those that meet criteria established by the Center for Chemical Process Safety (CCPS). While the CCPS methodology is widely accepted by chemical producers as appropriate for their facilities, we believe that the Department should be thorough in its review of each methodology used by covered facilities to determine if vulnerabilities identified by a particular facility are sufficiently addressed for the facility. Unnecessarily eliminating alternative vulnerability assessment methodologies on the basis that they are not first "certified" by CCPS would cause unnecessary disruptions and confusion to facilities successfully utilizing these programs.

Section 27.220. Tiering.

As previously stated, NACD supports DHS's use of risk-based tiers. Establishing tiers based on risk is important for many purposes, not the least of which is prioritizing facilities needing immediate attention. It is also consistent with a major chemical industry regulation, the Risk Management Program (RMP) rule, which has wide coverage and is widely-accepted as appropriate chemical risk management policy. The U.S. Environmental Protection Agency (EPA) appropriately established "tiers" as part of RMP to assign levels of risk management requirements for facilities with the greatest off-site consequence. Accordingly, the Agency assigned fewer requirements for facilities that posed smaller off-site consequence than facilities in the highest "tier." The chemical industry is so diverse, in terms of facility and inventory sizes,

chemical types, facility locations, and types of operations, that a “one-size-fits-all” regulatory approach would simply be implausible.

To maintain consistency within the realm of chemical risk management policy, we recommend that DHS establish three risk-based tiers of high-risk facilities. Facilities presenting the very highest level of risk through the RAMCAP process should be required to adhere to the most thorough level of performance standards required by the Department and be subject to the most frequent inspections of all the tiers to ensure continued compliance. Facilities placed in the highest tier should include those closest to major population areas and that, if attacked, would potentially cause significant damage to the population. In other words, we believe that it is more important for DHS to focus on where a facility is located and how many people it could impact versus focusing on facilities with chemicals on-site having potentially large off-site consequences but are not close to a population center.

Section 27.230. Risk-based performance standards.
NACD supports the use of performance-oriented standards, particularly over the use of inherently safer technologies or prescriptive, one-size-fits-all standards. Facility owners and operators should be permitted to propose to DHS performance standards for a specific facility as part of their site security plans. DHS would then have the opportunity to review and approve/disapprove of the standards as part of the security plan in its entirety. While developing the risk-based performance standards and applying them to specific facilities, DHS needs to bear in mind that the goal of the performance standards should be to reduce the vulnerabilities identified in the vulnerability assessment, not necessarily to reduce all potential consequences or mandate the use of specific countermeasures.

NACD also cautions DHS against recognizing the Maritime Transportation Security Act (MTSA) regulations as widely known or accepted performance standards of most or all chemical facilities. Most chemical distribution facilities are not currently covered by the Act because of the limited reliance on waterways to store or distribute chemicals. According to data collected by NACD, only one percent of NACD's approximately 250 members, representing over 1,400 facilities, ship chemicals by way of water.

Regarding the performance standard on background checks, NACD recommends that DHS allow facilities that are subject to Department of Transportation security regulations to use their current process rather than having DHS do separate checks or use the maritime clearance process. There is now a significant backlog in the background check process, and requiring all facilities to use a new process would increase this backlog.

Section 27.235. Alternative security program.
NACD commends DHS for considering the approval of alternative security programs being used by facilities in lieu of mandating only one program. NACD members have invested financial and other types of company resources into implementing NACD’s Responsible Distribution Process℠ (RDP), which mandates certain security measures. Just as NACD opposes a one-size-fits-all regulatory framework to address security, we also oppose a one-size-fits-all voluntary industry practice. Diversity within the chemical industry requires varying levels of measures

implemented. As such, each covered facility should be given the opportunity to present to DHS its security program for approval.

NACD will be applying for DHS recognition of the Responsible Distribution Process[SM] as an Alternative Security Program as soon as the Department issues public guidance on how to do so.

Section 27.245. Inspections and audits.
NACD prefers that DHS officials, not officials from other government agencies or non-governmental organizations, conduct third-party inspections or audits to assess compliance with the requirements of this regulation. We believe that consistency of audits can be maintained only if one agency using the same inspection and/or audit procedures performs the work.

NACD recommends that the Department obtain the necessary resources for it to perform facility compliance audits and avoid lessening consistency and accountability by contracting these important audits to others.

Subpart D – Other.
Section 27.400. Chemical-terrorism vulnerability information.
NACD applauds the protections that DHS proposes to place on information it designates as Chemical-terrorism Security and Vulnerability Information (CVI). In order to comply with CVI requirements, NACD seeks guidance from DHS on how (or what measures to use) NACD should address the need for third-party auditors that NACD hires to conduct on-site audits of each of its member companies once every three years to verify implementation of NACD's Responsible Distribution Process[SM]. RDP mandates that members implement and have third-party audited once every three years certain security measures, including site security plans and vulnerability assessments, that may be submitted to DHS as Alternative Security Plans as part of its compliance with this regulation. NACD is concerned that its third-party audit process could run afoul of DHS's CVI rules and therefore seeks the Department's interpretation of its CVI rules as they may impact NACD's third-party audit process.

Section 27.405. Review and preemption of State laws and regulations.
NACD encourages DHS to exercise its jurisdictional authority to the fullest extent under the Act to ensure that security regulations proposed by DHS supercede state rules. Varying degrees of regulations cause confusion for chemical facilities with locations in multiple states. Multiple security rules also provide varying levels of protection, which we do not believe is the intent of DHS in promulgating these rules.

Preamble – E. 4.: Guidance Regarding Site Security Plans.
The ANRM calls for several future guidance documents which NACD supports. However, DHS should be clear that any "guidance" issued as a result of the interim final rule would only serve to provide direction and advice to owners and operators during implementation and would not, under any circumstances, be enforceable or limit facilities' flexibility to choose security measures. Enforceable guidance would undermine the intent of the statute for DHS to promulgate flexible, performance-based regulations that do not take a "one-size-fits-all" approach to chemical security.

DHS should also develop this guidance with public review and comment and in consultation with the chemical industry and its various trade organizations. The opportunity for consultation will ensure that the guidance benefits to the greatest possible extent from current security practices and management systems that are already in place throughout the country. When promulgating its Risk Management Program rules, EPA worked with NACD and its members to develop sector-specific guidance to assist chemical distribution facilities understand RMP requirements. This guidance was extremely helpful and is still being used today. We recommend that DHS consider following EPA's example and work with industry to develop guidance.

In addition, to prevent confusion and aid in the development of facility security plans, any guidance issued by DHS should be available to the affected companies at least 120-180 days prior to the effective date of the written security plan.

Thank you for considering our comments. NACD looks 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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