March 5, 2008

Dear House Homeland Security Committee Member,

I am contacting you to express the views of the National Association of Chemical Distributors (NACD) on the "Chemical Facility Anti-Terrorism Act of 2008," which is scheduled for a House Homeland Security Committee mark-up tomorrow morning.

NACD's 250 chemical distribution member companies have established themselves as leaders in health, safety, security, and environmental performance through implementation of the Responsible Distribution Process℠ (RDP), a third-party verified management practice established in 1991 as a condition of membership in the Association. NACD was the first chemical trade association to approve new security measures, as part of its management program (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.

While NACD would support legislation to simply make the Chemical Facility Anti-Terrorism Standards (CFATS) permanent, the Association believes it is premature to make changes to the program at this stage. CFATS is a major new chemical security regulation required by Congress as part of the 2007 Homeland Security Appropriations Act. This brand new program, which took effect less than a year ago, establishes stringent security requirements. Facilities throughout the nation are currently investing significant time and resources into complying with these new requirements. The Department of Homeland Security (DHS) has developed the regulations as quickly as possible, but implementation is still only in the early stages with the first compliance deadline occurring just a month ago. NACD urges the House Homeland Security Committee and Congress to give CFATS more time to be fully implemented and tested before making changes to this important program.

In addition to our general concern about premature enactment of new chemical security rules, NACD has concerns with several specific provisions of the March 4, 2008, Committee Print of the "Chemical Facility Anti-Terrorism Act" as described below.

First, NACD has concerns about the requirement in Section 2103(b)(2)(B) to conduct periodic drills and exercises that include local law enforcement and emergency responders. NACD strongly supports the concept of drills with these local officials in principle. In fact, under NACD's Responsible Distribution Process℠, NACD members are required to coordinate with local emergency responders by making them aware of the potential hazards of the chemicals they have on site, conducting plant tours, and coordinating on emergency response plans. Our concern about a federal mandate to conduct periodic drills and exercises is due to the reality that local emergency response providers have limited resources and are not always available to devote the manpower and resources to these activities, particularly if there are numerous facilities in the area. These types of drills and exercises require a tremendous amount of planning and coordination to ensure that they are conducted safely and efficiently. Given these limitations,

facilities could be placed in the position of being out-of-compliance with the chemical security regulations because the local emergency responders simply do not have the time and resources to spend on these exercises.

An additional concern is that many emergency response organizations are volunteer. In these cases, it would be difficult to know whether background checks on the individuals in these volunteer organizations have been conducted. These individuals will have access to sensitive information, and if they are not who they say they are, serious security breaches could occur.

Again, while NACD supports the concept of drills and exercises with local emergency responders, we would urge the Committee to allow for some flexibility in order to recognize that these organizations have limited resources and cannot be forced to participate in such exercises.

NACD has serious concerns about Section 2107, which allows states and localities to adopt and enforce standards more stringent than the federal law unless these measures are in direct conflict. Because the protection of chemical facilities is a national security issue, NACD strongly believes that federal preemption is an important element of an effective chemical security program. There is precedent for federal preemption in the areas of aviation, nuclear, port, and hazardous materials transportation security. Lack of a strong national standard will result in a patchwork of different chemical security rules throughout the nation, which would make compliance confusing for any company that does business across state lines, which is the norm, and would not be in the best interest of national security, the objective that chemical security legislation is meant to promote.

Another major concern of NACD is the use of third-party entities under Section 2109 to review and approve/disapprove security vulnerability assessments and site security plans and to inspect facilities. NACD strongly believes that only Federal Government employees should be authorized to conduct these functions. There would be too much incentive for private, third-party entities to conduct these functions with their own self-interests and future business opportunities in mind, despite language in the bill to try to prevent this.

Lastly, NACD opposes the requirement under Section 2110(a) that all covered facilities, as part of their site security plans, conduct assessments of methods to reduce the consequences of a terrorist attack and the requirement under Section 2110(b) that facilities in high-risk tiers adopt these measures, otherwise known as inherently safer technologies. The appropriate role of security laws and regulations is not to dictate industrial processes.

Significant regulations and incentives already exist for facilities to use the safest materials and methods possible in their operations. Regulations include EPA’s Risk Management Program and OSHA’s Process Safety Management requirements. Incentives include the objective of companies to avoid costly incidents and to minimize potential consequences of such incidents, and the desire of companies to do what is in the best interest of their employees, their communities, and their business reputations. In addition, the chemical security regulations already have a built-in incentive to use the safest methods and processes possible in order to be assigned to a lower risk tier.

Chemical distributors maintain specific inventories of products in order to respond to the needs of their customers. A requirement to reduce inventories of certain products would prevent these distributors from effectively addressing their customers' needs. This type of requirement could also lead to increased transportation activities, which would increase the likelihood of loading, unloading, or in-transit incidents, including potential security incidents. NACD urges the Committee to remove the mandate to consider and adopt inherently safer technologies under Section 2110.

NACD appreciates the opportunity to comment on the "Chemical Facility Anti-Terrorism Act of 2008." We urge you to consider the concerns outlined above and, ideally, to limit the legislation to making DHS's authority to implement CFATS permanent.

Thank you for your consideration. Please feel free to contact me at jgibson@nacd.com or 703/527-6223, ext. 103 if you have any questions.

Sincerely,

Jennifer C. Gibson
Vice President, Government & Public Affairs
National Association of Chemical Distributors