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OSHA Docket Office  
Technical Data Center, Room N-2625  
Occupational Safety and Health Administration  
US Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**Via: Electronic Mail**

Executive Order 13650, Section 6(a) – Solicitation of Public Input on Options for Policy, Regulation, and Standards Modernization; Docket No. OSHA-2013-0026<sup>1</sup>

Interagency Working Group,

On January 3, 2014, the Occupational Safety and Health Administration (“OSHA”) on behalf of the Interagency Working Group (“IWG”)<sup>2</sup> established by Executive Order (“EO”) 13650 released a series of policy options for improving safety and security at chemical facilities and soliciting public comment about the merits of these options.<sup>3</sup> The Institute of Makers of Explosives (“IME”) submits the following comments on the above-referenced Solicitation.

**Interest of the IME**

IME is a nonprofit association founded in 1913 to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. We do not sponsor trade shows or marketing events. IME represents U.S. manufacturers and distributors of commercial explosive materials and oxidizers as well as other companies that provide related services. Millions of metric tons of high explosives, blasting agents, and oxidizers are consumed annually in the U.S. in support of industries critical to the national economy. Of this, IME member companies produce over 98 percent of the high explosives and a great majority of the blasting agents and oxidizers. These products are used in every state and are distributed worldwide.

At the same time, the safety and security record of the explosives industry is exceptional. We attribute this record to the industry-wide movement away from nitroglycerine-based products to ammonium nitrate-based products, and industry best practices that underlay regulations of OSHA, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), DHS, EPA and DOT.

Within the larger universe of chemical manufacturing, the explosives industry is a downstream industry, with one exception; the manufacture of ammonium nitrate (“AN”). IME members produce the majority of this

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<sup>1</sup> Memorandum Opening Docket for Public Comment, OSHA, January 3, 2014.

<sup>2</sup> The IWG is co-chaired by OSHA, the Department of Homeland Security (“DHS”), and the Environmental Protection Agency (“EPA”), with participation from the Departments of Agriculture, Justice, and Transportation (“DOT”).

<sup>3</sup> Hereinafter, “Solicitation.”

commodity. Our industry's downstream operations then consume upwards of 75 percent of all AN used in the U.S.

### Background

The scope of the EO necessarily has the potential to impact all aspects of our operations. We appreciate and have taken advantage of all opportunities provided by the IWG to receive stakeholder input. We have used these opportunities to convey with written and oral comments our commitment to the safety and security of the products we manufacture and use. Among other things, the IWG was tasked to develop options for improved chemical facility safety and security. This "Section 6(a)(i)" deliverable was due to the public by November 29, 2013, but was not actually released until January 3, 2014. According to Section 6(a)(ii) of the EO, stakeholders are to be given 90 days to provide comment on the policy options. That deadline falls on April 3, 2014, but the IWG has moved the deadline back to March 31, 2014. In addition, with one exception, the IWG has collapsed all of the policy deliverables of Section 6 into the Section (a)(i) mandate.<sup>4</sup> This decision is concerning in that Subsection (a)(i) does not require the IWG to positively identify which legislative, regulatory or other actions are being pursued by the agencies. Therefore, stakeholders who have already addressed issues under Subsections (b), (c), and (d) are forced to repeat those recommendations through this policy notice. With this perspective we offer the following comments on those policy options applicable to the explosives industry.<sup>5</sup>

### General Comments

The IWG uses the term "guidance" 29 times in the policy options section. While guidance to clarify existing requirements may be a valuable compliance tool, we urge the IWG to resist the temptation to issue "guidance" which is, in practical effect, rulemaking by another name. There is no substitute for actual notice and comment rulemaking to ensure transparency and accountability for policy decisions. Any subsequent guidance needed to support promulgated rules should be developed in accordance with OMB Bulletin No. 07-02, *Final Bulletin for Agency Good Guidance Practices*.

Additionally, a number of the policy options raised by the IWG are addressed in consensus documents developed by various stakeholders. IME develops industry best practices to ensure the safe and secure handling of the products we manufacture, store, and use. We invite agencies to participate in the development of our best practice recommendations and to adopt them through rulemaking.

## **1. Improving the Safe and Secure Storage, Handling, and Sale of Ammonium Nitrate**

The motivation for the EO was the tragic loss of life and property in West, TX from the accidental explosion of improperly stored AN. Even before the release of the EO and the initial stakeholder conference call on August 2, 2013, IME was working with IWG members to address safety practices for the management of AN. In July, at the government's request we provided detailed recommendations to help update a 1997 EPA Safety Alert on AN. That original Alert was issued subsequent to another industrial accident involving AN in Port Neal, IA in 1994. IME welcomes all opportunities to assist the IWG in identifying best practices for the management of AN. That said, we are compelled to point out that neither of the above tragedies involved AN used by the commercial explosives industry. Nor was AN used by our industry involved in the 1947 Texas City, TX disaster or in the Oklahoma City, OK bombing in 1995. In short, we are happy to be a part of the solution even though we are not a part of the problem.

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<sup>4</sup> The exception is OSHA's mandate to issue a Request for Information ("RFI") on issues related to the modernization of the Process Safety Management ("PSM") standard under Section 6(e), which was published December 9, 2013. Our comments on the PSM RFI are attached hereto and incorporated herein.

<sup>5</sup> For ease of reference, our comments retain the numeration used in the Section 6(a)(i) policy options document.

The recommendations directed at AN will likely be the most critical to our industry. In addition to the facts presented above, the IWG must understand that the use of AN in our industry is so ubiquitous that there is no viable alternative. For these reasons, we are most interested in the outcome of the policy options laid out under this heading.

*a. How could the safety and security of storage, handling, and sale of AN be strengthened through rulemaking, policy changes, or guidance, and do existing AN requirements need to be clarified?*

We have explained in numerous statements and comments that AN is a stable, relatively benign substance when it is managed properly – and the proper management of AN is simple, well understood, and easily accomplished. AN must be stored in non-combustible bins, isolated from potential contaminants, and protected from substantial and sustained heat sources (e.g., fire) and shock. Where these simple tenets are followed, the risks associated with AN are negligible if not nonexistent.

As noted in the Solicitation, OSHA regulations at 29 CFR 1910.109(i) have governed the storage and management of AN since 1971. IME member companies have operated in compliance with this standard since that time, and have never experienced an accident. In fact, we are unaware of any accidental detonation of AN where this standard has been observed. While this accident-free history speaks volumes about the effectiveness of the standard, we nevertheless believe it should be updated to include additional safety precautions. These additional safety measures are included in IME's *Safety and Security Guidelines for [AN]* ("Guidelines"), which, notably, have been endorsed by the International Association of Fire Chiefs.<sup>6</sup> Specifically, we recommend that Section 1910.109(i) be amended to include the following:

- A prohibition on the use of combustible materials for bins and structural materials in immediate contact with AN (i.e., no wooden bins).
- An admonition to not fight fires that have engaged AN (no offsite firefighters should approach a fire involving AN; the appropriate and immediate response is to evacuate).
- A recommendation that all AN sites develop and implement a written emergency response plan, provide training to all employees, and provide the plan to local first responder organizations (several existing OSHA regulations set out appropriate plan elements).
- A recommendation that AN storage facilities located on mine sites follow §1910.109(i).<sup>7</sup>

This recommended expansion of Section 1910.109(i) would be a significant improvement to the existing standard by providing important additional safety benefits to workers, first responders, and the public. We are confident that compliance with an enhanced Section 1910.109(i), coupled with adherence to the best practices described in our Guidelines would lower the risks posed by AN to a level so exceptionally low that no further regulation would be warranted. Indeed, we are confident that this would be borne out by a probabilistic risk assessment.

The Solicitation indicates that EPA is considering an expansion of the agency's Risk Management Program ("RMP") rule to cover AN. Such an expansion is neither necessary nor appropriate. When Congress passed the Clean Air Act Amendments of 1990, Section 112(r) required EPA to publish regulations and guidance for chemical accident prevention at facilities using substances that posed the greatest risk of harm from accidental releases to the air. The program is intended to cover chemical substances that, because of their particular toxic or flammable characteristics, require precise, constant, and/or complex control systems to ensure their safe

<sup>6</sup> *Safety and Security Guidelines for Ammonium Nitrate*, (2013); IME, IAFC, International Society of Explosives Engineers, and National Stone, Sand and Gravel Association.

<sup>7</sup> The four recommendations noted are the key areas of improvement needed in the existing standard, but are not exclusive. Additional recommendations in IME's Guidelines could also be adopted by OSHA to further enhance the standard.

management. As we have repeatedly noted in other comments and statements, AN is not such a chemical. AN is not a self-reactive, volatile, or pyrophoric substance requiring constant diligence in its handling. Nor would a “release” of AN generate the type of “toxic cloud” that the RMP was originally enacted to prevent. Unless it is subjected to negligent mishandling or extreme external stimuli, AN is unlikely to ever pose a significant threat to the public or the environment. In fact, both the hazards of AN and its proper handling practices are so thoroughly understood that a process hazard analysis of any AN storage facility in the U.S. would inevitably lead to the same conclusion, i.e., that the material must be handled in the manner prescribed in Section 1910.109(i), as enhanced by current industry guidelines. It would make no sense to impose additional regulatory requirements only to demonstrate that existing regulations are already adequate.

In our response to OSHA’s RFI on the PSM program, we explained that AN should not be considered a “reactive” chemical for purposes of PSM.<sup>8</sup> The same rationale applies to the RMP rule. The United Nations and DOT classify AN as an oxidizer pursuant to established, reliable testing criteria. It is not considered a “reactive” substance under this testing scheme.<sup>9</sup>

Question “a” also addresses security concerns surrounding AN. As the IWG is aware, in 2007, Congress enacted the Secure Handling of Ammonium Nitrate Act (“SHANA”). In developing the legislation, DHS was given discretion to exempt the explosives industry from SHANA in recognition of the close regulation of the industry by ATF.<sup>10</sup> Congress intended DHS to identify entities engaged in the sale and purchase of AN and to ensure that those individuals who have authority to transfer ownership rights are vetted against the terrorist screening database (“TSDB”). Regrettably, when DHS proposed its AN Security Program (“ANSP”) rules to implement SHANA, it proposed a far different regulatory scheme than that envisioned by Congress.

The proposed rule would require individuals to register and be vetted against the TSDB for simple possession of AN. Furthermore, the proposed rule fails to reciprocally recognize the vetting of individuals done under other federal security programs, including ATF’s vetting program.<sup>11</sup> These aspects of the rule will cripple the explosives industry. By not limiting the rule to a registration of entities that sell and transfer ownership of AN, DHS has created a chain-of-custody program which dwarfs the original scope of the law. Under the proposed rule, workers that Congress never intended to be covered – sales clerks, loading personnel, and transportation workers – would be required to register, be vetted, and be subjected to burdensome face-to-face validation requirements each time AN is handed off to another individual. These proposals are a significant threat to our industry. If promulgated as proposed, the rail and barge transporters that move 85 percent of the AN used in the explosives industry have intimated that they will opt for self-imposed embargos rather than attempt to comply with excessive and impracticable operational requirements. If these modes of transportation were no longer available, there is not sufficient truck capacity to pick up the slack and move the billions of pounds of AN used in our industry. Such embargoes would essentially shut down the explosives industry and have a devastating effect on the overall U.S. economy.

The commerce of AN within the explosives industry is fundamentally different than in the agricultural community. AN is not sold over-the-counter in man-portable bags. Rather, the billions of pounds of AN used in the explosives community is sold in bulk under contract between entities that are regulated by ATF. The AN sold into the explosives industry has only one purpose – to be used as an explosive. Therefore, its sale and distribution has much more in common with the sale and distribution of commercial explosives. The individuals who work in this industry are already subject to background checks that include criminal history, proof of identify

<sup>8</sup> Those comments are incorporated herein by reference.

<sup>9</sup> Nor is AN an “extraordinarily hazardous substance” under New Jersey’s Toxic Catastrophe Prevention Act.

<sup>10</sup> SHANA was not enacted under regular order, denying opportunities to perfect this legislation. AN is not the only explosive precursor whose misappropriation and misuse in improvised explosive devices (“IEDs”) is well-known. The law fell far short of preventing IEDs by its limitation to AN. Other security-conscious countries and multi-national organizations including the European Union regulate a suite of explosive precursor chemicals that have been used in IEDs.

<sup>11</sup> Since 2003, ATF has been vetting workers who are “responsible persons” and those authorized to possess explosives. Its vetting standards are those used in all other vetting programs administered by DHS.

and right to work, mental illness, and other standards, in addition to a check against the TSDB. Once AN has entered the regulatory sphere of ATF, the ANSP program proposed by DHS adds nothing as AN is further distributed within this closed commercial realm. Rather, the ATF program should serve as a model for the ANSP.

On numerous occasions IME has urged DHS to issue a supplemental proposed rule to address the flaws in the current proposal. During the course of the EO listening sessions and in congressional testimony the suggestion has been made that the immediate finalization of the ANSP, as currently proposed, would help prevent accidents involving AN such as that in West, TX. This proposition is ludicrous. The ANSP is a security program, not a safety program. Promulgation of the rule, even if the flaws currently in the proposal are remedied, will do nothing to enhance existing safety regulations or correct unsound handling practices in facilities storing AN.

In addition, AN is a chemical of interest (“COI”) subject to DHS Chemical Facility Anti-Terrorism Standard (“CFATS”) program. Under CFATS, DHS has proposed yet another stand-alone, onerous personnel surety program (“PSP”). Again, DHS fails to fully leverage existing background security programs and would require individuals to resubmit personal identifying information (“PII”). DHS’s failure to recognize other federal vetting programs as sufficient for its programs puts it at odds with HSPD-11. IME’s concerns are well-known to DHS. Suffice it to say that IME supports background checks to determine whether individuals engaged in security-sensitive activities have terrorist ties. Rather than stove-piping redundant vetting programs, we support the principle of “enroll once; use many.” This catchphrase embodies the concept that covered individuals should be able, at the time of enrollment, to indicate on an application the programs for which clearance is needed and to provide PII one time, and that the enrollment information would be shared within the government to provide the individual with multiple access privileges. Adding yet another duplicative vetting program would waste federal and private resources without enhancing security.

*b. Should DHS consider lowering the screening threshold quantities for AN under the Chemical Facility Anti-Terrorism Standard (“CFATS”)?*

IME would have no objection to lowering the CFATS screening threshold for AN. That said, the CFATS program is aimed at regulating “high risk” facilities, and it is unknown if lowering this threshold would result in any appreciable number of facilities being tiered into the program, especially with the hiatus given to agricultural production facilities. It would be better to lower or eliminate the reporting threshold under the ANSP to identify those possessing AN. While some users of AN likely store smaller quantities of the material, this does not lessen the attractiveness of these sources of AN to those who would obtain it for nefarious uses. For example, we believe DHS should leverage this program to cover consumer sales of binary “exploding target” products. Even a small quantity of AN can be misused to manufacture a device with the potential to do considerable damage, and multiple thefts or purchases from smaller vendors or users can be accumulated over time to build a sizeable stockpile. A would-be terrorist requires only opportunity, determination, and patience.

We have also recommended that DHS eliminate the COI entry for Division 1.1 AN. As discussed below, there is no commercial product with this classification.

*c. Should DHS review the Top-Screen filing extension granted to agricultural production facilities?*

IME would support the elimination of the Top-Screen extension for all agricultural chemicals, including AN, that are known to have been used or could potentially be used to manufacture an IED. As the IWG is aware, AN obtained from the agricultural sector was successfully used in the Oklahoma City bombing. Other agricultural products have been used in IEDs. For these reasons, IME supports the elimination of the Top-Screen filing extension for all agriculture COI susceptible to being used in IEDs, and, as noted above, would have no objection to lowering the CFATS screening threshold for AN.

*d. What are potential updates to the August 2013 Chemical Advisory: Safe Storage, Handling, and Management of Ammonium Nitrate or additional AN guidance products that would assist the private sector and state and local governments with improving on-the-ground safety and security?*

In September 2013, IME submitted comments on the August 2013 *Chemical Advisory: Safe Storage, Handling, and Management of Ammonium Nitrate* (“Advisory”). Among other things, IME urged that the Advisory be revised to eliminate all suggestions that offsite first responders should engage a fire involving AN, and to eliminate the continued permissive use of combustible materials in AN storage areas (i.e., no wooden bins). We hope that these comments will be addressed in a subsequent version of the Advisory. In addition, the Advisory should be revised to incorporate additional safety and security recommendations in IME’s Guidelines. IME is available and would welcome the opportunity to provide further recommendations and technical assistance as the Advisory undergoes revision. IME members have exhaustive scientific, technical, and engineering expertise in all aspects of AN production, storage and use, that we believe would be extremely useful to the agency personnel responsible for revising the document. The unblemished safety record of the commercial explosives industry in managing AN speaks to our experience and knowledge, and to our continued commitment to AN safety and security.

*e. How should the agencies evaluate the implementation of safer alternatives and best practices for AN, and what are the best methodologies for accomplishing this?*

The commercial explosives industry has historically been a leader in researching and adopting inherently safer technologies and practices. The U.S. industry, since its inception, has been relentless in its efforts to produce increasingly stable, but effective products that can be transported, stored, and used safely and reliably. One such “IST” innovation that is still relevant today was the development of AN-based blasting agents and explosives in the 1950s. In the years since their initial introduction, they have largely supplanted nitroglycerine (“NG”) based products. AN-based materials are inherently more stable than their NG-based precursors, and credit for much of the exceptional safety record enjoyed by the commercial explosives industry can be attributed to this single innovation.

AN is ubiquitous in the explosives industry. It is an indispensable ingredient in blasting agents used in mining, construction, and other essential industries. As noted above, upwards of 75 percent of the billions of pounds of AN consumed annually in the U.S. is manufactured for the explosives industry. AN-based blasting agents have become the most widely used explosive materials in the world largely because of their stability, reliability, and effectiveness. DOT classifies AN-based blasting agents as Division 1.5 explosives because they are so insensitive that there is little probability of initiation or of transition from burning to detonation under normal conditions. OSHA also has concluded, correctly, that the insensitivity of these materials make them unsuited to coverage under PSM.<sup>12</sup> For similar reasons, AN is also excluded from the standard. If properly managed under existing regulations and industry best practices,<sup>13</sup> AN is stable, its behavior is known, understood, and predictable, and it does not present the type of hazard warranting complex regulation and control.

Currently, there is no viable substitute or “safer alternative” to AN. If there were, the industry would already be using it. This is not to say that the industry is complacent. Rather, the companies in this sector remain dedicated to developing the safest, most effective products possible, investing significant resources every year in research and development toward this objective. In the meantime, the industry is committed to ensuring that the products currently being manufactured are properly managed and used. Because of our industry’s long association with AN and AN-based blasting agents, we necessarily have an in-depth technical understanding of the chemical and physical properties of the materials. The manufacturing and storage practices used by the explosives industry incorporate sound engineering, appropriate design/construction, best practices operating

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<sup>12</sup> 72 Fed. Reg. 18799 (2007).

<sup>13</sup> See, 29 CFR 1910.109(i), and IME *Safety and Security Guidelines for AN*.

procedures, and security measures that are intended ensure the safety and security of our facilities and the public. These practices and procedures constitute “IST” in the area of materials management and security.

In addition to IME’s AN Guidelines, the Institute publishes a series of Safety Library Publications (“SLPs”) that address the proper management, storage, transportation, use, and disposal of explosives products.<sup>14</sup> While other organizations have developed best practices for handling chemical substances in general,<sup>15</sup> IME’s SLPs and guidance documents, including the AN Guidelines, represent “management IST” specific to the explosives industry. IME has long advocated for the incorporation of our publications in government regulations. A number of ATF, OSHA, and state regulations incorporate and/or reference IME SLPs. In 2002 we petitioned OSHA to update its Explosives and Blasting Agents Standard at 29 CFR 1910.109 (including the AN provisions at Section 1910.109(i)), and, currently, DOT is engaged in rulemaking in response to a 2011 petition to incorporate SLP 23, *Recommendations for the Transportation of Explosives, Division 1.5, Ammonium Nitrate Emulsions, Division 5.1, Combustible Liquids*, into the Hazardous Materials Regulations.<sup>16</sup> OSHA’s proposed rule to revise the Section 1910.109 standard was ultimately withdrawn because of a lack of agency resources, and the standard remains seriously outdated. We have urged OSHA, in our comments on the PSM RFI, to renew the Section 1910.109 rulemaking, and we stand ready to assist the agency in that endeavor. As we have noted elsewhere herein, the AN provisions of that standard, in particular, should be updated to reflect current “IST” for the handling of the material as reflected in IME’s AN Guidelines.

*f. Should the agencies examine the use of third-party audits and develop targeted guidance for industries that need assistance in understanding safe practices for handling AN?*

While IME has no objection to allowing the use of third-party compliance auditing as an option, we would not support a proposal to *require* third party audits at AN facilities managed by the explosives industry. Our industry has an exceptional safety record in managing these facilities, and has sufficient in-house capability to ensure that AN facilities are compliant with applicable regulations and otherwise meet the highest industry standards. AN facilities maintained by IME member companies are regularly inspected (formally and informally), any deficiencies noted are remedied promptly, and local first responder organizations are welcome to visit and inspect the sites at any time. A mandatory requirement to hire outside consultants to audit the facilities would be superfluous and would impose unnecessary burdens on explosives companies without providing commensurate benefits to safety or security.

Moreover, as we have noted in our comments on the PSM RFI, the use of third-party audits in any industry will do nothing to address the issue of “outlier,” facilities that either through ignorance or intransigence do not comply with applicable regulatory requirements. These companies will avoid compliance with a third-party auditing requirement in the same way they avoid compliance with other regulatory requirements. Compliance enforcement is ultimately and inescapably a government function; instituting a third-party auditing requirement will not obviate the need for agency auditing and enforcement efforts.

As we note elsewhere in these comments, the proper management of AN is not complicated or difficult to understand and implement. There is no need for federal agencies to develop additional guidance on the proper handling of AN; adequate guidance already exists. IME’s AN Guidelines could be readily implemented by industries needing assistance in improving their AN management practices. While we do recommend that the IWG Chemical Advisory and regulations at 29 CFR 1910.109(i) be updated by incorporating key provisions included in our Guidelines, beyond that, agency resources would be better spent in identifying sites needing assistance and in enforcing existing regulations.

<sup>14</sup> The SLPs, as well as IME’s AN Guidelines, are available via free download from the IME Website.

<sup>15</sup> See, e.g., Responsible Care (American Chemistry Council), ChemStewards (Society of Chemical Manufacturers & Affiliates), and “Responsible Distribution” (National Association of Chemical Distributors). TFI has also recently announced the formation of “ResponsibleAg,” which is aimed primarily at the management of AN.

<sup>16</sup> HM-233D.

## 2. Process Safety Improvement and Modernization

### I. Policy, Regulatory, or Guidance Options by the Agencies

*a. Should EPA and OSHA modernize, clarify, and harmonize the PSM and RMP programs through rulemaking, policy change, or guidance development? If so, please provide specific suggestions.*

With regard to PSM, please see our comments on OSHA's PSM RFI (attached).

While regulatory harmonization is a laudable goal and the PSM standard and RMP rule have some similar elements, the ultimate objectives of the programs differ. PSM is intended to safeguard workers while the goal of the RMP program is the protection of the public and the environment. Accordingly, chemical substances covered by one program may not be amenable to coverage under the other, particularly when other regulatory requirements and industry practices and procedures are factored in. One example is Division 1.1 explosives, or explosives that have a mass explosion hazard. These materials are subject to PSM; employees working on-site at a facility that experiences an accident could be endangered, and PSM provides additional safety oversight to prevent such an accident from occurring. On the other hand, the RMP program does not, appropriately, apply to Division 1.1 explosives because existing ATF regulations and industry best practices ensure that, in the event of an accident, no serious offsite consequences will occur.<sup>17</sup> Accordingly, it would be unrealistic to expect or require complete harmonization between the chemical substances covered by the two programs.

That said, IME would support harmonization efforts in certain areas, including but not limited to: (i) definitions and general terminology; (ii) the applicability, scope, and appropriate use of recognized and generally accepted good engineering practices ("RAGAGEP"); (iii) agency interpretations and guidance; and (iv) emphasis programs and other enforcement policies. The agencies also should coordinate any new rulemakings undertaken in either program to avoid inconsistent and/or redundant regulation. We also recommend that any future rulemaking be based on probabilistic risk assessment; a decision to engage in rulemaking should give due consideration to probability of event and not place an inordinate, unbalanced emphasis on consequence analysis.

*b. How should OSHA clarify the exemption for retail facilities under PSM?*

See our comments on OSHA's RFI on PSM (attached).

*d. What inconsistencies should OSHA and EPA harmonize to achieve consistency between PSM and RMP enforcement policies and guidance?*

See our general comments regarding harmonization under "(a)" above.

*e. Should EPA, OSHA, and PHMSA initiate rulemaking, policy changes, or guidance to account for human factors in process safety, management of change, facility operating procedures, incident investigation, training, process hazard analysis, and other elements? If so, please provide specific recommendations on how the agencies should better address these?*

See our comments on OSHA's PSM RFI.

*f. Should EPA, OSHA, and PHMSA initiate rulemaking, policy changes, or guidance to use existing leading and lagging indicators to better evaluate performance over time? If so, please provide recommendations on how the agencies may address this and what indicators are most meaningful.*

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<sup>17</sup> Division 1.1 explosives were delisted from the RMP rule in 1998 for these reasons.



IME member companies regularly use the types of leading and lagging indicators described in the Solicitation. We would have no objection if the agencies were to issue guidance on the value and potential use of such indicators in implementing federal programs. However, because there is such diversity in how leading and lagging indicators are defined and applied, and because their applicability and efficacy can vary depending on the process and/or industry to which they are applied, we would oppose any effort to make their use mandatory via regulation.

*g. Would it be beneficial for the agencies to develop and publish guidance for employers or operators on conducting root-cause analysis following significant incidents or releases?*

IME member companies regularly discuss root causes when discussing incidents and near incidents (including those occurring outside the U.S. and those not involving IME member companies). Incidents are reported at quarterly meetings, and are monitored and discussed through final resolution. Where a root cause of an accident can be determined and a corrective action(s) identified, all IME members are encouraged to examine their own operations and implement preventative measures where necessary and appropriate.

The commercial explosives industry is subject to certain regulatory programs that require root-cause analyses in the event of an accident or incident. For example, many IME member companies operate multipurpose bulk trucks ("MBTs") under Special Permits issued by DOT. A condition of holding these Special Permits is that if the MBT is involved in an accident, the holder must arrange for an independent accident reconstruction investigation to determine the root cause of the incident and any other factors that might be relevant to prevent similar accidents from occurring in the future, if such information is not otherwise available from investigative reports from the holders' insurance company.

The use of root-cause analysis in addressing incidents is essential to the commercial explosives industry. Accordingly, we would support the development of guidance on conducting root-cause analyses, and believe it would be particularly beneficial to small businesses and/or to entities not accustomed to performing comprehensive analyses of accidents or incidents. Among other things, we would expect the guidance to define what the agencies consider a "significant" incident or release (e.g., reportable releases, incidents involving worker injuries, near misses, and the like), and provide some assurance that companies' voluntary analyses will not be routinely requested during inspections or used as evidence of a violation.

*h. Would it be beneficial for OSHA to develop and publish PSM guidance for small businesses, particularly those that handle highly hazardous chemicals that are not the employer's primary product?*

The publication of PSM guidance aimed particularly at small businesses would be beneficial, and may assist OSHA in identifying or communicating with "outlier" facilities that may not be aware that PSM is applicable to their operations. In support of such a project the IWG should also consider expanding EPA's "List of Lists" to include OSHA, ATF, and DHS chemical lists to enable regulated entities to identify, in one step, all regulatory programs associated with the various chemical substances they handle.

*i. How should EPA, OSHA, PHMSA and USCG harmonize and standardize terminology in order to clarify requirements and definitions across multiple jurisdictions?*

As noted previously herein, IME would support any effort to harmonize terminology and other regulatory requirements that span intra-jurisdictional programs as well as multiple jurisdictions. For example, the harmonization of chemical names and other identifiers would be necessary in order to enable the successful expansion of EPA's List of Lists, referred to above. It would also help alleviate confusion regarding the chemical classifications used by various agencies. In particular, the DOT classification of Division 1.1 AN is not understood by other federal agencies and has resulted in the dissemination of misinformation during public "listening sessions" and in congressional hearings. There are no commercial Division 1.1 AN products manufactured

anywhere in the U.S. The category was created by DOT merely to alert manufacturers that if such a product *were* to be produced, it would be subject to DOT rules governing Class 1 explosive materials.<sup>18</sup> Both forms of AN in commerce today - technical grade AN used by the explosives industry and fertilizer grade AN - are classified as Division 5.1 oxidizers based on DOT testing criteria. The chemistry of these AN grades is the same. The only distinction is the density of the product.

*j. Should inspector and compliance officer training be expanded to include best practices and to improve process safety beyond regulatory requirements?*

The Solicitation suggests that inspectors and compliance officers could be trained to go beyond their enforcement roles and actually make best practice recommendations to facility owners and operators. IME would oppose this arrangement. Unlike many other industries, the manufacture of explosives is highly specialized, requiring a level of management and operator expertise and experience that is not readily available outside of the industry itself. In addition, the production processes and material formulations used to manufacture even similar explosives products tend to be unique and proprietary across the sector, i.e., there are no universally-recognized methods of production (i.e., processes), that would be amenable to the type of across-the-board training contemplated by this suggestion. In order to offer any meaningful recommendations, an inspector or compliance officer would have to have extensive first-hand knowledge of the explosives industry. Even if this were practicable, which it is not, it would put an inordinate strain on agency resources that could not be justified from a safety standpoint.

In addition, we have concerns that expanding the role of the agency inspectors and compliance officers in this manner could expose regulated facilities to additional potential liability. If recommendations made by an inadequately trained or inexperienced inspector or compliance officer were to be rejected by a facility owner/operator, the facility would be forced to document and defend its justifications for doing so. This would add to the facility's already significant compliance burdens.

OSHA and EPA already have recourse to their respective General Duty Clause ("GDC") authorities in acting on perceived shortcomings in facility operations. We also understand that OSHA inspectors implementing the Chemical Facilities National Emphasis Program have referenced RAGAGEP in inspections conducted under that program. GDC authority can, and has been used to address obvious hazardous conditions that are not otherwise covered by a standard or rule. The potential relevance of RAGAGEP to certain operations is also often easy to understand and identify. Glaring deficiencies that are observed during an inspection can be addressed using these authorities and methods. We do not believe that giving inspectors or compliance officers generalized training on industry best practices will add to their effectiveness. The appropriate role of agency officials is to confirm compliance with applicable regulations, identify patent hazards, and discuss with facility owners/operators the use of or deviation from available RAGAGEP.<sup>19</sup>

Recognized best practices that are critical to occupational or environmental health and safety should be incorporated into regulations, not "recommended" by inspectors or compliance officers. As we have described above, IME encourages agencies with regulatory responsibilities over our industry to adopt our SLPs and guidance documents in agency rules. These documents represent "best practices" in the commercial explosives industry and were developed with the hope and intent that they would, ultimately, be incorporated into government regulations.

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<sup>18</sup> Manufacturers of Class 1 explosives, unlike producers of non-Class 1 products, are prohibited from self-classifying these materials. Class 1 explosives must be assigned an appropriate classification by DOT based on testing at a DOT-approved laboratory. To date, DOT has never issued a Division 1.1 classification for AN.

<sup>19</sup> While we recognize the value of RAGAGEP to industry and regulators, we would oppose any attempt by OSHA to dictate, through enforcement actions or otherwise, the RAGAGEP used by a facility. Likewise, facilities should have the flexibility to deviate from a strict implementation of RAGAGEP if they determine that such deviation is appropriate to a particular operation and can be accomplished without compromising safety.

Rather than use limited agency resources to provide marginally useful training to inspectors and compliance officers, the resources should be directed to identifying facilities handling hazardous materials that may be unaware of their regulatory obligations.

*l. Should EPA, OSHA and PHMSA evaluate the implementation of a “safety case” regulatory model to reduce risks in complex industrial processes as low as reasonably practicable?*

We have not had sufficient time or opportunity to evaluate the efficacy of the safety case model for use in the commercial explosives industry. Regardless, one issue that would have to be carefully considered is whether the safety case model could be used to partially or completely supplant traditional regulatory practice in the U.S. Fixed, substantiated regulations, for the most part, give the regulated community a clear understanding of its compliance obligations. While we appreciate the potential value of operational flexibility and risk-based regulation offered by the safety case model, those advantages must be weighed against the certainty that a static regulatory structure provides.

*m. Should the agencies evaluate the implementation of safer alternatives and best practices, and what are the best methodologies for accomplishing this?*

Earlier in these comments we addressed the IST issue. To reiterate, the commercial explosives industry is committed to developing stable and reliable products that ensure the safety of workers, users, and the environment. The industry consistently devotes significant research and development resources toward this objective, and has successfully advanced the concept of “IST” in its creation of new, increasingly insensitive blasting products and in its refinement of correct and effectual management practices for explosives, blasting agents and precursor chemicals, including AN. The idea of IST is fundamental to the explosives industry, the clearest evidence of this being the development and promotion of AN-based blasting agents as a replacement for NG-based products. Our continued commitment to safety through innovation is also reflected in our AN Guidelines which, in tandem with existing OSHA regulations, set the standard for handling AN by reducing the risk associated with AN storage to an exceedingly low level.

Clearly, the concept of IST is wholeheartedly embraced by the explosives industry. However, we believe that IST is best implemented through industry and/or individual company efforts. We would not support the imposition of mandatory IST requirements.

*n. How should EPA and OSHA use RMP accident data to identify trends and use the information to develop guidance or regulatory changes, compliance priorities, and technical assistance? If so, what are the ways that this might be done?*

Our only comment on this question concerns the suggested segregation of the data. Accident/incident data are collected under numerous federal programs. This data should be evaluated collectively, where relevant, and used to enhance all federal programs that could benefit from the shared information. While the various agencies must take care to protect security-sensitive information, the amalgamation of related data could be used to great advantage in improving safety and security overall.

## **II. Options for Collaborating with Private Organizations on External Standards**

*p. What opportunities exist for EPA, OSHA, and NPPD to work with industry associations to leverage industry programs and improve process safety and security through the industry programs and consensus standards, and encourage best practices, as well as to improve regulatory efficiency, especially for small businesses?*

IME has traditionally welcomed input from regulatory agencies in the development of our safety and security publications and programs. ATF and DHS representatives regularly attend IME committee meetings and participate in discussions of SLP updates as well as issues impacting our regulatory obligations and compliance efforts. IME has produced, in cooperation with DOT, a DVD and accompanying instructor's guide, *"Responding to Highway Incidents Involving Commercial Explosives"* (revised 2013).

Additional models for enhancing agency/industry communication and cooperation are the ongoing DHS/Chemical Sector Coordinating Council, and DOT/Railroad Safety Advisory Committee efforts. The IWG should consider encouraging similar, productive interactions between federal agencies and the industries they regulate. Heightened interaction not only promotes effective regulation and understanding of the commercial practicalities faced by industry, but may also assist federal agencies to identify and inform "outlier" facilities of applicable regulatory requirements and industry best practices of which they may be unaware.

*q. In which consensus standard groups should EPA and OSHA participate to stay current on industry best practices and improve chemical process safety?*

As noted previously, best practice standards for the commercial explosives industry are represented in IME's SLPs and guidance documents. Also, as noted above, IME welcomes the participation of agency officials in its committee meetings and appreciates all opportunities to engage with agency officials responsible for regulating our industry.

IME also participates on several national consensus standard-setting organization committees, including NFPA 495, 498, 780, and 400, and ANSI/ASSE A10. A number of federal agencies participate on these committees as well.

### **3. Coverage of Additional Hazardous Chemicals or Categories of Chemicals under Process Safety and Security Regulations**

*a. Should OSHA and EPA initiate rulemaking to cover additional hazardous chemicals under the PSM standard and RMP rule? If so, how should the agencies identify these chemicals?*

See our comments on OSHA's PSM RFI. The views expressed regarding the expansion of the PSM standard apply equally to the RMP rule. In addition, please see the written statements submitted by IME and IME members at the EO listening sessions hosted by the IWG, and our Statements for the Record submitted to various congressional committees (attached).

*b. Is there a method, other than periodically updating the PSM and RMP lists of covered chemicals through rulemaking that OSHA and EPA could use to expand their lists of covered chemicals?*

The expansion of either program to include additional chemical substances or to apply specific requirements to existing listed chemical substances should be accomplished through notice and comment rulemaking.

*c. What additional chemicals should NPPD consider adding to the existing CFATS COI list?*

IME has not recommended adding chemicals to the COI list. However, we have recommended that DHS eliminate the COI entry for Division 1.1 AN. As discussed above, there is no commercial product with this classification.

*d. Should DHS attempt to harmonize security requirements at chemical facilities exempt from CFATS with the requirements applicable to CFATS-regulated facilities and, if so, how?*

The short answer is “yes.” And, harmonization efforts should begin with, or at least include, the elimination of redundant vetting program requirements. The FY 2014 Omnibus Appropriations Act contains a directive that DHS avoid costly duplication of programs, particularly as it relates to identifying individuals with terrorist ties.

The purpose of federal security vetting and credentialing programs is to ensure that security-sensitive workers do not pose a threat to national security. DHS currently operates five background check programs covering different work environments that affect transportation workers – HME, TWIC, FAST, SIDA and IAC. More vetting programs are being proposed, including those under the ANSP and CFATS. The Department of Defense, ATF and the Nuclear Regulatory Commission operate other employee vetting programs.

Virtually all individuals subject to federal worker vetting and credentialing programs are successfully screened. The redundancy of programs is costly to the government and covered individuals, and, since the vetting standards are the same, there is no value added. While DHS has harmonized disqualifications, only the IAC provides full reciprocal recognition of other DHS background credentials. Finally, only under the HME and ATF programs are employers provided information about the disposition of their employees’ background checks. Without such information, employers are unable to prevent individuals identified as security threats from transporting hazardous materials, rendering the background check ineffective and undermining employer efforts to protect the public and their other employees.

In numerous written submissions, we have suggested that DHS provide reciprocal recognition to those enrolled in its own programs, and we have specifically asked DHS to open the TWIC program used by MTSA facilities to those requiring vetting under CFATS. MTSA facilities are currently exempt from CFATS, and Congress has also directed DHS to harmonize standards for these two programs. While some have expressed concern with the TWIC program, critics have failed to identify a better program or approach. The Department of Defense recognizes the TWIC as a common access credential. Certainly, the proposed PSP is far inferior to this program. DHS recently requested and OMB approved a revised TWIC application form that would allow other populations, approved by TSA, to apply for TWICs. TSA does all vetting for the TWIC and will do so for the PSP. TSA could coordinate the sharing of data about vetted individuals between the two programs, not require these individuals to resubmit information that is already in the government’s possession.<sup>20</sup>

Next, we strongly recommend that DHS accept ATF’s vetting of explosives workers for those individuals at facilities regulated under the Safe Explosives Act (“SEA”) and CFATS. Again, the regulated community should not have to enroll in duplicative vetting programs simply because the federal government cannot (or will not) share information. Finally, we strongly recommend that transportation workers and facilities be exempt from CFATS. Currently, DHS does not cover transportation facilities in deference to TSA. DHS should also exempt transportation workers from the PSP vetting requirements. The mission for securing the transportation sector lies with TSA, not those implementing the CFATS program.

#### **4. Chemical Reactivity Hazards**

*a. Should OSHA and EPA initiate rulemaking, policy changes, or guidance to cover chemical reactivity hazards under the PSM standard and RMP rule? If so, what definitions, terms, and conditions should be used to best define hazards that can lead to reactive incidents?*

See our comments on OSHA’s PSM RFI.

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<sup>20</sup> IME has recommended that the TWIC application form be modified so that the applicant can check which access privileges they are seeking, including to CFATS facilities.

*b. Should EPA, OSHA, and NPPD develop a definition of high risk chemical reactivity hazards for future rulemaking, policy changes, or guidance, and if so, what should be the basis of that definition?*

See our comments on OSHA's PSM RFI.

## **5. Explosive Chemical Hazards**

ATF is required by law to annually publish a list of "any chemical compound mixture, or device, the primary or common purposed of which is to function by explosion."<sup>21</sup> The list is extensive, but is not all-inclusive. Therefore, an explosive material not on the list may still be within the coverage of the law and under ATF's jurisdiction. Based on this statutory responsibility, we believe that other agencies should defer to ATF for a determination of whether a material is an explosive. It is in this context that we answer the questions in this section.

*a. What opportunities exist for involving stakeholders in the development of guidance, best practices, or regulatory action on explosives hazards? What guidance is specifically needed?*

The IWG suggests that opportunities for stakeholder engagement include public meetings and listening sessions, webinars, Federal Register notices, and participation at stakeholder conferences and workshops. We have already noted that we welcome agency involvement at IME committee meetings. This interaction is probably the most valuable means of increasing agency understanding of our industry, its products, and our best practices. Likewise, agency participation in our meetings allows us to learn about existing and developing agency policies, and the rationales underlying current and contemplated regulations.

We also take advantage of other opportunities to communicate with agency officials to express our views on developing issues and to share our expertise in the explosives field (e.g., the listening sessions held in connection with the EO, face-to-face meetings with agency officials, submissions of comments and statements). IME member companies have participated in meetings of the Interagency Committee on Explosives ("ICE"),<sup>22</sup> which is an excellent forum for sharing information about explosives regulation, technical developments in the field, and best practices in all aspects of explosives management. Other good examples of effective government and stakeholder interaction are the DHS/CSCC and DOT/RSAC models previously mentioned. Finally, we would be remiss if we did not mention the value of agency collected data. For example, we have used OSHA and DOT data on worker safety and hazardous materials incidents to look for lessons learned. Working with ATF, information about explosives thefts, losses, and recoveries was released again last year after a multi-year hiatus. This information is invaluable to help our industry evaluate the adequacy of current rules and industry best practices.

IME would also welcome the opportunity to assist the IWG agencies to develop guidance, where appropriate. In response to a request from one of the IWG members, IME provided recommendations for updating EPA's 1997 Chemical Alert on AN. These recommendations were subsequently incorporated into IME's Guidelines. We hope, in turn, that the Guidelines will be used in updating the August 2013 Chemical Advisory on AN produced by OSHA, EPA, and ATF.

The Solicitation also notes that ATF and EPA are interested in opportunities for stakeholder involvement. In addition to regularly attending IME committee meetings, ATF is required to consider industry best practices as part of the rulemaking process.<sup>23</sup> This requirement affords additional opportunities for direct interaction. While we are not aware of a like requirement governing EPA, OSHA, or DHS rulemaking, the agencies should consider

<sup>21</sup> 18 U.S.C. 841(d).

<sup>22</sup> ICE is a forum of federal departments and independent agencies that promote and facilitate information exchange regarding rulemaking and policies on the safety and security of ammunition, fireworks, explosives, and other high energy materials.

<sup>23</sup> 18 U.S.C. 842(j).

adopting the practice as a matter of policy. The direct involvement of the explosives industry early in the rulemaking process and in the development of guidance and policy ensures that government action is well-informed and that rules and policies are practicable and effective.

*b. Should OSHA revise its Explosives and Blasting Agents standard to cover dismantling and disposal of explosives?*

See our comments on OSHA's PSM RFI.

*c. Should ATF develop guidance to assist retailers in identifying suspicious purchases of explosive materials where minimal or no statutory controls exist, such as smokeless powder, black powder, and binary exploding targets?*

IME touched on this issue in comments submitted to DHS on the ANSP. Specifically, we recommended that binary "exploding target" products and similar items be regulated under that rule. We also would support action by ATF to close the regulatory gap surrounding black and smokeless powder and exploding target products. Short of full regulation, we also would support the development of guidance to educate retailers regarding the security concerns that these products may present.

*d. Should ATF update regulatory requirements or develop guidance for voluntary best practices in collaboration with industry associations on more robust locking mechanisms for explosives storage?*

As the agency is aware, IME supports ATF's lock study,<sup>24</sup> and supports the development of a rule on magazine key control. IME is ready to assist in any other research projects to help achieve our common goal of ensuring magazine integrity and security.

*e. Should ATF further collaborate with the Institute of Makers of Explosives to identify permissible deviations or standards for physical factors in bulk storage of explosives?*

IME's SLP 28, *Recommendations for Accountability and Security of Bulk Explosives and Bulk Security Sensitive Materials*, addresses issues surrounding bulk storage. We support industry and ATF efforts to identify and refine methods that will ensure the security of our raw materials and products.

## **6. Oil and Gas Facilities**

*a. Should OSHA initiate rulemaking to cover oil and gas well drilling and servicing facilities under the PSM standard?*

See our comments on OSHA's PSM RFI.

## **8. Process and Hazardous Chemical Security**

*a. What options should NPPD consider to incorporate economic and mission criticality into the CFATS risk-tiering methodology?*

Currently, facilities are determined to be high risk chemical facilities subject to CFATS based solely on risks associated with consequences to human life. We offer the following suggestions:

- DHS should use a risk assessment approach and corresponding tiering methodology that incorporates the elements of threat, vulnerability, and consequence.
- Threat should be based on available intelligence.

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<sup>24</sup> A prior study was conducted by an IME member company, and the results were reported at an IME meeting where ATF officials were in attendance.

- Economic consequences should be based on a facility losing its place in the supply chain as a result of terrorist activity.
- Vulnerability should consider the likelihood that a terrorist attack or exploitation would be successful. These are standards consistent with the NIPP.

*d. What vetting systems other than National Instant Criminal Background Check (NICS) should ATF use for more frequent vetting of employee possessors of explosives and responsible persons on Federal explosives licenses and permits?*

One of the most effective means of keeping explosives products out of the wrong hands is background vetting of our employees. When Congress passed the SEA, IME advocated for provisions extending the background check requirements of Federal Explosives Law to companies engaged in intrastate commerce. We believed at the time that closing this loophole, which precludes individuals convicted of or under indictment for a felony, including terrorism, and which precludes the teaching or demonstrating the making of explosive devices or weapons of mass destruction (“WMD”) with the intent that such devices be misused, would be sufficient to ensure that those with terrorist intent not have access to commercial explosives. However, this is not the case. There may be individuals engaged in conduct leading to or in support of an act of terrorism who have not been indicted or convicted of a felony, or who are not teaching or demonstrating the manufacture of WMD, but who intend to use those devices for a terrorist purpose. Both Presidents George Bush and Barack Obama have recommended closing this so-called “terror gap.”

The ability to vet names against the FBI’s Terrorist Screening Database (TSDB) is reserved to the government. The private sector has no access to the TSDB. While ATF can, and does, vet the names it receives of employees who will possess explosives, the agency does not have the ability to deny an explosives license or a permit to applicants if employees are found on the TSDB. Moreover, if ATF finds an employee listed on the TSDB, the agency does not have authority to inform the facility so that the person is not authorized to possess explosives. Such notification is particularly important since the FBI is not able to monitor all persons on the TSDB at all times. Because ATF does not have authority to disqualify an individual from possessing explosives if the individual is found on the TSDB or to re-vet those names when information on the TSDB changes, ATF’s vetting program is not deemed equivalent to the vetting and clearance procedures used by DHS. Harmonizing the vetting and clearance procedures of ATF with those used by these other DHS programs will increase opportunities to see that ATF’s vetting program is reciprocally recognized by these programs. This outcome would add intelligence value to all government vetting programs sharing the same platform, and provide savings to the federal government and the regulated community.

ATF should have authority to keep explosives out of the hands of terrorists and criminals. ATF should be given authority to disqualify individuals from possessing explosives if they are found on the TSDB. ATF should be given authority to re-vet the names of those working for explosives licensees and permittees against the TSDB as information on the TSDB changes. Additionally, the requirement that ATF give notice to employers when an employee is disqualified for a criminal conviction or warrant, such notice should also be given to employers when employees are found to be on the TSDB. The notice should follow ATF’s current procedures where the notice does not reveal the nature of an employee’s disqualification, and affected individuals are provided a right to appeal or to request a waiver of disqualifying offenses. We believe that these due process protections should be preserved. At the same time, with notice, our companies will be able to ensure that those who may have terrorist intent are not inadvertently allowed access to explosive materials and products. We have recommended in numerous comments and statements that Congress promptly amend the SEA to close these security gaps.



## 9. Identifying Facilities Covered under Existing Process Safety and Security Regulations

### *a. Should facilities covered under PSM but not RMP be required to register under the RMP reporting system?*

The Solicitation notes that EPA requires RMP-covered facilities to register a risk management plan with EPA that indicates whether the facility is also covered under PSM. This makes sense, given that a facility's coverage under PSM dictates its status under RMP; facilities that are subject to PSM are automatically placed in Program 3 of the RMP. We understand why EPA would want to have this information. We do not, however, see what utility would be gained by requiring facilities subject only to OSHA's PSM to register through a different, inapplicable program that is administered by a different agency. Even apart from the confusion that this would engender in the regulated community, we imagine that the reporting scheme would be difficult to manage between the agencies as well. If the registration of PSM plans is the objective, the registration should be mandated and administered by OSHA, not through a different federal agency with no jurisdiction over the program through which the plans are generated.

We understand that agencies are under pressure to find ways of leveraging existing resources. To the extent that EPA's reporting system could be converted to use as a centralized, interagency registration point for all federal health, safety, and environmental programs, similar to the "regulations.gov" system, it might make more sense to take that direction. Such an approach would also be responsive to the direction in the EO that federal agencies identify ways to coordinate and share information, and would be consistent with our recommendation that the List of Lists be expanded to include all federal programs that regulate chemical substances.

### *b. How can DHS most effectively identify entities that have not submitted required CFATS' Top-Screens?*

The EO directs DHS (and ATF) to determine the feasibility of sharing information with states and localities. While we support this effort, information sharing must be a two-way street; states and localities must also be encouraged to share information with federal agencies. States and local emergency responder organizations are the best resource for information on local and regional businesses that could be handling COI in threshold quantities.

DHS should also encourage EPA and OSHA to share information on the facilities subject to the RMP and PSM programs. Some chemical substances handled by facilities subject to those programs may also be COI. As we have recommended previously, EPA's List of Lists should be expanded to include, among other things, CFATS COI. As we saw in the case of West, TX, that facility was aware of its obligations under RMP, but, presumably, was unaware that it was also subject to CFATS. An expanded List of Lists may assist smaller, less sophisticated businesses to identify all the federal programs to which they might be subject. That said, it is quite apparent that a coordinated effort between local, state, and federal agencies to identify entities not currently complying with existing regulatory obligations is long overdue.

### Missing Policy Options

As comprehensive as the IWP policy options are, they do not include options that would encompass some of the over two dozen recommendations we have asked the working group to consider. Nothing in the policy options addresses the weaknesses of the Local Emergency Planning Committee ("LEPC") program. This in itself is remarkable given to expansive role proposed for LEPCs by the EO. That said, IME does not support broadening the scope of information shared through the LEPC portal. LEPCs are not set up to protect security-sensitive information. A better option is the approach currently used by DHS and ATF that requires regulated facilities to share information necessary for safety and security directly with local responders in their communities. The best way to identify "outlier" facilities is for local responders to pass this information back up the chain to the federal

level. We believe DHS should leverage FEMA grants to firefighters to help institutionalize this vital information exchange.

Also missing from the policy options are recommendations for ATF to update and finalize pending rulemakings, and to consider rulemaking to establish standards for magazine key control. The policy options should also include recommendations that DHS address the proliferation of redundant vetting programs under its control including those soon to be implemented under the CFATS and ANSP programs. The permanent authorization of CFATS should also be recommended, and DHS should be directed to reconsider flawed proposals to secure the commerce of AN. While the policy options ask about the merits of EPA, OSHA, and DHS updating the lists of chemicals they regulate, missing is a call for the IWG to expand EPA's List of Lists. As we have recommended in these comments, the List of Lists should be expanded to include ATF's list of explosives, OSHA's PSM chemicals, DOT's named hazardous materials, and DHS's COI. This would be a valuable compliance tool for the regulated community.

### Correction

One of the expressed goals of the EO is to improve interagency coordination. We were surprised, therefore, to find several significant errors in the Appendix A – AN Jurisdiction Table in the Solicitation. We have attached a corrected version of the table that accurately sets out the jurisdictional responsibilities between agencies.

### Conclusion

We appreciate the urgency and the enormity of the tasks before the IWG. We have offered reasonable and achievable recommendations regarding the chemicals and products used in our industry. We believe that, collectively, chemical safety and security can be improved by identifying gaps and weaknesses in rules that can be filled by recognized best practices. But, more regulation, without cost/benefit justification, is not the answer. The tragedy at West, TX was not occasioned by a gap in regulations. It was a consequence of noncompliance. Agencies need to do a better job of policing the rules they have before imposing even more rules on already compliant businesses. Ensuring that companies are in compliance with federal regulations is not a task that agencies can or should delegate to the regulated community. Nevertheless, we hope that the collaborative process established by the IWG will be successful, and that the agencies involved will continue to work with affected stakeholders to address our shared concerns even after this current mission concludes.

Respectfully Submitted,

*Cynthia Hilton*

Cynthia Hilton  
Executive Vice President

### Attachments:

- EO Statement, (October 28, 2013)
- Recommendations by Agency
- Redline of IWG Chemical Advisory on AN
- Comments to OSHA, RFI
- Comments to DHS, Information Sharing
- Congress: Statements for the Record (June 27, 2013, August 1, 2013, March 6, 2014)
- Comment on EO Progress (March, 2014)
- Appendix A – AN Jurisdiction Table correction

