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Ms. Lona Saccomando
Department of Homeland Security (DHS)
Cybersecurity and Infrastructure Security Agency (CISA)
CISARulemaking@cisa.dhs.gov

RE: Docket No. CISA-2020-0014-0001 – Removal of Certain Explosive Chemicals from the Chemical Facility Anti-Terrorism Standards (CFATS)

Dear Ms. Saccomando:

The American Fuel & Petrochemical Manufacturers (AFPM)¹ appreciates the opportunity to respond to the Department of Homeland Security's (DHS) advanced notice of proposed rulemaking (ANPRM) requesting public comment on the removal of all 49 Division 1.1 explosive chemicals of interest from Appendix A of the Chemical Facility Anti-Terrorism Standards (CFATS) regulations.² As stated in the notice, the Cybersecurity and Infrastructure Security Agency (CISA) is considering removing all 49 Division 1.1 explosive chemicals of interest from Appendix A of the CFATS regulations. Currently, both CISA and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulate facilities possessing these chemicals for security concerns. Removing these chemicals of interest from coverage under CFATS would reduce regulatory requirements for facilities currently covered by both CFATS and ATF's regulatory frameworks. AFPM supports removing these chemicals of interest (COIs) from coverage under CFATS to reduce regulatory burden and overlap, recognizing that facilities affected by this ANPRM are already subject to security regulations for the same chemicals by ATF.

Reviewing COIs on Appendix A is an important step in potentially modifying which facilities may be subject to CFATS. AFPM realizes that this ANRPM applies only to sites containing 49 Division 1.1 explosives due to regulatory overlap with ATF; however, AFPM strongly urges DHS to continue to review Appendix A to identify additional COIs for removal or

¹ AFPM is a national trade association representing nearly all U.S. refining and petrochemical manufacturing capacity. AFPM members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible.

² 86 CFR 495 (January 6, 2021).

to adjust reporting thresholds, as needed. AFPM believes that after more than a decade of reviewing and inspecting sites, DHS should more thoroughly understand the real security risks that certain COIs pose.

I. General Comments

AFPM strongly supports a periodic, regular review of the CFATS Appendix A COI list by DHS. Any changes to Appendix A, whether adding or removing chemicals, or lowering or raising existing thresholds, should only be done upon DHS making a well-reasoned determination based on credible data and sound science, and through formal rulemaking in compliance with the Administrative Procedure Act (APA). DHS must find that a chemical presents a specific security risk and that its regulation under CFATS would result in a measurable security benefit (i.e., risk reduction) that exceeds the cost of regulatory compliance.

In this instance, since all 49 Division 1.1 explosive chemicals of interest are already regulated by ATF, their inclusion as part of CFATS provides no additional measurable security benefit that exceeds the cost of compliance.

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Additional Revisions to Appendix for Consideration

In addition to removing the chemicals listed in this ANPRM, AFPM recommends DHS consider separate rulemakings to address additional revisions to Appendix A. The following comments reflect AFPM's longstanding priority concerns: request for clarification of the mixture rule, temporary storage of chemicals in transportation, and the COI review process.

A. Mixtures

AFPM urges DHS to simplify how mixtures are classified in Appendix A by utilizing the existing National Fire Protection Association's (NFPA) chemical hazard rating system.³ The current system of regulating mixtures by percentages of discreet chemicals in the mixture is neither scientifically sound nor technically justified, creates an undue burden for both the regulatory community and DHS, and cannot properly be implemented and enforced. AFPM offers a more practical approach that is consistent with other federal and state agencies, as well as standard industry practices-- the NFPA rating system, which has been used to describe the hazards of chemicals since 1960. The only substances that should be regulated in a security

³ See National Fire Protection Association, *Standard System for the Identification of the Hazards of Materials for Emergency Response*, (2012); <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=704>. The NFPA 704 rating system is a standard system developed by the U.S.-based NFPA for indicating the health, flammability, reactivity, and special hazards for many hazardous chemicals using the NFPA 704 Diamond, a common placard seen on storage tanks and vehicles carrying hazardous materials.

context are those with a health, flammability, or instability rating of four (4) or higher.⁴ Mixtures classified as NFPA 4 indicate extreme danger, while a value of 0 means that the material poses essentially no hazard. Therefore, AFPM believes that substances with ratings of three (3) or lower should not be included in Appendix A, unless they are substances that could easily be converted into a weapon of mass effect. AFPM has previously filed comments demonstrating that fuel tanks are not terrorist targets and would not have significant offsite consequences.⁵

Regulating chemical mixtures by discreet percentages has created an undue burden for both the regulated community and DHS. It is highly doubtful that terrorists are concerned with percentages of chemicals, as opposed to the health, flammability, or instability of the mixture (*i.e.*, the ability to utilize the mixture as a weapon). Regulating by percentage is also difficult to implement and enforce as mixtures can change daily, according to the raw materials used as process inputs. Enforcement of such provisions would require inspectors to sample the mixtures on a continuous basis. For example, AFPM opposes any move to regulate chemicals down to one (1) percent concentration. There is no scientific merit to the arbitrary selection of such a low concentration, which in almost all cases is unlikely to pose a significant security risk. Unless DHS can technically justify and demonstrate that a particular chemical at such a low concentration presents a high security risk, DHS should not regulate that mixture.

B. DHS Should Avoid Duplicative Regulations

DHS should avoid duplicative regulations. In that regard, numerous other federal agencies regulate security to some extent. One area requiring DHS deference is when a [COI] is “in transportation” and subject to the jurisdiction and security regulations issued by the DOT or a modal administration. Under CFATS, containers that are “in transportation” are regulated by the Department of Transportation (DOT) and not counted towards a facility’s screening threshold quantities (STQ).⁶ AFPM recommends that DHS maintain this exemption to avoid duplicative regulations that may waste scarce government and industry resources and confound the regulated community’s ability to comply with overlapping regulatory programs. If DHS were to extend the CFATS program into the transportation segment, it would exceed its statutory authority and create a confusing regulatory program.

C. Appendix A Review Process

AFPM recommends that before DHS proposes any additions to Appendix A, the agency must first develop reliable data that demonstrates that the proposed COI presents a security risk

⁴ See National Fire Protection Association, *Standard System for the Identification of the Hazards of Materials for Emergency Response*, (2012); <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=704>.

⁵ See March 16, 2010 comments by AFPM, submitted as the National Petrochemical and Refiners Association (NPRO), on DHS 2009-0141, 75 FR (Jan. 12, 2010): <https://www.regulations.gov/comment/DHS-2009-0141-0020>.

⁶ See 49 CFR Part 172, subpart I.

and that compliance with CFATS would mitigate this risk. The following factors are relevant for any DHS decision to propose modifications to the COI list:

- Regulatory overlap with other security regulations;
- Chemical composition, including toxicity, reactivity, and flammability;
- Ability to weaponize the chemical;
- Whether the chemical is available outside the facility;
- Offsite impact of a security incident involving the chemical at the facility;
- Ability to transport and conceal the chemical;
- Duration on site.

Anything short of this risk-based approach would be viewed as arbitrary and capricious. Such a demonstration of risk cannot be based upon public opinion, driven by political agenda, or be theoretical or hypothetical. Rather, it must be based on empirical data concerning the physical characteristics, hazards, and potential health effects of a given chemical, as it relates to various attack scenarios, and the detached, reproducible scientific assessment of that data. For DHS to review Appendix A thoroughly, equitably, and transparently, AFPM recommends that DHS convene an advisory board to assist in proposing future risk-based changes to the Appendix A list of COIs.

Furthermore, any changes to Appendix A must be done through formal rulemaking in compliance with the APA. AFPM commends DHS for engaging the rulemaking process for the proposed changes within this ANPRM and strongly urges the agency to commit to a regular review of Appendix A, so that the listing and quantities of COIs better reflect existing knowledge of the vulnerabilities, threats, and risks posed by each chemical component.

II. Conclusion

AFPM commends DHS for initiating this review of Appendix A, and for proposing to remove the 49 Division 1.1 explosive COI. Any changes to Appendix A, whether adding or removing chemicals, or lowering or raising existing thresholds, should only be done upon DHS making a well-reasoned determination based on credible data and sound science and a commitment to reduce overlapping regulatory programs, such as in this case.

AFPM encourages DHS to continue its examination of the COIs in Appendix A. For example, and as stated above, regulating chemical mixtures by discreet percentages has created an undue burden for both the regulated community and DHS. AFPM firmly believes that any mixture with a NFPA flammability rating of three (3) or less, under the definitions of the NFPA, should not be subject to CFATS. Likewise, AFPM maintains that any changes to Appendix A must be based on reliable data and sound science and done through formal notice and comment in the *Federal Register*, in accordance with the APA.

AFPM looks forward to working with DHS as revisions to this important part of the CFATS regulation are explored. If you have questions or need further information, please contact me at jgunnulfson@afpm.org or at 202-552-4371.

Respectfully submitted,

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