

December 1, 2011

BY ELECTRONIC MAIL

The Honorable Janet Napolitano
Secretary, U.S. Department of Homeland Security
National Protection and Programs Directorate
Infrastructure Security Compliance Division (NPPD/ISCD)
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Arlington, VA 20598-0610
Electronic Address: <http://www.regulations.gov> (RIN 1601-AA52; Docket ID 2008-0076)

Re: Comments on DHS' Proposed Ammonium Nitrate Security Program Rule

Dear Secretary Napolitano:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Department of Homeland Security's (DHS) *Proposed Ammonium Nitrate Security Program Rule*.¹ DHS' proposed rule would regulate the sale and transfer of ammonium nitrate pursuant to section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act with the intent of preventing the use of ammonium nitrate in an act of terrorism.² A more detailed discussion of the proposed rule is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272⁵ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and a recent amendment to the RFA, codified at 5 U.S.C.

¹ 76 Fed. Reg. 46908 (August 3, 2011).

² *Id.*

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁵ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

604(a)(3), require the agency to include in any final rule the agency's response to any comments filed by Advocacy and a detailed statement of any change made to the proposed rule as a result of the comments.

Background

As discussed in the proposed rule, ammonium nitrate is a chemical that exists in a variety of concentrations and physical forms that can have different security implications.⁶ Ammonium nitrate is principally used in fertilizers and explosives, but can also be altered by adding organic material, such as fuel oil, to create an explosive mixture known as Ammonium Nitrate/Fuel Oil (ANFO). Such mixtures have been used in terrorist attacks both domestically and internationally, including the 1995 Oklahoma City bombing that killed 168 people.⁷

DHS' proposed rule would implement the requirements of section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act. That legislation included Subtitle J, Secure Handling of Ammonium Nitrate, which, among other things, defines the term ammonium nitrate, directs DHS to regulate the sale and transfer of ammonium nitrate from ammonium nitrate facilities, provides for the regulation of ammonium nitrate mixtures, defines the terms "owners of ammonium nitrate facilities" and "ammonium nitrate purchasers," and provides for their registration with DHS after screening through the Terrorist Screening Database (TSDB).⁸ The legislation also gives DHS discretion to exempt ammonium nitrate used exclusively in the production of an explosive, calls upon DHS to produce guidance materials and posters for owners of ammonium nitrate facilities, and prohibits any person from taking possession of ammonium nitrate unless they are properly registered.⁹

DHS's proposed rule would establish a program to register and vet ammonium nitrate sellers, purchasers, facility representatives, and facility points of contact (POCs), verify and approve transfers of ammonium nitrate, require reporting of theft or loss, and provide for inspections/audits, civil penalties, and adjudications and appeals. In developing its proposed rule, DHS has conducted outreach to federal agencies and affected stakeholders, including publication of an Advance Notice of Proposed Rulemaking in 2008 and hosting a series of twelve public meetings around the country during the fall of 2011 to discuss the proposed rule and obtain public input on it. While DHS is under a statutory obligation to promulgate this rule, it has recognized that other federal regulations already apply to ammonium nitrate in various segments of the supply chain and it has tried to align the proposed rule with these existing programs to avoid duplicative, overlapping, or conflicting regulatory requirements.

Small Entities Have Expressed Concerns with the Proposed Rule

Following publication of the proposed rule, a number of small business representatives contacted Advocacy and expressed concerns with various aspects of the proposed rule. In response, Advocacy hosted a small business roundtable on November 22, 2011 to discuss the proposed

⁶ 76 Fed. Reg. 846912.

⁷ Id.

⁸ See, Public Law 110-161, Sec. 563 (December 26, 2007).

⁹ Id.

rule and to obtain small business input on it. Representatives from DHS attended the meeting and provided a background briefing on the proposed rule. Small business representatives at the meeting included a number of industries involved with ammonium nitrate, including agriculture, transportation (both truck and rail), mining, and explosives. The following comments are reflective of the issues raised during the roundtable discussion and in subsequent conversations with small business representatives. It should be noted that small business representatives are supportive of the need for an ammonium nitrate security program, but expressed concerns about various aspects of the proposed rule.

- 1. Small business representatives would like DHS to better align the proposed rule with existing security programs.** As discussed in the proposed rule and during the roundtable, there are a number of federal regulatory programs that already apply to ammonium nitrate, including DHS' Chemical Facilities Anti-Terrorism Standards (CFATS) (high risk chemical facilities), U.S. Coast Guard Maritime Security regulations (maritime vessels and facilities), Transportation Security Administration regulations (transportation of cargo), Bureau of Alcohol, Tobacco, Firearms, and Explosives (explosives), Department of Transportation (hazardous materials), Department of Commerce (export and re-export controls), as well as a variety of state and voluntary industry security programs. Representatives stated that DHS should engage in additional outreach and analysis of these programs to avoid duplicative, redundant, or overlapping requirements as well as potential conflicts with existing regulatory requirements. Advocacy recommends that DHS develop a side-by-side comparison of existing regulatory programs by industry sector and consider ways to streamline or integrate existing programs or provide exemptions for sectors that are already regulated and considered secure.
- 2. Small business representatives from the agricultural industry are concerned that the proposed rule will unduly limit access to ammonium nitrate as a fertilizer.** Representatives at the roundtable noted that the underlying legislation for the proposed rule specifically requires DHS to consult with appropriate private sector entities to ensure that access to ammonium nitrate for agricultural producers is not unduly burdened. However, attendees stated that agricultural retailers and transporters may discontinue selling or transporting ammonium nitrate if the regulatory requirements are too complex, expensive, or burdensome. This could lead to ammonium nitrate becoming unavailable for use as a fertilizer.¹⁰ Attendees stated that because ammonium nitrate accounted for only a small percent of agricultural retailer and transporters' revenues, some companies would likely stop selling or transporting it as a result of the proposed rule. Further, representatives stated that ammonium nitrate is a preferred product for certain crops and regions and that DHS should not force the industry into alternative products unless there is a compelling security need. Advocacy recommends that DHS conduct additional outreach to determine how the proposed rule would impact the availability of ammonium nitrate for agricultural producers and consider ways to minimize those impacts.

¹⁰ A representatives from the explosives industry expressed similar concerns about transporters ceasing to transport ammonium nitrate for explosives use if transportation is included in the rule.

- 3. Small business representatives expressed opposition to the 30 percent mixture provision in the proposed rule and believe that the level should be increased significantly.** The proposed rule would define any mixture (also referred to as “blends”) containing 30 percent or more ammonium nitrate by weight as ammonium nitrate subject to the proposed rule. Representatives stated that these mixtures come in many forms (e.g., homogeneous v. blended) and have distinct characteristics, but that mixtures containing ammonium nitrate at these levels are not effective as explosives. Accordingly, the attendees recommended that the mixture level be increased significantly. One attendee noted that CFATS and other programs provide exemptions for ammonium nitrate mixtures up to 70 percent. Also, an attendee from the explosives industry specifically requested that “liquid” (viscous) emulsion blends made with ammonium nitrate prill be exempt because the product is not a solid, is only manufactured and sold to the explosives industry, and is already regulated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Advocacy recommends that DHS conduct additional outreach to clarify the risks associated with these various mixtures and ascertain the threshold levels in other federal regulatory programs to determine whether the proposed mixture provision is overly restrictive.
- 4. Small business representatives expressed opposition to the 25 pound exemption in the proposed rule.** The proposed rule exempts quantities of ammonium nitrate or mixtures weighing less than 25 pounds (as well as first aid cold packs). DHS indicates that it selected this level because small containers of ammonium nitrate are commonly sold in 50 pound bags. However, attendees at the roundtable expressed opposition to the 25 pound exemption and noted that a person (a group of people) with malicious intent could easily assemble a large quantity of ammonium nitrate through multiple purchases of small quantities. Accordingly, attendees opposed the 25 pound exemption and stated that all amounts should be subject to regulation. (Attendees did not seem to have strong opinions – or had not fully considered - the exemption for first aid ice packs; however, at least one attendee indicated opposition to that exemption as well). Advocacy recommends that DHS reconsider whether it is appropriate to exempt small amounts of ammonium nitrate (as well as first aid cold packs) from the proposed rule.
- 5. Small business representatives from the trucking industry believe that transportation should be exempted from the rule.** The proposed rule would treat motor carriers that pick up and deliver ammonium nitrate as both sellers and purchasers, requiring that they be registered and vetted with DHS and that each transfer be authorized by DHS in advance. Representatives from the trucking industry noted that truck drivers are already vetted more extensively through existing transportation regulations than they would be under the proposed rule and believe that transportation should be exempted from the rule outright. For example, one attendee stated that commercial truck drivers already undergo full background checks in order to obtain a Hazardous Materials Endorsement (HME) or a Transportation Worker Identification Credential (TWIC), which are far more extensive than the Terrorist Screening Database (TSDB) scan that the proposed rule would require. Further, the attendee stated that motor carriers are already required to be registered with the Federal Motor Carrier Safety Administration and already have security training programs under the HM-232F programs for transporting hazardous materials. Finally, the attendee noted that the term “transporter” is not defined in the proposed rule, and wondered whether DHS intended the

term to apply to a person or a company. Advocacy recommends that DHS assess existing security programs for motor carriers and commercial truck drivers and consider whether it would be appropriate to exempt them from the rule when they are already subject to adequate security provisions.

- 6. Small business representatives from the explosives industry believe that DHS should recognize and accept the security requirements for the industry that are already in place.** The proposed rule would apply to ammonium nitrate used in explosives; however, representatives of the explosives industry stated that they are already subject to more extensive regulation by the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives, and in some cases by DHS under CFATS and the Maritime Transportation Security Act. As such, one attendee stated that certain transactions - specifically commercial transactions of technical grade ammonium nitrate (TGAN) - should be exempt from the proposed rule when buyers and sellers are already regulated by other, more robust federal security programs. The attendee noted that the underlying legislation authorizes DHS to exempt TGAN if it is exclusively “used in” the production of an explosive regulated by ATF; however, the proposed rule limits the exemption to ammonium nitrate that “is” an explosive. The attendee feels that DHS’ interpretation of the explosives exemption is too narrow and that DHS should exempt these entities from duplicative registration and vetting requirements because these activities are already being performed under other federal regulatory programs. Finally, the attendee stated that DHS’ definition of “transfer” is overly broad and should be limited to the transfer of ownership of the material. For example, the attendee believes that businesses (e.g., mines) that hire explosives companies to perform “shot services” should not be covered at all since they do not take ownership or possession of the explosive and all of the material used in the shot is instantaneously consumed in the detonation. Advocacy recommends that DHS consider recognizing and accepting (on a reciprocal basis) existing explosive programs that provide equivalent levels of security and consider exempting customers of shot services who do not take possession or control of explosives.
- 7. Small business representatives from the railroad industry stated that the proposed rule is operationally unworkable for the railroad industry.** The proposed rule would treat railroads that transport and deliver ammonium nitrate as both sellers and purchasers, requiring that they be registered and vetted by DHS and that each transfer be authorized by DHS in advance. An attendee from the railroad industry stated that the proposed rule is unworkable from a railroad perspective because it fails to consider the multiple changes in product custody that occur along the route (which might involve multiple train crews, freight carriers, and regional/short line railroads) and it is unclear which of these entities are intended to be included within the scope of the rule. The representative noted that multiple federal agencies (i.e., the Transportation Security Administration, Pipeline and Hazardous Materials Safety Administration, and Federal Railroad Administration) already regulate rail security and that the industry has adopted comprehensive security programs in cooperation with these regulators (which include employee vetting and security training). The representative also stated that delays caused while waiting for transfer approvals from DHS could place other materials on the train at risk and introduce unintended security threats. The attendee noted that threats to trains are fundamentally different from threats to trucks because trains only move on tracks and are hard to steal. The representative stated that many small

railroads would likely stop shipping ammonium nitrate because compliance with the proposed rule would be too costly and complicated for them. Advocacy recommends that DHS reassess existing security programs for the rail industry and consider whether exemptions are warranted in light of existing security provisions.

- 8. Small business representatives expressed confusion about which employees and transactions would be covered by the proposed rule.** The proposed rule requires all sellers and purchasers of ammonium nitrate to be registered with DHS and be vetted through the Terrorist Screening Database and that all transfers of ammonium nitrate be approved by DHS in advance. However, attendees noted that the legislation refers only to “owners of ammonium nitrate facilities” and “purchasers” of ammonium nitrate. There was widespread confusion about who would have to register and be vetted under the proposed rule (e.g., only facility owners, all employees involved in sales and transfers, all employees at the facility, etc.?) and which transactions would require prior approval from DHS (e.g., intra-facility transfers, transfers to transporters, transfers between transporters, etc.?) Further, attendees expressed concern that DHS’ proposed rule envisions “face to face” sales transactions, but said that is not how the industry and distribution chain functions. For example, they indicated that many transactions are conducted by telephone or internet and transfer might occur through a series of separate deliveries over the course of many weeks or months. Attendees were confused about whether each individual delivery required a separate approval or only the initial transaction. Finally, attendees said that customers of application services (e.g., agricultural producers) should be exempt from the rule because they do not take ownership, possession, or control of the product. Advocacy recommends that DHS conduct further outreach to determine how these various sales and distribution systems function and tailor the rule to minimize any unnecessary disruptions.
- 9. The Initial Regulatory Flexibility Analysis fails to consider “significant” regulatory alternatives and clearly omits some costs.** The RFA requires that each Initial Regulatory Flexibility Analysis (IRFA) include a description of “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”¹¹ A “significant” alternative under the RFA is therefore one that: 1) is feasible; 2) meets the agency’s statutory objectives; and 3) reduces the burden on small entities.¹² While the IRFA for the proposed rule discusses several alternatives,¹³ many of them are not significant alternatives under the RFA because they are not feasible by DHS’ own determination. Further, some of the alternatives are assessed based on their costs to the agency, not on whether they reduce the burden on small entities. Finally, the analysis clearly omits some cost, such as training employees and developing and revising security programs, and it is not clear how many employees and transactions would be subject to the rule. Attendees at the

¹¹ 5 U.S.C. § 603(c). This section goes on to state: the analysis shall discuss significant alternatives such as -- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

¹² See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, June 2010, p. 35-37, 73-76 (available at <http://www.sba.gov/advo/laws/rfaguide.pdf>).

¹³ 76 Fed. Reg. 46937.

roundtable expressed similar concerns about the scope and application of the rule, and several of the attendees recommended that DHS consider publishing a supplemental notice of proposed rulemaking following review of comments and revisions to the proposed rule. Because agency compliance with the RFA is subject to judicial review,¹⁴ Advocacy is concerned that deficiencies could leave any final rule vulnerable to legal challenge. Accordingly, Advocacy recommends that DHS consider publication of a supplemental NPRM and IRFA if significant alternatives are identified that would reduce the burden on small entities while still meeting the agency's statutory objectives.

Conclusion

Thank you for the opportunity to comment on this proposed rule. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. As such, we hope these comments are both helpful and constructive to DHS. Please feel free to contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

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/s/

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Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

¹⁴ See, 5 U.S.C. § 611.