

**DEPARTMENT OF HOMELAND SECURITY
NATIONAL PROTECTION AND PROGRAMS DIRECTORATE**

6 CFR Chapter I

[DHS 2008-0076]

RIN: 1601-AA52

Secure Handling of Ammonium Nitrate Program

AGENCY: Department of Homeland Security, National Protection and Programs Directorate.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This Advance Notice of Proposed Rulemaking (ANPRM) seeks comment on a recent amendment to the Homeland Security Act entitled the Secure Handling of Ammonium Nitrate. The amendment requires the Department of Homeland Security (DHS or Department) to “regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility...to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.”

DATES: Written comments must be submitted on or before [insert date 60 days after date of publication in the **Federal Register**].

ADDRESSES: You may submit comments, identified by docket number 2008-0076, by *one* of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: U.S. Department of Homeland Security, National Protection and Programs Directorate, Office of Infrastructure Protection, Infrastructure Security

Compliance Division, Mail Stop 8100, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: Dennis Deziel, Office of Infrastructure Protection, Infrastructure Security Compliance Division, Mail Stop 8100, Washington, DC 20528, telephone number (703) 235-5263.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

AN – Ammonium Nitrate

ANFO – Ammonium Nitrate/Fuel Oil

ANPRM – Advance Notice of Proposed Rulemaking

CFATS – Chemical Facility Anti-Terrorism Standards

COI – Chemicals of Interest

DHS or Department – Department of Homeland Security

DOT – Department of Transportation

IED – Improvised Explosive Device

IP – Office of Infrastructure Protection

ISCD – Infrastructure Security Compliance Division

NPPD – National Protection and Programs Directorate

POS – Point of Sale

STQ – Screening Threshold Quantity

TSDB – Terrorist Screening Database

USDA – United States Department of Agriculture

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the advance notice of proposed rulemaking (ANPRM). The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from any final rule consequent from this ANPRM. Comments that will provide the most assistance to the Department in developing these procedures will refer to a specific provision of the ANPRM or the Secure Handling of Ammonium Nitrate provisions in the Homeland Security Act, explain the reason for any comments, and include other information or authority that supports such comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

II. Background

Section 563 of the 2008 Consolidated Appropriations Act, Subtitle J, Secure Handling of Ammonium Nitrate (“Section 563”), Pub. L. 110-161, amends the Homeland Security Act of 2002. The amendment requires the Department to “regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility...to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.”

A. Ammonium Nitrate (AN)

AN is a chemical that exists in multiple concentrations and physical forms, each of which may have different security implications. DHS is primarily concerned with AN

when used as an explosive or as a fertilizer mixed with fuel oil to create an explosive mixture known as Ammonium Nitrate/Fuel Oil (ANFO). Both of these forms (i.e., explosive and fertilizer coupled with liquid fuel oil) in the hands of terrorists have the potential to be detonated and when there is sufficient exposure may create significant adverse consequences for human life or health. AN fertilizer is commonly found in agriculture-related operations nationwide and, given the availability of small-scale packaging (e.g., 50-pound bags), could be susceptible to theft and misuse in making an improvised explosive device (IED). AN is also used commercially as an explosive (in the mining industry, for example), and in that form, could be stolen and detonated by terrorists.

Terrorist organizations have and will likely continue to use explosives, including AN-based explosives, in future terrorist attacks. While preventing the misappropriation and misuse of AN on American soil could mitigate national risk, AN is only one of many chemicals that are susceptible to misuse by terrorists.

B. AN and the Chemical Facility Anti-Terrorism Standards (CFATS) Regulation

In addition to the authority granted to DHS by Section 563 of the 2008 Consolidated Appropriations Act, the Department has authority under an earlier statute to regulate the security of certain facilities that possess AN. In October 2006, Congress enacted Section 550 of the Homeland Security Appropriations Act of 2007 (Pub. L. 109-295), which required the Department to issue regulations for the security of high-risk chemical facilities. Under that authority, the Department promulgated an interim final rule called the Chemical Facility Anti-Terrorism Standards (CFATS), 6 CFR Part 27.

See 72 FR 17688 (April 9, 2007). To help the Department identify high-risk chemical facilities under the CFATS regulation, the Department adopted a final list of chemicals of interest (COI) as Appendix A to CFATS. See 72 FR 65396 (November 20, 2007). Any chemical facility that possesses any COI at or above the applicable screening threshold quantity (STQ) specified in Appendix A for that COI must complete and submit to DHS certain consequence-based information (the “Top-Screen”). Any facility preliminarily determined to be high-risk after DHS review of the facility’s Top-Screen must then meet additional security-related requirements under CFATS. Due to the risks AN may pose if exploded on-site or if stolen or diverted to produce IEDs, AN (in both explosive and specified fertilizer form) was one of over 300 chemicals of interest that DHS listed in Appendix A to CFATS. See 72 FR 65407-65408, 65410.¹

While both Section 563 and the CFATS rule share a goal of reducing terrorist risks associated with AN, the scope and methods of regulation under Section 563 and CFATS are expected to be very different. The CFATS rule – which addresses hundreds of chemicals in addition to AN – is directed at the security of high-risk facilities. The CFATS rule does not, however, impose any limitations on the sale or transfer of AN. By contrast, Section 563 does not address the physical security of AN facilities. Instead, Section 563 imposes certain conditions on sales or other transfers of AN – without regard to the quantities involved – e.g., by requiring that AN can only be transferred between registered AN purchasers (or their agents) and AN facilities. In developing the rules

¹ The listing of AN in explosive form in Appendix A to CFATS covers any commercial grade of ammonium nitrate (with more than 0.2 percent combustible substances, including any organic substance calculated as carbon, to the exclusion of any other added substance). The screening threshold quantities for this form of AN are 5,000 lbs (as a release-explosive) and 400 lbs when in transportation packaging (as a theft-explosive). Appendix A also lists AN in solid form (with a nitrogen concentration of 23% or greater) with an STQ of 2000 lbs. This form of AN is commonly used as a fertilizer in the agricultural community and, when used in a mixture, will count toward the STQ if the mixture contains a minimum concentration of 33% or more of solid AN.

required by Section 563, DHS intends to draw on information gained under the CFATS program about AN, especially its use by the agricultural community, so that CFATS and the new program under Section 563 complement each other.

III. Section 563: Secure Handling of Ammonium Nitrate Act

Pursuant to Section 563, DHS will develop and implement a regulatory program covering the sale and transfer of AN for the purpose of preventing the misappropriation or use of AN in acts of terrorism. Consistent with Section 563, DHS expects to include the following categories of activities and sub-activities in that program:

Category 1: Registration Activities

- A. Registration Applications. DHS would require AN facilities and prospective AN purchasers to apply for registration numbers from DHS in order to sell, transfer, and/or purchase AN. Prospective registrants would have to provide specific identifying information to DHS.
- B. Terrorist Screening Database (TSDB) Checks. DHS would conduct checks of identifying information of all prospective registrants against identifying information that appears in the TSDB.
- C. Registration Numbers. DHS generally would plan to issue or deny registration numbers within 72 hours of receipt of an AN facility or AN purchaser's complete registration application.

Category 2: Point-of-Sale (POS) Activities

- A. Seller Verification of Purchaser's Registration and Identity. At points-of-sale, AN facilities would have to verify that potential AN purchasers are registered

with DHS (including verifying each AN purchaser's identity and registration number).

- B. Recordkeeping. DHS would require all AN facilities to keep records of sales or transfers of AN for at least two years after each transaction, with penalties for failing to maintain records appropriately.

Category 3: Additional Regulatory Activities/Requirements

- A. Reporting Theft or Loss of AN. DHS would require AN facilities and AN purchasers to report the theft or loss of AN to Federal law enforcement authorities within one calendar day of discovery of the theft or loss.
- B. Inspections and Audits. DHS would conduct or oversee regulatory compliance inspections and audits of AN facilities' records to ensure that regulated facilities are properly maintaining records, to monitor compliance with the requirements of Section 563, and to deter or prevent misappropriation of AN for terrorist acts.
- C. Guidance Materials and Posters. DHS would develop guidance materials that 1) set forth procedures for appealing a denial of an application for a registration number, and 2) help AN facilities identify suspicious AN purchases, attempted purchases, and transfers and determine the appropriate course of action. DHS would also develop posters providing information on sellers' record-keeping requirements and penalties for violating those requirements.

Category 4: Administrative Activities

Appeals and Penalties. The Department would establish an expedited appeals process for applicants denied a registration number. Specifically, Section 563 requires the Department to resolve such an appeal within 72 hours of receiving a denied

individual's request for appeal. Additionally, the Department has the authority to assess civil penalties of up to \$50,000 per violation of the regulations and thus will establish a process for managing both the assessment and potential appeal of those penalties.

Establishing Threshold Level of AN in a Substance. Under Section 563, DHS would establish a threshold percentage of AN in a substance as a prerequisite for that substance to be considered AN for purposes of complying with the statute. While pure or "straight," AN with a sufficient concentration of nitrates can be used as an explosives precursor, there is some scientific uncertainty regarding the specific detonability of pure AN. Experts in various governmental and non-governmental organizations continue to research the minimum quantity (i.e., critical mass) of straight AN required for detonation, the size of conventional explosive charge (i.e., booster) necessary to detonate straight AN, and the actual yield (i.e., the explosive energy) from a straight AN detonation.

IV. Questions for Commenters

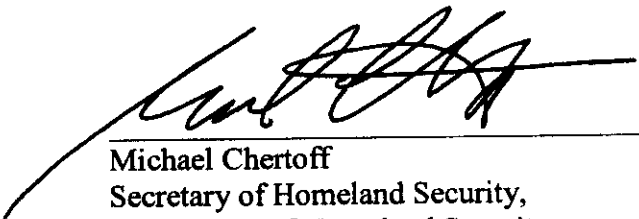
Comments that will provide the most assistance to DHS in this rulemaking include, but are not limited to, the following:

- a. Comments regarding submission of registration applications (e.g., whether applications should be submitted electronically or in paper form; whether applications should be available only through DHS or through Local Cooperative Extension Service Offices or at United States Post Offices).
- b. Comments regarding the technical capabilities (e.g., access to computers; access to Internet; average level of computing skills; frequency of use of integrated Information Technology systems) of AN manufacturers, distributors, sellers, and end-users.

- c. Comments regarding DHS distribution of AN registration letters or certificates (e.g., whether DHS should use email or regular mail).
- d. Comments regarding a verification process for registrations and AN purchases, including methods for verifying the identity of any AN purchaser, as well as the identity of designated agents purchasing AN on behalf of registered AN purchasers.
- e. Comments on the detonability of AN at certain concentrations, including research being conducted concerning the detonability of AN.
- f. Comments on how likely AN fertilizer users would be to use an alternative fertilizer that is potentially less detonable, such as, for example, *Sulf-N® 26 Fertilizer Process and Product* (ammonium sulfate nitrate fertilizer) which DHS recently “designated” as a Qualified Anti-Terrorism Technology (QATT) pursuant to 6 U.S.C. §§ 441- 444 (the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act). See www.safetyact.gov.
- g. Comments on how best to conduct or oversee regulatory compliance inspections and audits of AN facilities’ records to ensure that regulated facilities are properly maintaining records, to monitor compliance with the requirements of Section 563, and to deter or prevent misappropriation of AN for terrorist acts.
- h. Comments on the economic impacts (both long-term and short-term, quantifiable and qualitative) of the implementation of Section 563, including potential impacts on State, local, and tribal governments of the United States; potential impacts on agri-business, including AN manufacturers, importers, packagers, distributors, retailers, and end-users including farmers (e.g., whether current AN purchasers

would likely reduce their AN purchases as a result of a new regulatory regime);
and potential impacts on small businesses.

- i. Comments on the monetary and other costs anticipated to be incurred by U.S. citizens and others as a result of the new compliance requirements, such as the costs in time and money that an individual may incur to obtain an AN registration. These costs may or may not be quantifiable and may include actual monetary outlays, transitional costs incurred to obtain alternative documents, and the costs that will be incurred in connection with potential delays at the point of sale.
- j. Comments on a possible fee structure to address some or all of the costs of this new program, such as registration, TSDB checks, and issuance of registration numbers.
- k. Comments on the benefits of this rulemaking.
- l. Comments on any alternative methods of complying with the legislation.
- m. Comments on the best methods or processes for interacting with state and local governments regarding AN security.



Michael Chertoff
Secretary of Homeland Security,
Department of Homeland Security.