NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS

NACD Responsible Distribution Process

Quality • Responsibility • Stewardship

June 17, 2009

Dear House Homeland Security Committee Member,

I am writing to express the views of the National Association of Chemical Distributors (NACD) on H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009, which is scheduled for a House Homeland Security Committee mark-up tomorrow morning.

NACD has 250 distributor members and over 90 Affiliates. NACD members purchase chemical products from manufacturers and process, re-package, warehouse, market, and transport these materials to an industrial customer base of approximately 750,000. Chemical distributors serve a wide variety of industries critical to the nation's health and economy ranging from food and drugs to water treatment to electronics to cosmetics to paints and coatings. Responsible distribution and customer service are key priorities for NACD members. Distributors operate on tight profit margins, so times have been challenging over the past several months.

NACD's member companies have established themselves as leaders in health, safety, security, and environmental performance through implementation of the Responsible Distribution Process[SM] (RDP*)*, a third-party verified management practice established in 1991 as a condition of membership in the Association. NACD has adopted and implemented security measures as part of RDP and has developed a security vulnerability assessment (SVA) 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 supports legislation to give the Department of Homeland Security permanent authority to regulate chemical facilities, we believe that it is pre-mature to make significant changes to the current chemical security regime as H.R. 2868 would do. The Chemical Facility Anti-Terrorism Standards (CFATS) are still in the implementation process. Facilities have only recently begun to receive their final risk tier assignments and are now beginning to write and implement their site security plans (SSPs). DHS will then need to review these SSPs and conduct compliance inspections. Therefore, it will take more time to learn if there are any gaps in the system. CFATS is a major new regulatory program, and DHS has done a commendable job writing the regulations and setting up the internal infrastructure to be able to implement and

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enforce the new regulations. Because of these efforts, real security measures are being implemented at facilities throughout the nation. Requiring DHS to go back and rework the regulations at this point would be counterproductive.

NACD also has several specific concerns about H.R. 2868. First, NACD has serious concerns about the requirement under Section 2111(a) that each covered facility, as part of its site security plan, conduct an assessment of methods to reduce the consequences of a terrorist attack and the requirement under Section 2110(b) that facilities in the highest risk tiers adopt these measures, otherwise known as inherently safer technologies (ISTs).

During Tuesday's committee hearing, there was substantial discussion about the IST analysis requirement in the New Jersey chemical security regulations and how it has been relatively painless for chemical facilities to comply with this requirement. **We would like to emphasize that the IST provisions in H.R. 2868 are much more extensive than those in the New Jersey regulations**. The IST assessment requirement in New Jersey applies *only* to facilities that handle extremely hazardous, flammable, or reactive chemicals in certain quantities and are covered under the Toxic Catastrophe Prevention Act (TCPA). The requirement in H.R. 2868, on the other hand, applies to **all facilities covered under the CFATS** program. This would include many small distributors who are covered under CFATS because they handle small quantities of theft and diversion chemicals. In addition, unlike the New Jersey regulation, which only requires an assessment, H.R. 2828 would require facilities in risk tiers I and II to actually implement the ISTs.

The act of conducting the IST assessment would be extremely costly for NACD members. These assessments will require expertise with IST methods, the likelihood of these methods to reduce risk, and their costs. The majority of NACD members are small businesses and may not have teams of chemical and process safety engineers on staff who would be able to conduct the IST assessments. These companies would be forced to hire consultants, who at rates of hundreds of dollar per hour, would easily drive the costs of the assessments into tens of thousands of dollars per facility.

In addition, while some chemical distributors may custom blend substances for customers, the majority do not manufacture chemicals. Their operations involve warehousing, repackaging, and transportation of materials to their customers. They maintain specific inventories of products in order to respond to the needs of these customers. For most facilities, an IST assessment would likely produce limited options that would not justify the cost and effort of the exercise itself. In cases where distributors might be required to reduce inventories of certain products, this would prevent these companies from effectively addressing their customers' needs. Particularly in these tough economic times, this could be the final straw to put some companies out of business, which would result in further job losses.

An IST requirement could also lead to increased transportation activities, which would increase the likelihood of loading, unloading, or in-transit incidents, including potential security incidents. Finally, the CFATS already have a built-in incentive for facilities to use the safest methods and processes possible in order to be assigned to a lower risk tier or to completely tier

out of the regulation. For all of these reasons, NACD strongly urges the Committee to remove the mandates to assess and adopt inherently safer technologies under Section 2111.

Second, NACD has serious concerns about the prescriptive nature of H.R. 2868. There are several specific mandates in the bill including those that would require facilities to conduct annual drills and exercises with the participation of local officials and emergency responders, set out specific criteria for employee training and procedures for background checks, and require that union representatives be involved in the development of SVAs and SSPs. These specific measures may not be appropriate for every covered facility. For example, under Section 2101(2)(K), the requirement to conduct yearly drills and exercises that include local law enforcement and emergency responders could place facilities in the position of being out-of-compliance with the regulations because the emergency responders in many locales do not always have the time and resources to spend on these exercises and cannot be forced to participate. NACD strongly supports the concept of such drills and exercises, but urges Congress to allow for flexibility in this area in order to recognize the resource limitations of the local organizations.

In addition, NACD strongly opposes the citizen suit provision in Section 2116, which would allow any individual or organization to sue a chemical facility for alleged non-compliance. H.R. 2868 gives DHS authority to impose substantial civil and administrative penalties as well as the authority to shut down facilities for non-compliance. The threat of citizen suites is not only unnecessary, but could also divert resources from security enhancements to litigation costs.

Finally, NACD is concerned about Section 2109, which would allow states and localities to adopt and enforce standards more stringent than the federal law. Because the protection of chemical facilities is a national security issue, NACD 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 industry norm, and would not be in the best interest of national security, the very objective that chemical security legislation is meant to promote.

NACD appreciates the opportunity to comment on H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009." We urge you to consider the concerns outlined above and, ideally, to limit the legislation to simply extending DHS's authority to implement the Chemical Facility Anti-Terrorism Standards.

Thank you for your consideration. Please feel free to contact me at jgibson@nacd.com or 703/527-6223, ext. 3047 if you have any questions.

Sincerely,

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National Association of Chemical Distributors