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Ammonium Nitrate Security Program; Proposed Rule

**DEPARTMENT OF HOMELAND SECURITY****Office of the Secretary****6 CFR Part 31**

[Docket ID 2008–0076]

RIN 1601–AA52

**Ammonium Nitrate Security Program****AGENCY:** National Protection and Programs Directorate, DHS**ACTION:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule would implement anti-terrorism measures to better secure the homeland. The Department of Homeland Security would regulate the sale and transfer of ammonium nitrate pursuant to section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act with the purpose of preventing the use of ammonium nitrate in an act of terrorism. This proposed rule seeks comment on both proposed text for such a regulation and on several practical and legal issues integral to the development of an Ammonium Nitrate Security Program.

**DATES:** Comments and related material must either be submitted to our online docket via <http://www.regulations.gov> on or before December 1, 2011 or reach the Docket Management Facility by that date. Comments sent to DHS or the Office of Management and Budget (OMB) on collection of information must reach DHS or OMB on or before October 3, 2011.

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

- *Federal eRulemaking Portal:* Follow the instructions at <http://www.regulations.gov> for submitting comments.

- *Mail:* U.S. Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Security Compliance Division (NPPD/ISCD), 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20598–0610.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the “Public Participation” portion of the **SUPPLEMENTARY INFORMATION** section below.

*Collection of Information Comments:* If you have comments on the collection of information discussed in section IV.F (“Paperwork Reduction Act”) of this Notice of Proposed Rulemaking (NPRM), you may submit comments to the DHS as indicated above, and you

may also send comments to the Office of Information and Regulatory Affairs (OIRA), OMB. Comments on the collection of information must reach DHS or OIRA on or before October 3, 2011. To ensure that your comments to OIRA are received on time, the preferred methods are by e-mail to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov) (include the docket number and “Attention: Desk Officer for Department of Homeland Security/NPPD” in the subject line of the e-mail) or fax at 202–395–6566. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for Department of Homeland Security/NPPD.

**FOR FURTHER INFORMATION CONTACT:** Ammonium Nitrate Security Program Manager, U.S. Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Security Compliance Division (NPPD/ISCD), 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20598–0610, telephone number (703) 235–5263.

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### Abbreviations and Terms Used in This Document

AN Ammonium Nitrate  
 ANFO Ammonium Nitrate/Fuel Oil  
 ANPRM Advance Notice of Proposed Rulemaking  
 ATF Bureau of Alcohol, Tobacco, Firearms, and Explosives  
 ATSA Aviation and Transportation Security Act  
 CFATS Chemical Facility Anti-Terrorism Standards  
 CFR Code of Federal Regulations  
 COI Chemical of Interest  
 CVI Chemical-terrorism Vulnerability Information  
 DHS Department of Homeland Security  
 DOT Department of Transportation  
 EAR Export Administration Regulations  
 FBI Federal Bureau of Investigation  
 FR **Federal Register**  
 HMR Hazardous Materials Regulations  
 HMT Hazardous Materials Table  
 IED Improvised Explosive Device  
 IRFA Initial Regulatory Flexibility Analysis  
 MTSA Maritime Transportation Security Act  
 NAICS North American Industrial Classification System  
 NPRM Notice of Proposed Rulemaking  
 PCII Protected Critical Infrastructure Information  
 PHMSA Pipeline and Hazardous Materials Safety Administration  
 POC Point of Contact  
 QATT Qualified Anti-Terrorism Technology  
 RFA Regulatory Flexibility Act  
 SAFETY Support Anti-Terrorism By Fostering Effective Technologies  
 SBA Small Business Administration  
 SORN System of Records Notice  
 SSI Sensitive Security Information  
 TSA Transportation Security Administration  
 TSDB Terrorist Screening Database  
 TWIC Transportation Worker Identification Credential  
 UMRA Unfunded Mandates Reform Act  
 USC United States Code  
 USCG United States Coast Guard  
 USDA United States Department of Agriculture  
 VSL Value per Statistical Life

### I. Public Participation

Interested persons are invited to participate in this rulemaking by

submitting written data, views, or arguments on all aspects of this NPRM. The Department of Homeland Security (DHS or the Department) also invites comments that relate to the economic, environmental, or federalism effects that may result from this NPRM. Comments that will provide the most assistance to the Department in developing this proposed rule will refer to a specific provision of the NPRM or the Secure Handling of Ammonium Nitrate provisions in the Homeland Security Act, as amended, explain the reason for any comments, and include other information or authority that supports such comments.

*Submission of Sensitive Information:* Do not submit comments that include trade secrets, confidential commercial or financial information, Chemical-terrorism Vulnerability Information (CVI), Protected Critical Infrastructure Information (PCII), or Sensitive Security Information (SSI) to the public regulatory docket. Please submit such comments separately from other comments on the proposed rule. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the following address: U.S. Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Security Compliance Division (NPPD/ISCD), 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20598-0610.

Upon receipt of such comments, DHS will not place the comments in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. DHS will hold them in a separate file to which the public does not have access, and place a note in the public docket that DHS has received such materials from the commenter. If DHS receives a request to examine or copy this information, DHS will treat it as any other request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department's FOIA regulation found in Part 5 of Title 6 of the Code of Federal Regulations (CFR).

*Instructions:* All submissions 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: Overview of Subtitle J and Associated Regulatory Development Activities

#### A. Subtitle J

Section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act amends the Homeland Security Act of 2002 and directs DHS 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.” See Public Law 110-161, Division E (2007). Section 563 amends the Homeland Security Act of 2002 (6 U.S.C. 361 *et seq.*) by adding in a new Subtitle J—Secure Handling of Ammonium Nitrate, sections 899A-899J (to be codified from 6 U.S.C. 488 to 6 U.S.C. 488i) throughout this document refer to the corresponding sections in the Homeland Security Act of 2002, as amended by section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act. All references to “Subtitle J” throughout this document refer to Subtitle J of the Homeland Security Act of 2002, as created by the Fiscal Year 2008 Department of Homeland Security Appropriations Act.

Pursuant to Subtitle J, the Department must develop regulations that require, at a minimum, the following activities:

- *Registration Applications:* Certain ammonium nitrate sellers and prospective ammonium nitrate purchasers must apply for ammonium nitrate (AN) registration numbers from DHS in order to sell, transfer, and/or purchase ammonium nitrate. See 6 U.S.C. 488a(c) and 6 U.S.C. 488a(d).

- *Terrorist Screening Database Checks:* The Department must use identifying information of each prospective applicant to conduct a check against identifying information that appears in the Terrorist Screening Database (TSDB). See 6 U.S.C. 488a(i)(2)(A).

- *Registration Numbers:* The Department generally must issue an ammonium nitrate registration number or deny the registration of an applicant within 72 hours of receipt of each ammonium nitrate seller's or ammonium nitrate purchaser's complete registration application. See 6 U.S.C. 488a(i)(3)(A).

- *Purchaser Verification Activities:* At the point of sale, ammonium nitrate sellers must verify each potential ammonium nitrate purchaser's identity and registration to purchase ammonium nitrate pursuant to procedures

established by the Department. *See* 6 U.S.C. 488a(e)(2)(D).

- *Recordkeeping:* All ammonium nitrate facilities must keep records of sales or transfers of ammonium nitrate for at least two years after each transaction. *See* 6 U.S.C. 488a(e)(1) and 6 U.S.C. 488a(e)(2).

- *Reporting Theft or Loss of Ammonium Nitrate:* Certain ammonium nitrate sellers must report the theft or loss of ammonium nitrate to Federal authorities within one calendar day of discovery of theft or loss. *See* 6 U.S.C. 488d.

- *Inspections and Audits:* The Department must conduct or oversee regulatory compliance inspections and audits of ammonium nitrate facilities' records, monitor compliance with the requirements of Subtitle J, and deter or prevent misappropriation of ammonium nitrate for use in terrorist acts. *See* 6 U.S.C. 488b.

- *Guidance Materials and Posters:* The Department must develop guidance materials that set forth procedures for appealing denial of an application for an ammonium nitrate registration number, guidance materials that help ammonium nitrate facilities identify suspicious ammonium nitrate purchases or attempted purchases or transfers, and posters providing information on sellers' record-keeping responsibilities and on the penalties for violating requirements under the Department's ammonium nitrate program. *See* 6 U.S.C. 488a(i)(4)(c) and 6 U.S.C. 488c(c).

- *Establishing Threshold Percentage of Ammonium Nitrate in a Mixture:* The Department must establish a threshold percentage of ammonium nitrate in a mixture for that mixture to be regulated under the Department's ammonium nitrate program. *See* 6 U.S.C. 488a(b).

- *Appeals and Penalties:* The Department must establish an expedited appeals process for applicants denied ammonium nitrate registration numbers, as well as an appeals process for individuals assessed civil penalties for violating the rules promulgated under Subtitle J. *See* 6 U.S.C. 488a(i)(4) and 6 U.S.C. 488e(d).

#### B. October 2008 Report to Congress

In an Explanatory Statement accompanying section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act the Chairman of the House Committee on Appropriations indicated a desire for the Department's National Protection and Programs Directorate to "provide a plan to implement [Subtitle J], including analysis of the resources required to do so, and a proposal for reallocating funding within the National Protection

and Programs Directorate for doing so." *See* Explanatory Statement Submitted by Mr. Obey, Chairman of the House Committee on Appropriations, Regarding the Consolidated Appropriations Amendment of the House of Representatives to the Senate Amendment to H.R. 2764, 153 Cong. Rec. H15741, H16092 (2007), available at <http://www.gpo.gov/fdsys/pkg/CREC-2007-12-17/pdf/CREC-2007-12-17-bk2.pdf>. In October 2008, the Department submitted to Congress a report in response to this Explanatory Statement, outlining possible approaches to implementing Subtitle J and the potential costs associated with each approach. The Department's report to Congress has aided in evaluating many of the approaches contained in this NPRM. The Department's report can be found in the docket for this NPRM, which is available at <http://www.regulations.gov>.

#### C. Advance Notice of Proposed Rulemaking

DHS published an Advance Notice of Proposed Rulemaking (ANPRM) titled "Secure Handling of Ammonium Nitrate Program" on October 29, 2008. *See* 73 FR 64280. The ANPRM solicited public comment on the following specific issues:

- 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 offices or at United States Post Offices);

- Comments regarding the technical capabilities (e.g., access to computers; access to the Internet; average level of computing skills; frequency of use of integrated Information Technology systems) of ammonium nitrate manufacturers, distributors, sellers, and end-users;

- Comments regarding DHS distribution of ammonium nitrate registration letters or certificates (e.g., whether DHS should use e-mail or regular mail);

- Comments regarding a verification process for registrations and ammonium nitrate purchases, including methods for verifying the identity of any ammonium nitrate purchaser, as well as the identity of designated agents purchasing ammonium nitrate on behalf of registered ammonium nitrate purchasers;

- Comments on the detonability of ammonium nitrate at certain concentrations, including research being conducted concerning the detonability of ammonium nitrate;

- Comments on how likely ammonium nitrate fertilizer users would be to use an alternative fertilizer that is potentially less detonable, such as 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* <http://www.safetyact.gov>;

- Comments on how best to conduct or oversee regulatory compliance inspections and audits of ammonium nitrate facilities' records to ensure that regulated ammonium nitrate facilities are properly maintaining records, to monitor compliance with the requirements of Subtitle J, and to deter or prevent misappropriation of ammonium nitrate for use in terrorist acts;

- Comments on the economic impacts (both long-term and short-term, quantifiable and qualitative) of the implementation of Subtitle J, including potential impacts on State, local, and tribal governments of the United States; potential impacts on agri-business, including ammonium nitrate manufacturers, importers, packagers, distributors, retailers, and end-users including farmers (e.g., whether current ammonium nitrate purchasers would likely reduce their ammonium nitrate purchases as a result of a new regulatory regime); and potential impacts on small businesses;

- 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 ammonium nitrate registration number. 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;

- 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 ammonium nitrate registration numbers;

- Comments on the benefits of this rulemaking;

- Comments on any alternative methods of complying with Subtitle J; and

- Comments on the best methods or processes for interacting with state and local governments regarding ammonium nitrate security.

See 73 FR 64280, 64281, section IV—Questions for Commenters.

DHS received comments from 33 organizations and individuals. The majority of the submissions, 20, were from private companies and trade associations, including associations affiliated with the farming, explosives, and mining industries. Three universities provided comments, as did three government agencies. Six individuals, including one farmer, also submitted comments.

The topics addressed by the commenters covered a wide range of issues. The two issues that received the most attention were the registration process and the feasibility of using substances other than ammonium nitrate in agricultural operations. DHS received 15 comments concerning the registration process; all 15 commenters wanted the registration process to be as simple and straightforward as possible. Some commenters stated that if a registration process were to be implemented, then a registrant should receive his/her approval from DHS within 72 hours. The commenters expressed differing views on the technological capabilities of the regulated community. Some argued that computer use was sufficiently common for the entire process to be automated through an Internet-based portal. As articulated by these comments, an online process would be fast, inexpensive, and could be structured to allow individuals to apply from their homes or places of business. Others argued that computers are not common enough among ammonium nitrate users, who would either be forced to travel to different locations to register or to invest in computers. This second group of commenters believed that registration through an Internet-based portal would constitute an unjustified burden.

Many commenters believed that regulating ammonium nitrate and not other types of fertilizer will cause a decrease in ammonium nitrate usage because of an expected rise in its cost. There was no agreement on the degree to which the cost of ammonium nitrate use would change, but multiple commenters indicated that cost would be passed along the supply chain until it ultimately reaches end-users. If the cost of ammonium nitrate were to go up, commenters hypothesized that ammonium nitrate alternatives may become preferable. Some comments suggested that continued ammonium nitrate use is based on historical ammonium nitrate use and that using an alternative would have no noticeable effect on operations. Others argued the

opposite, stating that alternative fertilizers would not serve the needs of certain crops equally well. Commenters from certain States where ammonium nitrate is regularly used in agricultural operations indicated that ammonium nitrate is the best choice for nitrogen application for certain crops. Other commenters, however, asserted that viable alternatives exist with respect to the majority of crops for which ammonium nitrate currently is used as a fertilizer.

There was a general consensus among commenters regarding the need to avoid duplication of other Federal licensing, regulatory, and inspection programs. Commenters stated that to be registered under the ammonium nitrate program could be unnecessary for individuals already registered under related regulatory programs covering ammonium nitrate use, such as DHS's Chemical Facility Anti-Terrorism Standards (CFATS), Department of Transportation (DOT) hazardous materials regulations, and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations. These commenters noted that ATF's inspection process also could be used for ammonium nitrate inspections under this program to minimize inconvenience to ammonium nitrate users.

A number of commenters indicated that some ammonium nitrate is normally lost as bulk ammonium nitrate moves through the supply chain. Commenters noted, for example, that equipment used for transporting bulk ammonium nitrate, such as hoppers, bins, and railcars are not shift-proof, resulting in incidental spillage of ammonium nitrate prills, which are the small, bead-like pellets of ammonium nitrate typically used in the manufacturing, transportation, and bulk use of ammonium nitrate. Additionally, commenters noted that there is normally loss during movement throughout the supply chain due to melting or solidification of ammonium nitrate prills based on nothing more than ambient temperature and humidity. For instance, commenters noted that in a 90-ton railcar shipment, it is not unusual for these phenomena to result in loss of 200–500 pounds of ammonium nitrate. This may result because ammonium nitrate is hygroscopic in nature (*i.e.*, it readily absorbs moisture). When ammonium nitrate prills come into contact with ambient moisture in the air, the prills may cake or meld together, which can simultaneously increase the overall mass of bulk ammonium nitrate while reducing its overall volume. These properties cause significant difficulty in accounting for ammonium

nitrate on a fine scale. Consequently, these commenters stated that DHS should not require ammonium nitrate users to report losses of magnitudes normally encountered during ammonium nitrate use and transport.

Several commenters addressed the threshold quantity or percentage composition of ammonium nitrate triggering regulation under this program. The universities that commented on the ANPRM addressed the use of ammonium nitrate in scientific research, while other commenters addressed the use of ammonium nitrate as a component of cold packs. These commenters stated that the quantities of ammonium nitrate used in scientific research and in cold pack manufacturing are so small that persons conducting scientific research or purchasing and selling cold packs should not be subjected to a rigorous regulatory scheme. Several commenters also recommended that DHS should exempt mixtures containing ammonium nitrate that ATF classified “explosives.”

In developing this NPRM, DHS carefully considered all public comments submitted in response to the ANPRM. DHS will respond to the issues raised therein when responding to the comments received on this NPRM.

#### *D. Research Efforts and Findings*

In support of the effort to develop regulations to implement Subtitle J, the Department has examined and considered research into a variety of topics including the security hazards presented by the use of ammonium nitrate; its detonability; existing Federal and State ammonium nitrate programs; and voluntary security programs. In the course of conducting this research, the Department reviewed numerous materials, including, but not limited to, the following:

- A. Bauer, R.D. Heater & J.H. Paterson, Queen's Univ. Mining Eng'g Dep't, *The Sensitivity of Ammonium Nitrate Melts and Solutions to Projectile Impact* (1981).
- A. King & A. Bauer, Queen's Univ. Mining Eng'g Dep't, *Shock Initiation Characteristics of Ammonium Nitrate* (1980).
- R.W. Van Dolah, F.C. Gibson & J.N. Murphy, U.S. Dep't of Interior, Bureau of Mines, *Further Studies on Sympathetic Detonation*, Report of Investigations 6903 (1966).
- R.W. Van Dolah, F.C. Gibson & J.N. Murphy, U.S. Dep't of Interior, Bureau of Mines, *Sympathetic Detonation of Ammonium Nitrate and Ammonium Nitrate-Fuel Oil*, Report of Investigations 6746 (1966).

• J.J. Burns, G.S. Scott, G.W. Jones & Bernard Lewis, U.S. Dep't of Interior, Bureau of Mines, Investigations on the Explosibility of Ammonium Nitrate, Report of Investigations 4994 (1953).

Information about these materials can be found in the docket for this NPRM. The Department seeks public comment on whether or not there are additional studies or other research materials the Department should consider in support of the development of the final regulations as well as any copies of such studies or research materials.

### 1. Security Hazards Presented by Use of Ammonium Nitrate

Ammonium nitrate is a chemical that exists in multiple concentrations and physical forms, and different concentrations and forms have different security implications. In the United States, the principal uses for ammonium nitrate are as a fertilizer or as part of an explosive mixture. Ammonium nitrate can be sensitized (made more sensitive to shocks, and thus easier to detonate) with the addition of organic material. One common example is when fertilizer-grade ammonium nitrate is mixed with fuel oil and creates an explosive mixture known as Ammonium Nitrate/Fuel Oil (ANFO). The fuel oil acts as an energy source. Both ammonium nitrate fertilizers and ANFO have been misused in acts of terrorism to cause catastrophic damage to human health, safety, national security, the economy, and critical infrastructure.

Nationwide, fertilizer-grade ammonium nitrate is commonly used in agricultural operations and the chemical and explosives industries. See A. King & A. Bauer, 4. Due to its availability in small-scale packaging (e.g., 50-pound bags), ammonium nitrate is susceptible to theft and misuse in making improvised explosive devices (IEDs).

Over the years, ammonium nitrate has been used as an explosives component in terrorist attacks, both domestically and internationally. The 1995 Murrah Federal Building attack in Oklahoma City claimed the lives of 168 individuals and demonstrated how ammonium nitrate could be misused to perpetrate deadly terrorist attacks. See Oklahoma City National Memorial, A Look at the Numbers, <http://www.oklahomacitynationalmemorial.org/secondary.php?section=5&catid=145&id=83> (last visited Aug. 11, 2010). The Provisional Irish Republican Army also used ammonium nitrate as part of its London bombing campaign in the early 1980s. See Boyce Rensberger, Ammonium Nitrate Explosives Are Simple, Easily Made, Widely Used in Industry, Wash.

Post, Apr. 21, 1995, at A28. More recently, ammonium nitrate was used in the 1998 East African embassy truck bombings, killing hundreds and injuring thousands at the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya. See Corky Siemaszko, Wtc Chemicals In Kenya Blast (Aug. 14, 1998), [http://www.nydailynews.com/archives/news/1998/08/14/1998-08-14\\_wtc\\_chemicals\\_in\\_kenya\\_blast.html](http://www.nydailynews.com/archives/news/1998/08/14/1998-08-14_wtc_chemicals_in_kenya_blast.html) (last visited May 11, 2011). Ammonium nitrate was also used in a November 2003 series of truck bombings in Turkey, killing over 50 individuals and injuring an additional 700 individuals at multiple locations across Istanbul. See Lauren Johnston, CBSNews.com, Fertilizer Used in Terror Bombs (Apr. 14, 2004), <http://www.cbsnews.com/stories/2004/04/14/world/main611898.shtml> (last visited Aug. 11, 2010). Additionally, since the events of 9/11, stores of ammonium nitrate have been confiscated during raids on terrorist sites around the world, including raids on sites in Canada (see Steve Schippert, Threats Watch, Canada Raid Breaks Cell: 3 Tons of Explosives Found (June 3, 2006), <http://threatswatch.org/inbrief/2006/06/canada-raid-breaks-cell-3-tons/> (last visited Aug. 11, 2010)), England (see BBC News, Ammonium Nitrate 'Easy to Find' (Mar. 30, 2004), [http://news.bbc.co.uk/2/hi/uk\\_news/3582921.stm](http://news.bbc.co.uk/2/hi/uk_news/3582921.stm) (last visited Aug. 11, 2010)), and the Philippines (see U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2005, p. 78).

### 2. Detonability of Ammonium Nitrate

It is understood that under proper conditions pure (unblended) ammonium nitrate is detonable. Making reliable explosives from ammonium nitrate is simplified through the addition of a fuel component with which it can react. In addition, though rare, accidental explosions have occurred during the manufacture, storage, and transport of ammonium nitrate. See J.J. Burns, G.S. Scott, G.W. Jones & Bernard Lewis, 1. Despite the explosive hazard presented by ammonium nitrate, however, it has been successfully and safely used for decades as a fertilizer. See R.W. Van Dolah, F.C. Gibson & J.N. Murphy; Report of Investigations 6746, 2. There is little scientific consensus about the critical diameter of an explosive required for detonation and the size of the conventional explosive charge (i.e., booster) necessary to detonate unblended ammonium nitrate. These questions about detonability all receive research attention today, and have also received research attention in the past.

See A. Bauer, R.D. Heater & J.H. Paterson, 1, 5 (1981). Preliminary results of ongoing research suggest that unblended ammonium nitrate can be difficult to detonate with any reliability. To date, terrorists typically have employed combinations of ammonium nitrate and fuel oil when utilizing ammonium nitrate in terrorist attacks.

To better understand the detonability of ammonium nitrate and its use in explosives, the Department reviewed, and considered the results of, a study conducted by Sandia National Laboratory. Due to the detailed nature of its content and findings, however, this study, which is "For Official Use Only," is not available to the public. The Department has also consulted with the Federal Bureau of Investigation's (FBI) Explosives Unit. This consultation helped the Department to understand the detonability of unblended ammonium nitrate, the detonability of ammonium nitrate mixtures, and the role ammonium nitrate plays in IED construction and terror-related activities.

The Department seeks public comment on the detonability of ammonium nitrate.

### 3. Federal Regulations Addressing Ammonium Nitrate

In developing this proposed rule, DHS reviewed other Federal regulations that cover portions of the ammonium nitrate supply chain or deal with identity verification; a number of these other regulations are discussed below. DHS examined these regulations for potential overlap with the proposed Ammonium Nitrate Security Program. In developing this NPRM, the Department collaborated with many of its Federal security partners in an attempt to harmonize this proposed rule with other regulatory regimes.

#### a. Chemical Facility Anti-Terrorism Standards

In addition to the authority granted to DHS by Subtitle J, the Department had authority under section 550 of the Homeland Security Appropriations Act of 2007, Pub. L. 109-295, to issue regulations governing the security of high-risk chemical facilities. Under that authority, the Department promulgated an interim final rule titled the Chemical Facility Anti-Terrorism Standards (CFATS), 6 CFR part 27. See 72 FR 17688 (April 9, 2007). Under CFATS, the Department regulates the security of high-risk chemical facilities, including high-risk chemical facilities that possess ammonium nitrate.

To help the Department identify high-risk chemical facilities under CFATS,

the Department adopted a 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 specified in Appendix A for that COI must complete and submit to DHS certain consequence-based information via an online tool called the Chemical Security Assessment Tool Top-Screen. Any chemical facility preliminarily determined to be high-risk after DHS review of the chemical facility's Top-Screen must then meet additional security-related requirements under CFATS. Due to the risks ammonium nitrate may pose if either (1) exploded on-site, or (2) stolen or diverted to produce IEDs, ammonium nitrate (in both explosive and specified fertilizer forms) is one of over 300 COI that DHS listed in Appendix A to CFATS. See 72 FR 65407–65408, 65410.

Although Subtitle J and CFATS share a goal of preventing terrorism risks associated with ammonium nitrate, the scopes and methods of regulation under Subtitle J and CFATS are very different. The CFATS rule—which addresses hundreds of chemicals in addition to ammonium nitrate—is directed at the security of high-risk chemical facilities. The CFATS rule does not, however, impose any limitations on the sale or transfer of ammonium nitrate. By contrast, Subtitle J does not address the physical security of ammonium nitrate facilities but does impose certain conditions on the sale or transfer of ammonium nitrate (e.g., requiring that ammonium nitrate may only be transferred between registered ammonium nitrate sellers and registered ammonium nitrate purchasers (or purchasers' agents)).

In developing the rule required by Subtitle J, DHS intends to draw on information gained under the CFATS program about ammonium nitrate, and will work to ensure that CFATS and the new Subtitle J program complement each other. For additional discussion of the CFATS program's interaction with the proposed ammonium nitrate rule, see section III.A.1 of this NPRM.

#### b. U.S. Coast Guard Maritime Security Regulations

The U.S. Coast Guard (USCG) regulates ammonium nitrate under multiple programs. Under the Maritime Transportation Security Act (MTSA), 46 U.S.C. 70101 *et seq.*, USCG has authority to regulate security both aboard maritime vessels and at facilities located in, under, or adjacent to any waters subject to the jurisdiction of the

United States. Through its MTSA regulations, USCG regulates the security of vessels transporting ammonium nitrate, as well as the security of certain facilities that store, manufacture, use, or distribute ammonium nitrate. In addition, USCG regulates the transportation of ammonium nitrate, and the loading or unloading of ammonium nitrate from vessels at any waterfront facility. See 33 CFR part 126 (regulating the handling of ammonium nitrate at waterfront facilities, and establishing penalties for handling ammonium nitrate without a permit); 46 CFR 148.01–7 (regulating the bulk shipment of ammonium nitrate).

USCG has also designated as a “Certain Dangerous Cargo” any ammonium nitrate that is not certain dangerous cargo residue. See 33 CFR 160.204. Based on this designation, each vessel carrying ammonium nitrate on bodies of water other than certain portions of inland rivers must submit a Notice of Arrival prior to arrival in port. See 33 CFR part 160, subpart C. The Notice of Arrival must contain certain information, including the name of the vessel's owner and operator, the names of the last five ports or places visited, the amount of ammonium nitrate on board, and information pertaining to each crewmember aboard. See 33 CFR 160.206. Owners and operators of U.S.-flagged vessels carrying ammonium nitrate in bulk must have, and must operate in compliance with, USCG-approved vessel security plans. See 33 CFR 104.410. Likewise, owners and operators of facilities that receive vessels carrying ammonium nitrate in bulk must have and operate in compliance with USCG-approved facility security plans. See 33 CFR 105.410.

#### c. Transportation Security Administration

The Transportation Security Administration (TSA) has broad authority over security of all modes of transportation. These authorities are found primarily in the Aviation and Transportation Security Act of 2001 (ATSA), Public Law 107–71, which regulates the transportation of cargo, including ammonium nitrate. ATSA broadly allows TSA to “exercise \* \* \* powers, relating to transportation security as [TSA] considers appropriate.” See 49 U.S.C. 114. TSA exercises its authority under ATSA in part by performing threat assessments on truck drivers who must receive Hazardous Materials Endorsements in order to be authorized to transport ammonium nitrate.

d. Bureau of Alcohol, Tobacco, Firearms, and Explosives

ATF, a principal law enforcement agency within the U.S. Department of Justice, is dedicated to preventing terrorism, reducing violent crime, and protecting our nation. Among its authorities, under 27 CFR part 555, ATF is responsible for regulating the use of explosives, which are defined by inclusion in ATF's annual List of Explosive Materials, ATF Publication 5400.8. See 75 FR 1085 (Jan. 8, 2010) (notice of annual list). While ATF does not consider ammonium nitrate an explosive, ammonium nitrate explosive mixtures and ANFO are included in ATF's list of explosive materials. ATF regulations require that no person, other than a licensee or permittee, knowingly transport or receive any explosive material (including ANFO). See 27 CFR 555.26(a). Section III.A.3 of this NPRM discusses the interaction of ATF regulations with the proposed ammonium nitrate rule.

#### e. Department of Transportation Hazardous Materials Regulations

The Federal Hazardous Materials Transportation Law (Federal Hazmat Law, 49 U.S.C. 5101 *et seq.*) authorizes the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.” The Secretary of Transportation has delegated this authority to Pipeline and Hazardous Materials Safety Administration (PHMSA). PHMSA, through its Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180), prescribes transportation requirements for hazardous materials, including ammonium nitrate.

The Hazardous Materials Table (HMT; 49 CFR 172.101) lists several shipping descriptions for ammonium nitrate and ammonium nitrate mixtures or solutions. These descriptions vary based on the properties of the particular ammonium nitrate at issue. As such, a shipment of ammonium nitrate may be classed and regulated as a Division 1.1D explosive, Division 5.1 oxidizer, or Class 9 miscellaneous hazardous material. For transport in commerce these materials must comply with all applicable HMR requirements (e.g., packaging, shipping papers, marking, labeling, placarding, security plans, emergency response information, training, etc.).

#### f. Department of Commerce

Under the Export Administration Regulations (EAR), the U.S. Department

of Commerce’s Bureau of Industry and Security regulates the export and re-export of ammonium nitrate. A “re-export” is the shipment or transmission of an item subject to the EAR from one foreign country (*i.e.*, a country other than the United States) to another foreign country. A re-export also occurs when there is release of technology or software subject to the EAR to a foreign national outside the United States. *See* 15 CFR 734.2, and 15 CFR part 772 (definition of “re-export”).

Specifically, under the EAR, licensees are authorized to export or re-export ammonium nitrate only to certain countries listed in the EAR, and consistent with the terms of the issued export license. *See* 15 CFR 742.6 and 15 CFR 747.3. Under the EAR, ammonium nitrate is defined to include fertilizers and fertilizer blends containing more than 15% by weight ammonium nitrate, except liquid fertilizers (containing any amount of ammonium nitrate) or dry fertilizers which contain less than 15% by weight ammonium nitrate. *See* 15 CFR part 774, Supplement 1 for item-specific export licensing information. Individuals involved in the domestic sale or transfer of ammonium nitrate, as defined by DHS, at U.S.-based exporters of ammonium nitrate would be required to register with the Department under the proposed Ammonium Nitrate Security Program.

4. State Regulations Addressing Ammonium Nitrate

Virtually all 50 States regulate ammonium nitrate in some manner, based on its use either as a fertilizer, an explosive, or both. Although not in universal agreement, relevant State regulations typically define ammonium nitrate as an ammonium and nitrate mixture containing not less than 33 percent nitrate; require purchasers and sellers of ammonium nitrate to register with a governing State body; and require sellers of ammonium nitrate to maintain records of sales of ammonium nitrate for at least two years. Many State regulations grant State officials both the authority to inspect facilities possessing or distributing ammonium nitrate and the authority to fine or otherwise penalize facilities or individuals who fail to comply with regulations concerning ammonium nitrate.

5. Voluntary Programs Addressing Ammonium Nitrate

In addition to efforts required by existing Federal and State regulations, many producers, distributors, and users of ammonium nitrate have undertaken voluntary efforts to secure the ammonium nitrate supply chain. Chief among these voluntary efforts is the “America’s Security Begins With You” program. This program is a voluntary “know-your-customer” program developed jointly by the ATF and members of the fertilizer industry following the 1995 attack on the Alfred

P. Murrah Federal Building in Oklahoma City. The Department believes that, in many instances, voluntary programs already in place can serve as good building blocks for meeting regulatory requirements. The Department seeks comments providing details on voluntary programs related to ammonium nitrate security and how they could potentially be leveraged by ammonium nitrate users to meet the requirements of the proposed rule.

III. Discussion of Proposed Rule: Implementing Subtitle J

What follows is a discussion of the approach DHS is proposing to take in implementing Subtitle J. Where appropriate, potential alternative approaches are also discussed. DHS welcomes public comment on the proposed rule, and also on potential alternative approaches.

The cost to the public of this proposed rule ranges from \$300 million to \$1.041 billion over 10 years at a 7% discount rate. The primary estimate is the mean which is \$671 million. For comparison, at a 3% discount rate, the cost of the proposed rule ranges from \$364 million to \$1.3 billion with a primary (mean) estimate of \$814 million. The average annualized cost for the program ranges from \$43 million to \$148 million (with a mean of \$85 million), also employing a 7% discount rate. The following two tables present the summary discounted total and annualized costs for the rule.

OMB ACCOUNTING STATEMENT OF ANNUALIZED COSTS AND BENEFITS PROGRAM YEARS 1–10)

	3 Percent discount rate			7 Percent discount rate		
	Primary estimate (millions)	Minimum estimate (millions)	Maximum estimate (millions)	Primary estimate (millions)	Minimum estimate (millions)	Maximum estimate (millions)
Costs						
Annualized Monetized Costs .....	\$95.4	\$42.7	\$148.1	\$95.5	\$42.7	\$148.2
Benefits						
Qualitative (un-quantified) Benefits .....	Reduced vulnerability to terrorist attack using ammonium nitrate.					

SUMMARY OF COSTS (\$ MILLIONS, 7 PERCENT DISCOUNT RATE)—BY PROGRAM YEAR

	Registration	Appeals	Point of sale	Recordkeeping	Audits/ inspections	Federal costs	* Total cost
PY1 .....	18.9	0.1	67.5	6.2	0.4	9.8	102.7
PY2 .....	4.4	0.0	62.6	4.4	0.4	6.5	78.2
PY3 .....	4.3	0.0	58.4	4.1	0.4	6.0	73.2
PY4 .....	4.2	0.0	54.7	3.8	0.4	5.7	68.7
PY5 .....	4.2	0.0	51.1	3.6	0.3	5.3	64.4
PY6 .....	8.9	0.0	48.1	3.4	0.3	5.1	65.8
PY7 .....	6.8	0.0	44.6	3.1	0.3	4.7	59.5
PY8 .....	6.7	0.0	41.7	3.0	0.3	4.4	56.0
PY9 .....	6.6	0.0	39.0	2.8	0.2	4.2	52.6
PY10 .....	6.5	0.0	36.4	2.6	0.2	3.9	49.5
Total .....	71.3	0.1	503.8	36.8	3.0	55.3	670.6

\* Reporting of Thefts rounds to zero in individual years and are omitted from this table but included in the total and regulatory analysis.



DHS also conducted a break-even analysis that examines the required reduction in the potential frequency of terrorist attacks involving ammonium nitrate. The proposed rule would be cost effective if it resulted in a reduction in attack frequency by at least one attack the size of the Oklahoma City bombing (which occurred 16 years ago) per 14 years. For discussion of this analysis, and for explanation of other cost calculations, please see section IV of this NPRM, which discusses various regulatory analyses conducted by DHS.

*A. Ammonium Nitrate Subject to Subtitle J Requirements (See Section 31.105 of the Proposed Rule)*

This section will address the definition of ammonium nitrate. Congress has defined ammonium nitrate for purposes of *Subtitle J* to include "solid ammonium nitrate that is chiefly the ammonium salt of nitric acid and contains not less than 33 percent nitrogen by weight." See 6 U.S.C. 488(1)(A). DHS proposes to use this definition of solid ammonium nitrate in section 31.105 of the proposed rule.

Also included in the definition of ammonium nitrate for purposes of *Subtitle J* is "any mixture containing a percentage of ammonium nitrate that is equal to or greater than the percentage determined by [DHS]." See 6 U.S.C. 488(1)(B). In establishing this mixture percentage for purposes of *Subtitle J*, the Department was required to consult with the heads of appropriate Federal departments and agencies, including the Secretary of Agriculture, and to provide notice and an opportunity for comment. See 6 U.S.C. 488a(b). That consultation is discussed below.

This section will also discuss the Department's consideration of a minimum threshold amount of ammonium nitrate that would have to change hands as part of a sale or transfer before that sale or transfer (including the individuals participating in the transaction) would be subject to *Subtitle J*'s requirements. This section will also discuss the Department's discretionary ability to exempt from regulation "a person producing, selling, or purchasing ammonium nitrate exclusively for use in the production of an explosive under a license or permit issued under chapter 40 of title 18, United States Code." See 6 U.S.C. 488a(f).

1. Mixture Requirement

Mixtures containing high percentages of ammonium nitrate can be effectively used in bomb-making. By proposing to include a mixture requirement in the Ammonium Nitrate Security Program, the Department is seeking to capture

under this rule mixtures that terrorist bomb-makers would be most interested in acquiring. To assist in determining an appropriate threshold percentage of ammonium nitrate in a mixture for purposes of *Subtitle J*, the Department reviewed multiple detonability studies, examined mixture requirements employed by other Federal and State regulatory programs, and consulted with a variety of Federal, State, and private sector entities. Based on this research and after consultation with the FBI's Explosives Unit, the Department proposes to define ammonium nitrate in section 31.105 to include any mixture that is 30 percent or more ammonium nitrate by weight. By setting the mixture requirement at 30 percent, the Department believes the proposed rule will capture those ammonium nitrate mixtures that could be most effectively used in bomb-making, or that could be most effectively retooled or reconfigured for use in bomb-making.

The Department is aware that this proposed mixture requirement differs from the mixture requirements used for ammonium nitrate under CFATS. Under CFATS, a mixture containing ammonium nitrate is counted towards the screening threshold quantity for ammonium nitrate if ammonium nitrate makes up 33 percent or more of the mixture. Therefore, this proposed mixture requirement for this rule would apply more broadly than the mixture requirement in CFATS; the ammonium nitrate mixtures covered under this proposed requirement would include ammonium nitrate mixtures containing between 30 and 33 percent ammonium nitrate by weight, while CFATS' mixture requirements do not cover mixtures containing between 30 and 33 percent ammonium nitrate by weight.

There are two main reasons for the difference between the CFATS approach to ammonium nitrate mixtures and the proposed Ammonium Nitrate Security Program approach to mixtures. First, the two mixture requirements exist to accomplish different goals. The CFATS mixture requirements exist to help the Department identify potentially high-risk chemical facilities subject to CFATS. The CFATS mixture requirements are not an assertion by the Department that only ammonium nitrate mixtures containing 33 percent or more ammonium nitrate are vulnerable to misuse in acts of terrorism. The proposed Ammonium Nitrate Security Program mixture requirement, however, is solely meant to identify ammonium nitrate mixtures that have the potential to be misused in acts of terrorism. Accordingly, a more conservative and

inclusive mixture requirement is appropriate for *Subtitle J*.

Second, during the development of this proposed rule, the Department obtained information from the Department of Justice, indicating that under certain circumstances, experiments that have shown that mixtures containing as low as 30 percent ammonium nitrate by weight can be used as components of viable explosives. This information was unavailable to DHS when it wrote and published the CFATS mixture requirements. In light of this evidence and the purpose for which the *Subtitle J* mixture requirement is being established, the Department believes that setting the proposed mixture requirement at 30 percent ammonium nitrate is the correct course of action.

The Department's proposed mixture requirement would exempt persons and entities from coverage under the proposed rule only to the extent that they possess or obtain mixtures containing less than 30 percent ammonium nitrate by weight. The proposed requirement would not exempt persons and entities from coverage to the extent that they possess or obtain solid ammonium nitrate which they intend to incorporate into ammonium nitrate mixtures. The Department thus proposes that the purchase, sale, transfer, or acquisition of solid ammonium nitrate to be incorporated into mixtures will be treated the same as the purchase, sale, transfer, or acquisition of ammonium nitrate not to be incorporated into mixtures.

The Department is interested in receiving comments on this proposed approach, including comments on the Department's proposal to define ammonium nitrate to include any mixture that is 30 percent or more ammonium nitrate by weight. DHS requests comments addressing the appropriateness of this percentage, comments addressing whether it would be more appropriate to express this percentage as a percentage of mixture weight or as a percentage of mixture volume, and comments discussing whether a higher or lower mixture percentage would be more appropriate. The Department is also interested in comments addressing possible consumer and retail impacts of the proposed mixture requirement, and on the detonability of ammonium nitrate and ammonium nitrate mixtures of varying percentages.

## 2. Threshold Weight and Individual Products Exemptions

The Department's understanding is that, outside of small sample or research quantities, ammonium nitrate is primarily sold either in bulk or in pre-packaged bags containing no less than 50 pounds of ammonium nitrate.

Mixtures that contain small percentages or amounts of ammonium nitrate are also found in various retail products, including home and garden products (e.g., fertilizer mixtures) and cold packs.

Under Subtitle J, the Department has authority to regulate transactions (and the individuals conducting them) involving any amount of ammonium nitrate. The Department is proposing to establish a threshold weight to which the regulation would apply, and is considering whether the marginal security benefits gained from regulating transactions involving de minimis quantities of ammonium nitrate are outweighed by the costs of regulating those transactions. Similarly, the Department is considering whether the security benefits gained from regulating transactions involving products packaged such that they are unlikely to be used to make an explosive are outweighed by the costs of regulating those transactions. To avoid capturing these transactions under its regulatory regime, and to avoid complicating ammonium nitrate transactions that may only pose a de minimis security risk, the Department is considering applying both a minimum threshold weight and an individual products exemption for cold packs to this rulemaking.

The Department is considering establishing a threshold weight whereby each transaction would be subject to Subtitle J's regulatory requirements only if the transaction involves the sale, transfer, or purchase of ammonium nitrate that, in the aggregate, is equal to or greater than the threshold weight. Specifically, section 31.105 of the proposed rule contains a 25 pound threshold weight. The Department believes that this weight is low enough to prevent a bad actor from easily acquiring a sufficient quantity of ammonium nitrate to pose a terrorist threat. The Department also believes that this weight is high enough to avoid capturing small laboratory quantities of ammonium nitrate or transactions involving other de minimis quantities of ammonium nitrate that are unlikely to be misappropriated for use in a terrorist act. The Department believes that such de minimis quantities are unlikely to be misappropriated for use in a terrorist act due to the large number of transactions in de minimis quantities that would be

required to accumulate sufficient ammonium nitrate to construct an explosive that poses a significant terrorist threat. This threshold should also reduce the economic impact of the Ammonium Nitrate Security Program by avoiding regulation of those transactions that present de minimis security risk.

In order to determine the utility of this approach, the Department solicits comments on the manners in which ammonium nitrate is sold and packaged, the manners and frequencies of use of ammonium nitrate in small quantities, and the utility of setting a threshold weight. The Department additionally requests comments addressing the appropriateness of the proposed 25 pound threshold weight. Specifically, the Department asks whether another threshold weight, such as 5 pounds, 10 pounds, 50 pounds, or another quantity, would better achieve the desired results of the proposed rule.

If the Ammonium Nitrate Security Program does include a threshold weight, DHS proposes that the threshold weight would apply to mixtures as well as to unblended ammonium nitrate. As such, the proposed rule would apply to an ammonium nitrate mixture only if (1) the mixture weighs at least the threshold weight, and (2) the mixture contains at least 30 percent ammonium nitrate by weight. Both conditions would need to be satisfied in order for the proposed rule to apply to a given mixture.

The Department proposes that when applying the threshold weight to an ammonium nitrate mixture, the total weight of the mixture should be counted, as opposed to just the weight of the ammonium nitrate in the mixture. In other words, all ten pounds of a single ten-pound bag (or all ten pounds of ten one-pound bags) of fertilizer mixture containing 30 percent ammonium nitrate by weight would count towards the threshold weight, and not just the three pounds which is the weight of the ammonium nitrate portion of that mixture. The Department believes this approach would be more effective at preventing a bad actor from acquiring sufficient quantities of ammonium nitrate than would an alternative approach under which only the ammonium nitrate content of a mixture is counted towards threshold weight. The Department solicits comments on the utility and manner of application of the proposed threshold weight to mixtures containing ammonium nitrate.

In addition to including a threshold weight in the proposed rule, the Department is proposing to exempt cold packs containing ammonium nitrate

from regulation. In section 31.105 of the proposed rule the Department proposes to define a "cold pack" as a small, commercially-available package commonly used as a replacement for ice in the application of first aid, containing unmixed water and ammonium nitrate that, immediately prior to use, can be manipulated to cause the comingling of the water and the ammonium nitrate resulting in an endothermic reaction that significantly lowers the temperature of the package. For the following reasons, DHS does not believe that Congress intended the people and facilities buying and selling cold packs to be regulated by Subtitle J.

The Department believes that the security benefits obtained from regulating sales and transfers of cold packs would be minimal and outweighed by significant impact on the general public. Cold packs individually contain extremely small amounts of ammonium nitrate such that collecting very large numbers of them would be necessary in order to obtain enough ammonium nitrate to produce a dangerous explosive device.

The Department also believes that regulating sales and transfers of cold packs would impose substantial economic impacts on the public, which would not be justified by the minimal security benefit gained by cold packs regulation. Specifically, DHS is concerned that regulation of cold packs would have serious and negative impacts on the provision of first aid, first responders, and the medical sector generally. These substantial impacts would be spread over a large variety of retail stores, medical facilities, health care providers, athletic teams, regulated industries that require first aid kits containing cold packs, and individuals using cold packs for personal first aid purposes. A preliminary examination indicates that the potential affected populations could easily exceed six million individuals, businesses, and organizations or public entities. Complicating the issue is the fact that many cold pack manufacturers do not use ammonium nitrate in their products—many manufactures assemble cold packs that contain other chemicals instead of ammonium nitrate. Cold pack purchasers or sellers might not know which chemicals are present in the cold packs they obtain, prior to obtaining them, which could complicate their abilities to comply with any regulatory requirements.

For these reasons, the Department does not believe that Congress intended cold packs—or the sporting goods stores, recreational centers, schools, and other entities that purchase or sell

them—to be covered under Subtitle J. DHS requests comments describing the populations that could be impacted by cold packs regulation, including comments discussing those populations' abilities to comply with the proposed regulatory requirements.

The Department's proposed cold packs exemption would exempt persons and entities from coverage under the rule only to the extent that they purchase, sell, or transfer cold packs containing ammonium nitrate. The proposed rule would not exempt persons and entities (such as manufacturers of cold packs) from coverage to the extent that they purchase or transfer ammonium nitrate which they intend to incorporate into cold packs. The Department thus proposes that the purchase, sale, transfer, or acquisition of ammonium nitrate to be incorporated into cold packs will be treated the same as the purchase, sale, transfer, or acquisition of ammonium nitrate not to be incorporated into cold packs.

The Department solicits comments on these proposed exemptions. The Department also solicits comments

describing uses for ammonium nitrate other than as a fertilizer, a cold packs component, or an explosives ingredient. DHS solicits comments on whether any other uses of ammonium nitrate warrant exemptions.

3. Explosives Exemption

The Department has the discretion to exempt from regulation persons and facilities producing, selling, transferring, or purchasing ammonium nitrate exclusively for use in the production of explosives under a license or permit issued under the Federal explosives laws, 18 U.S.C. Chapter 40, and associated regulations. See 6 U.S.C. 488a(f).

ATF is responsible for enforcing federal explosives laws and has established regulations for doing so. See 27 CFR Part 555. ATF's regulatory authority over a facility or individual licensed to use an ammonium nitrate-based explosive is limited to ammonium nitrate that (1) has been mixed with a fuel (*i.e.*, ANFO) which is defined in 27 CFR 555.11 as an "explosive" and (2) is contained on ATF's List of Explosive Materials. Unblended ammonium nitrate, however, is not defined as an

explosive under 27 CFR part 555, and thus ATF does not regulate ammonium nitrate that has not been mixed with a fuel oil, outside of the limited separation distance requirements governing the storage of ammonium nitrate when stored in the vicinity of other high explosives and blasting agents, as set forth in 27 CFR 555.220. This is the case even where unblended ammonium nitrate is being produced, purchased, or stored by a facility regulated by ATF as a manufacturer of ANFO. It is also the Department's understanding that facilities producing ANFO typically have inventories of ammonium nitrate on hand for use in manufacturing ANFO, while entities engaged solely in the re-sale or purchase of ANFO are unlikely to possess any ammonium nitrate other than that which is contained within ANFO mixtures.

The Department is considering three possible approaches for regulating individuals and facilities involved in the production of ANFO. These approaches are summarized in the following table, and discussed thereafter.

	Option 1	Option 2	Option 3
Would DHS opt to exempt individuals and facilities that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives?	No .....	Yes .....	Partial Exemption.
Brief description of option .....	Ammonium nitrate transactions would be regulated by DHS whether or not the ammonium nitrate purchased, sold, or transferred has been combined with fuel oil to create ANFO.	Ammonium nitrate purchases, sales, or transfers by individuals and facilities solely to enable use of ammonium nitrate in the production of explosives would not be regulated by DHS.	Ammonium nitrate combined with fuel oil (ANFO) would not be regulated by DHS.
Would DHS regulate ammonium nitrate mixtures that are "explosives" subject to ATF regulation ( <i>i.e.</i> , ANFO)?	Yes .....	No .....	No.
What duplication would result from this option?	Individuals and facilities would be subject to regulation by both DHS under Subtitle J and ATF under the Federal explosives laws.	Individuals and facilities regulated by ATF under the Federal explosives laws would not be regulated by DHS. No duplication would result.	Certain facilities ( <i>e.g.</i> , those that produce ANFO) would be subject to both DHS and ATF regulations.
What gaps would result from this option?	No gaps in coverage of ammonium nitrate as it moves through the supply chain.	Could create a considerable gap in regulatory coverage throughout the ammonium nitrate supply chain, as ATF regulations apply solely to ANFO and not the ammonium nitrate used to create it.	Compromise approach closes gaps in security of the ammonium nitrate supply chain.

The first option is to apply the final rule implementing Subtitle J to individuals and facilities that purchase, sell, or transfer ammonium nitrate for use in the production of explosives. Under this approach, such individuals and facilities would be subject to regulation by both DHS under Subtitle

J and ATF under the Federal explosives laws. By not exempting ammonium nitrate used in explosives from coverage, DHS would be treating all individuals and facilities who purchase, sell, or transfer ammonium nitrate—whether as part of ANFO mixtures or not—the same. This approach would

ensure that there are no gaps in coverage of ammonium nitrate as it moves through the supply chain—ammonium nitrate would be captured under DHS's ammonium nitrate program both before and after being combined with fuel oil to create ANFO, and would be captured under ATF's regulations after being

combined with fuel oil to create ANFO. The major disadvantage of not exempting ammonium nitrate used in explosives is that individuals and facilities who purchase, sell, or transfer ammonium nitrate for the purpose of manufacturing explosives would be subject to potentially duplicative regulatory requirements, including two sets of licensing requirements, two sets of recordkeeping requirements, two sets of point of sale requirements, and inspections by both ATF and DHS. In response to the October 29, 2008 ANPRM, some commenters expressed concern over these potentially repetitive regulatory requirements.

The second option is to entirely exempt from Subtitle J requirements facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives, as they are already regulated by ATF. In this model, facilities and persons that are licensed by ATF to mix ammonium nitrate with fuel to create ANFO, but that do not purchase, sell, or transfer ammonium nitrate for other purposes and do not perform ammonium nitrate application services, would not be subject to the rule implementing Subtitle J. The primary advantage of this approach is that it would prevent potentially duplicative regulatory requirements from applying to ammonium nitrate facilities and individuals that are already subject to ATF regulations. This approach, however, could create a considerable gap in regulatory coverage throughout the ammonium nitrate supply chain, as ATF regulations apply solely to ANFO and not the ammonium nitrate used to create it. For example, facilities that produce ammonium nitrate to sell to manufacturers of ANFO but who themselves do not produce ANFO would be subject to neither ATF nor DHS regulation under this approach. Similarly, stores of ammonium nitrate at facilities producing ANFO would not be subject to any regulatory requirements (e.g., recordkeeping requirements, reporting of theft or loss requirements) by DHS or ATF under this approach. This would create regulatory gaps in the ammonium nitrate supply chain which could be exploited by terrorists.

The third option would exempt from regulation ammonium nitrate mixtures that are "explosives" subject to ATF regulation (i.e., ANFO). DHS is proposing this option in section 31.305 of the proposed rule. Under this approach, entities and individuals that purchase, sell, or transfer ANFO, but who do not produce ANFO or possess ammonium nitrate for other reasons, would be exempt from all Subtitle J

requirements and would be subject solely to ATF regulation. Individuals producing ANFO, however, would be subject to the Subtitle J requirements, as they, by necessity, possess ammonium nitrate (which they possess as unblended ammonium nitrate before combining it with fuel oil to make ANFO). This approach recognizes both the fact that ATF already regulates ANFO, as well as the fact that ATF's jurisdiction is limited such that ATF does not regulate the ammonium nitrate used by facilities to make ANFO. Through this compromise approach, individuals and entities whose ammonium nitrate-related operations are already regulated by ATF are spared the duplicative DHS oversight that would result from the first option (discussed above), while gaps in security of the ammonium nitrate supply chain that would be created by the second option (discussed above) are avoided. The primary drawback of this approach is that it would make certain facilities (e.g., those that produce ANFO) subject to both DHS and ATF regulations. To minimize this impact, the Department and ATF currently are discussing ways to coordinate inspections and other compliance activities for these ammonium nitrate facilities, and will work together to ensure that there is minimal duplication of effort or burden caused by this approach, if adopted.

The Department welcomes comments on this proposed approach to ammonium nitrate produced, bought, sold, or transferred exclusively for the purpose of producing explosives. The Department also welcomes comments on any other exemptions that it should consider.

### *B. Requirements for the Registration of AN Sellers and AN Purchasers (See Sections 31.200–31.250 of the Proposed Rule)*

#### 1. Overview

Pursuant to 6 U.S.C. 488a(c), 6 U.S.C. 488a(d), 6 U.S.C. 488e(a)(3)(A), and 6 U.S.C. 488e(a)(3)(B), the Department must establish a process by which persons owning or operating "AN Facilities" and persons intending to purchase ammonium nitrate must register with the Department. Section 31.105 of the proposed rule defines an "AN Facility" as any person or entity that produces, sells, or otherwise transfers ownership of, or provides application services for, ammonium nitrate. The Department proposes to define "application services" in section 31.105 as the physical deposit of fertilizer onto turf, fields, crops, or other

agricultural property, where these services are provided by an individual or entity other than the person or entity owning or operating the property upon which the fertilizer is deposited. The Department is interested in receiving comments on these definitions, as well as all other definitions included in the proposed rule.

The proposed registration process would include conducting a check of appropriate identifying information of any person seeking to register against identifying information that appears in the Terrorist Screening Database. Accordingly, prospective applicants would be required to provide specific identifying information to the Department. Appearance in the TSDB is grounds for denial of a registration number (an "AN Registered User Number"). In section 31.220(a)(1) of the proposed rule, the Department proposes to develop an online web portal through which individuals will apply for AN Registered User Numbers. The Department proposes that AN Registered User Numbers will be disseminated to successful applicants via e-mail or through the DHS web portal. The Department also proposes in section 31.235 to make AN Registered User Numbers valid for a period of five years. Additional proposals on who would be required to register and on various aspects of the registration process are discussed in the following paragraphs. The Department seeks public comment on its proposed registration methodology, on other methods the Department may consider for registration, and on the length of time registration numbers should remain valid.

#### 2. Who Must Register

6 U.S.C. 488a(c)(1)(A) and 6 U.S.C. 488e(a)(3)(B) require owners and operators of AN Facilities (including facilities that provide ammonium nitrate application services) to register with the Department. For the reasons provided below, the Department proposes in section 31.200 that any person who may individually perform a sale or transfer of ammonium nitrate on behalf of an AN Facility would be required to register as an owner or operator. Registered AN Facility personnel (whether owners or operators) involved with sales, transfers, or provision of application services are collectively referred to in the proposed rule as "AN Sellers," of which "AN Facility Representatives" and "Designated AN Facility Points of Contact (POCs)" are subsets that have special responsibilities under the proposed rule. "AN Facility Representatives" are any AN Facility

personnel, be they owners or operators, designated to act on behalf of an AN Facility for purposes of compliance with this rule. A "Designated AN Facility POC" is the AN Facility Representative designated by an AN Facility to act as the primary point of contact with the Department on behalf of the AN Facility for purposes of compliance with this rule.

6 U.S.C. 488a(d) and 6 U.S.C. 488e(a)(3)(A) also require anyone who intends to purchase ammonium nitrate to register with the Department. The proposed rule refers to these individuals as "AN Purchasers."

Additional details on the registration of AN Sellers, AN Facility Representatives, Designated AN Facility POCs, and AN Purchasers follow. The Department welcomes public comment on the usefulness of these registration categories.

DHS also welcomes public comment discussing other potential registration categories. DHS is interested in comments addressing the benefits and costs of potentially registering organizations in addition to the registration of individual persons. The Department's proposed rule would require only the registration of individual persons, although DHS is interested in receiving comments addressing what benefits and costs, if any, there would be in requiring registration of organizations involved in ammonium nitrate sales, transfers, or application services. DHS is interested in receiving comments addressing which types of organizations (if any) should register—organizations affiliated with AN Facilities, organizations affiliated with AN Purchasers, both, or neither. The Department also invites comments addressing organizational structures, and whether different registration requirements should apply to organizations with different ownership, governance, or operational structures. The Department also seeks comments discussing potential ways in which organizational registration could take place.

### 3. Registering AN Sellers

6 U.S.C. 488a(c)(1)(A) and 6 U.S.C. 488e(a)(3)(B) require persons who own and persons who operate AN Facilities to register with the Department. DHS believes that Subtitle J's registration requirements for AN Facility personnel will be satisfied if AN Facilities designate AN Sellers, AN Facility Representatives, and/or Designated AN Facility POCs to register and perform the sale, transfer, and application service responsibilities discussed elsewhere in this NPRM. The

Department proposes to require only those owners and operators actually involved in sales, transfers, or application services to register. DHS is also considering, however, whether Subtitle J requires all owners to register. DHS welcomes comments on this issue and the benefits and costs imposed by a registration requirement for various types of owners. We understand that some would consider it overly burdensome to require all owners or operators of AN Facilities to register, because not all owners or operators are involved in or have influence over their organizations' ammonium nitrate operations, and because not all owners or operators have the capability to cause ammonium nitrate misappropriation.

Some AN Facilities, such as those owned by large companies, may have many persons who could be considered owners under 6 U.S.C. 488a(c)(1)(A) and 6 U.S.C. 488e(a)(3)(B). The Department requests comment on who should be required to register to fulfill Subtitle J's owner registration requirements for these types of facilities. DHS also requests comment describing how registration of various owners would or would not fulfill the objective of Subtitle J—"to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." See 6 U.S.C. 488a(a).

The Department is also interested in obtaining more information about individuals who operate (but do not own) AN Facilities, particularly at AN Facilities where owners themselves are not involved in day-to-day operations and do not personally sell, transfer, or perform application services for ammonium nitrate. Operators include employees or other persons who could act on behalf of a facility in conducting sales and transfers, such as sales clerks, cashiers, sales managers, and persons who provide ammonium nitrate transportation services (*e.g.*, delivery truck drivers) or application services. Enabling operator registration is consistent with the Department's authority under 6 U.S.C. 488a(a) and 6 U.S.C. 488e(a)(3)(B), and is necessary in order to ensure that persons with the ability to sell, transfer, or provide application services for ammonium nitrate are not terrorists. DHS welcomes comments on which operators involved in the sale and transfer of ammonium nitrate, or involved in ammonium nitrate application services, should be required and why they should be required to register with the Department.

In light of the Department's understanding of the roles of AN Facility owners and operators, DHS is

proposing that several categories of individuals register as "AN Sellers":

(1) Any individual who has an ownership interest in an AN Facility may register as an AN Seller.

(2) Any individual designated to act on behalf of an AN Facility for purposes of compliance with this regulation would be required to register as an AN Seller, such as, possibly, a site manager, sales manager, or corporate officer.

(3) Any individual involved in the sale or transfer of ammonium nitrate on behalf of an AN Facility would be required to register as an AN Seller, such as a sales clerk or cashier.

(4) Any individual performing ammonium nitrate application services on behalf of an AN Facility would be required to register as an AN Seller. DHS proposes that every sale, transfer, or provision of ammonium nitrate application services would have to be conducted by a registered individual (or by multiple registered individuals). Accordingly, while every AN Facility will be required to have at least one AN Seller registered with the Department, not every individual with job at an AN Facility would have to register to be an AN Seller. These proposals would largely give AN Facilities the flexibility to seek registration of and to conduct business with the personnel of their choosing, while also ensuring that all sales, transfers, and application services are conducted by individuals who have been vetted by and registered with the Department.

DHS is proposing that within the category of AN Sellers there be a subcategory of individuals called "AN Facility Representatives." The qualifications and responsibilities of AN Facility Representatives will be discussed in the following section. AN Sellers who are not AN Facility Representatives would have authority to perform all of the regulatory activities that owners or operators must perform pursuant to Subtitle J (*e.g.*, verifying the identities of prospective AN Purchasers, recording the details of completed sales, and handing over possession of ammonium nitrate to approved AN Purchasers), but would not be responsible for ensuring that other AN Facility personnel are following the Department's regulations. For a description of permissible responsibilities of AN Sellers, refer to section 31.210 of the proposed rule.

The Department proposes that every AN Facility would have to have at least one registered AN Seller (*i.e.*, the Designated AN Facility POC), but may seek the registration of as many other AN Facility Representatives and AN Sellers as it deems appropriate. The

Department proposes that whether or not an AN Facility seeks registration of more than a single person will be discretionary.

In section 31.220(c)(3), the Department proposes that each person registering as an AN Seller, AN Facility Representative, or Designated AN Facility POC will be expected to provide information identifying all AN Facilities at which he/she will perform sales or transfers of ammonium nitrate, or on behalf of which he/she will perform application services. In section 31.220(b), the Department proposes that a single individual may serve as an AN Seller for multiple AN Facilities.

#### 4. Registering AN Facility Representatives

The Department recognizes that not all AN Sellers will have the same level of non-regulatory responsibility and authority within an AN Facility, and that some AN Sellers may not be in a position to monitor or control overall AN Facility compliance or the compliance of other AN Facility employees with the final regulations. In light of this, in section 31.215(b), the Department is proposing the creation of a subcategory of individuals called "AN Facility Representatives" within the broader class of AN Sellers. The Department proposes that AN Facility Representatives would be AN Sellers who are not only responsible for their own compliance with the regulations, but also would be responsible for the AN Facility's overall compliance with the regulations and the compliance of all other AN Facility employees.

The Department also proposes that, for purposes of these regulations, the definition of "AN Facility Representative" be broad enough to include not only individuals who own all or part of AN Facilities, but also any non-owner AN Facility operators, employees, or contractors designated to act on behalf of an AN Facility for purposes of compliance with this proposed rule. Thus, for purposes of the proposed rule, an AN Facility would be allowed to designate as an AN Facility Representative an individual without any ownership in the AN Facility, such as, possibly, a site manager, sales manager, or corporate officer, to meet the "owner" and "operator" registration requirements of Subtitle J.

In section 31.215(b), the Department proposes that every AN Facility would have to have at least one AN Facility Representative registered on its behalf, but may have as many AN Facility Representatives registered on its behalf as it deems appropriate. Whether or not an AN Facility seeks registration of any

additional AN Facility Representatives is entirely discretionary. The Department also proposes that while an AN Facility would have to have at least one registered AN Facility Representative, whether or not an AN Facility seeks registration of any additional AN Sellers who are not AN Facility Representatives is entirely discretionary. Under the Department's proposed approach, an AN Facility may decide that it is most cost-effective to register only AN Facility Representatives; however, in that case, AN Facility Representatives would have to be able to perform all applicable regulatory compliance activities in this rule.

While the Department's proposal does not preclude the registration of multiple AN Facility Representatives for a single AN Facility, each AN Facility will be required to designate a single AN Facility Representative to act as the primary point of contact with the Department on behalf of the AN Facility. This individual will be referred to as the "Designated AN Facility POC." The qualifications and responsibilities of Designated AN Facility POCs will be discussed in the following section.

An individual registering as an AN Facility Representative will be expected to provide the name of and contact information for the Designated AN Facility POC for each AN Facility on behalf of which he/she is registering. Please note that a single individual may serve as an AN Facility Representative for multiple AN Facilities.

#### 5. Registering a Designated AN Facility POC

In section 31.215(a) of the proposed rule, the Department proposes requiring each AN Facility to designate a single AN Facility Representative to act as the primary point of contact with the Department on behalf of the AN Facility. The Department proposes that the Designated AN Facility POC will be the individual who is responsible for contacts with the Department regarding regulatory activities, such as the scheduling of inspections under sections 31.500 and 31.505 of the proposed rule. The Department proposes that the Designated AN Facility POC will have this point-of-contact responsibility in addition to all other AN Facility Representative responsibilities.

Please note that a single individual may serve as a Designated AN Facility POC for multiple AN Facilities.

#### 6. Summary of AN Facility Personnel Registration Proposals

In summary, the Department is proposing that any individual working at or for an AN Facility that performs sales or transfers of ammonium nitrate, or that performs ammonium nitrate application services, would have to register with the Department. Sales, transfers, or application services may only be performed by an individual who successfully registers with the Department and is granted an AN Registered User Number as an AN Seller (or AN Facility Representative or Designated AN Facility POC, as both AN Facility Representatives and Designated AN Facility POCs are subsets of AN Sellers). An AN Facility may have as many or as few registered AN Sellers as it deems fit, and would be required to have at least one registered AN Facility Representative.

AN Facility Representatives have several responsibilities that AN Sellers who are not AN Facility Representatives do not have (*i.e.*, responsibilities for ensuring an AN Facility's holistic compliance with Subtitle J requirements). Each AN Facility would be required to designate a single AN Facility Representative to be that facility's Designated AN Facility POC, who will serve as the facility's primary point of contact with the Department.

The Department welcomes comments on the propriety and effectiveness of this proposed approach, including comments that address the following issues:

- The ownership and management structures of AN Facilities;
- The proposed qualifications for being an AN Facility Representative, including whether individuals who do not own all or part of an AN Facility should be able to register as AN Facility Representatives;
- The proposed regulatory compliance responsibilities of AN Sellers and AN Facility Representatives, which will be described in further detail throughout the remainder of this NPRM;
- Whether or not proof of ownership (for owners) or proof of delegation of authority from company ownership or management (for non-owners) should be required for individuals registering as AN Facility Representatives; and
- The proposal that not all AN Facility owners or operators should be required to register.

The Department also welcomes comments on potential alternative approaches. Several such alternative approaches follow:

- Permitting only individuals who own all or part of an AN Facility to

register, and requiring those individuals to perform all applicable regulatory compliance activities, such as verifying AN Purchasers' AN Registered User Numbers and identities (as described in sections 31.300 and 31.305 of the proposed rule); or

- Permitting only AN Facility Representatives to register, but allowing any facility personnel to conduct ammonium nitrate sales, transactions, and application services; or
- Permitting only AN Facility Representatives to register, but allowing non-registered facility personnel whose names have been provided to the Department to be involved in ammonium nitrate sales, transactions, and application services.

#### 7. Registering AN Purchasers

6 U.S.C. 488a(d) and 6 U.S.C. 488e(a)(3)(A) require any individual who intends to purchase or acquire ammonium nitrate to register with the Department. Specifically, the Department proposes in section 31.205 to require that each individual person attempting to purchase or acquire ammonium nitrate from an AN Facility would be required to register with the Department. Whether that person is the owner of the purchasing entity or simply an employee thereof, the Department proposes to require that person to have a valid AN Registered User Number. Moreover, whether a purchasing entity would want to have a single individual complete all purchases or have multiple individuals with purchasing authority would be within that entity's discretion, but the Department would require any individual attempting to purchase ammonium nitrate to be registered before an AN Facility would be authorized to sell ammonium nitrate to him/her. This is necessary to ensure that each individual taking ownership of ammonium nitrate has been vetted before obtaining ammonium nitrate. The Department welcomes public comment on this proposed approach.

The Department also proposes that it will not require persons receiving ammonium nitrate application services to register as AN Purchasers. The Department does not believe that Subtitle J requires registration and TSDB vetting of owners/operators of agricultural property who receive application services, as long as those individuals do not otherwise qualify for registration under this proposed rule.<sup>1</sup>

<sup>1</sup> If an owner or operator receives and possesses ammonium nitrate for any length of time before it is applied as fertilizer to his/her agricultural property, he/she would qualify as an AN Purchaser

DHS does not believe that ammonium nitrate fertilizer is likely to be misappropriated for use in acts of terrorism after it has been applied to agricultural property. The Department welcomes public comment on this conclusion.

#### 8. Federal/State/Tribal/Local Government-Owned Entities That Are AN Facilities or AN Purchasers

While the Department does not believe that many Federal, State, tribal, or local governmentally-owned entities engage in the sale, transfer, or purchase of ammonium nitrate, the Department believes that some such entities do. In Subtitle J, Congress did not exempt from regulation AN Facilities that are owned by, or AN Purchasers who work for, Federal, State, tribal, or local governments. Accordingly, the Department is proposing to treat such entities like any other AN Facilities or AN Purchasers, and is proposing to require them to comply with all applicable regulatory requirements. The Department solicits comments on the existence of governmentally-owned entities engaged in the sale, transfer, or purchase of ammonium nitrate; on the existence of government-owned entities that provide application services; examples of such entities; and whether or not such entities should receive special treatment under the Ammonium Nitrate Security Program.

#### 9. Registration Process

The Department is proposing that each applicant for an AN Registered User Number would be required to register as a Designated AN Facility POC, AN Facility Representative, AN Seller, and/or AN Purchaser through an online Web portal (the "AN User Registration Portal") developed by the Department and made available via the Internet. Proposed procedures for applying for an AN Registered User Number and registering as a Designated AN Facility POC, AN Facility Representative, AN Seller, and/or AN Purchaser can be found in section 31.220 of the proposed rule. (This NPRM refers to applicants who have successfully registered under these proposed procedures as "registered users.")

One alternative to Internet-only registration is to add a phone registration option to the current Internet option. This alternative would

under the Department's proposed rule. Such an owner or operator would have to register with DHS as an AN Purchaser, would have to be screened against the TSDB, and would have to fulfill the other proposed obligations of AN Purchasers as described elsewhere in this NPRM.

provide both an online Web portal and phone-based registration system. Applicants could choose between Web portal registration and phone registration—DHS would accept either if it implemented this alternative. Under this alternative, DHS could accept registration applications over the phone, vet applicants against the TSDB (as described in section III.B.11 of this NPRM), and subsequently mail applicants paper letters containing registration numbers or registration denials. DHS could also potentially provide each applicant with the option of receiving a call, conveying registration results or registration status, prior to receipt of a paper letter in the mail. Calls could be provided to enable applicants to learn their statuses prior to receiving letters in the mail.

Although DHS is proposing Internet-only registration at this time, the Department invites public comments addressing the above alternative registration approach, and any other alternative registration approaches that commenters believe would enable applicants and DHS to efficiently carry out their respective registration obligations. Specifically, DHS is interested in identifying alternative approaches to the Internet that would allow DHS to meet its statutory requirements to, "to the extent practicable, issue or deny registration numbers under [Subtitle J] not later than 72 hours after the time [DHS] receives a complete registration application, unless [DHS] determines, in the interest of national security, that additional time is necessary to review an application[.]" and to "notify a person seeking to register with the Department [\* \* \*] of the status of the application of that person not later than 72 hours after the time [DHS] receives a complete registration application." See 6 U.S.C. 488a(i)(3). The Department will consider and examine alternatives suggested in public comments in assessing whether to require online registration in the final rule. DHS is particularly interested in receiving public comments addressing the business and economic impacts that various registration alternatives would have on the regulated community, including the costs and benefits of the various alternatives on individual registration applicants. Because it is proposing to implement an online registration system, DHS requests comments addressing the level of access to the Internet that registration applicants currently have, comments addressing the level of access applicants anticipate having in the future, and

comments addressing how registration applicants who do not have readily-accessible Internet access could obtain the access necessary to register online. DHS specifically requests information, data, and/or studies pertaining to the regulated community's access to the Internet. The Department will consider any data or studies received on any aspects of registration or on any alternatives, as well as other comments, and if appropriate, modify the registration system proposed in this NPRM.

While not every potential applicant may have personal access to the Internet, the Internet is widely available, such as at public libraries or in other public buildings. AN Facilities are also welcome, but not required, to provide Internet access to potential applicants. The Department believes that there are significant benefits to an online approach. The benefits to applicants, registered users, and the Department of an online approach include: (1) Quicker response from the Department, thereby minimizing the time during which an applicant or registered user would not be able to purchase, sell, or transfer ammonium nitrate, or perform ammonium nitrate application services; (2) ability for an applicant or registered user to access, view, update, and manage his/her personally identifiable information; and (3) ability for a registered user to easily renew his/her AN Registered User Number once it has expired. Additional benefits of online registration, and description of rationales for online registration, follow.

As described in section III.B.11 of this NPRM, DHS proposes to vet registration applicants against the TSDB as part of the Ammonium Nitrate Security Program. Accurate TSDB vetting depends upon DHS obtaining accurate information from registration applicants. Because TSDB vetting results or submissions of inaccurate or improper registration information to DHS could lead to registration denials or revocations (as described in sections III.B.12 and 13 of this NPRM), preventing individuals from being able to access ammonium nitrate and thus impacting their livelihoods, DHS believes that it should implement the most accurate registration system possible. DHS believes that implementing an online registration system would reduce the risk of human error in submission and transcription of registration information, as compared to the phone-in registration alternative mentioned above or as compared to mail-in or other possible registration alternatives. DHS is seeking comment on this assumption. DHS also believes

that implementing an online registration system would reduce the risks of lost paperwork or misdirected mail, both by registration applicants and by DHS, which would be inherent in any alternative registration systems relying on mailed correspondence or paper forms. While allowing registration over the phone would eliminate the potential loss of mailed paper forms by registration applicants, it would not entirely eliminate the potential for some paper letters from DHS containing registration numbers or registration denials to be lost. DHS thus believes that an online registration system is likely to be the most accurate registration system possible; it would be less prone to the types of errors identified above than alternative registration systems. DHS seeks comments on how errors could be reduced through alternative registration systems.

DHS proposes Internet-only registration because Subtitle J directs the Department to "establish procedures to efficiently receive applications for registration numbers." See 6 U.S.C. 488a(i)(1)(A). A major goal of Subtitle J is to expedite and streamline the registration and regulatory compliance processes that are part of the Ammonium Nitrate Security Program. See, e.g., 6 U.S.C. 488a(i)(3)(A) (directing DHS to, "to the extent practicable, issue or deny registration numbers under [Subtitle J] not later than 72 hours after the time [DHS] receives a complete registration application [\* \* \*]"); 6 U.S.C. 488a(i)(1)(A) (directing DHS to "*promptly* issue or deny" registration numbers (emphasis added)); 6 U.S.C. 488a(i)(1)(B) (directing DHS to structure the program to maximize the number of registration applicants that apply for registration soon after implementation of the program); 6 U.S.C. 488a(i)(3)(B) (directing DHS to notify registration applicants whenever there are delays in processing registration applications); and 6 U.S.C. 488a(i)(4)(A) (directing DHS to create an expedited appeals process for individuals whose registration applications are denied). Implementing an online registration system would not only enable DHS to return registration results to applicants over the Internet within the 72-hour timeframe set forth in 6 U.S.C. 488a(i)(3)(A), it would also enable DHS to return registration results to applicants faster than under any of the other possible registration alternatives, thereby best achieving the goal of expediting registration that underlies Subtitle J. The Department proposes the

Internet-only approach because mail processing times, delays associated with transcribing phoned-in registrations, and delays associated with generating and processing paper forms mailed to or from DHS would slow DHS's responses to registration applications. For these reasons, a phone-in or mail-in registration alternative would not expedite registration in comparison to online registration. However, DHS seeks comment on whether or not possible registration delays would be preferable to the burdens of having to access public computers that would be imposed by an Internet-only registration approach on individuals without readily-accessible Internet access. DHS is also seeking comments on other ways in which these burdens might be mitigated for those without readily-accessible Internet access.

DHS acknowledges that the proposed Internet-only registration procedures, if finalized, would impose costs and burden on regulated members of the public. Online registration would likely be more burdensome for individuals without readily-accessible access to the Internet than for others. Subtitle J, however, specifies that persons do not need to be registered to purchase, sell, transfer, or receive ammonium nitrate until six months after the issuance of the final rule implementing the Ammonium Nitrate Security Program. See 6 U.S.C. 488e(e). DHS believes that this six-month period will provide a sufficient opportunity for those without readily-accessible Internet access to obtain the brief Internet access necessary to register with the Department. The period of time between issuance of a final rule and implementation of the registration requirement (*i.e.*, that individuals possess AN Registered User Numbers) should minimize burden or business disruption felt by registration applicants. Nevertheless, the Department seeks comments on the likely burdens (in terms of time and expense) on those who would need to access public computers in order to register online. DHS also seeks comments on any additional costs incurred besides those associated with registration.

In Subtitle J, 6 U.S.C. 488a(i)(1)(B) additionally directs the Department to take steps to maximize the number of registration applications that are submitted and processed during the six months following the issuance of the final rule. In order to accomplish this, the Department intends to engage in a concerted outreach effort both immediately before and immediately after the release of the final rule in an



effort to raise awareness of Subtitle J's registration requirements and the process for completing them. The Department welcomes public comments on both potential outreach targets and other steps the Department can take to maximize the number of registration applications that are submitted and processed during the initial six-month registration period.

The Department's proposal would require online registration, but would not mandate what sort of Internet access registration applicants must obtain in order to complete the registration process. As mentioned previously, registration applicants could use public computers and internet connections, or computers and Internet connections provided by AN Facilities, in order to register if they do not have access to personal computers and the internet. DHS recognizes that use of public computers or unsecured Internet connections can increase privacy risks and risks of loss of sensitive personal data. The Department has published a Privacy Impact Assessment concurrently with publication of this NPRM addressing these risks, and also addressing other privacy risks and safeguards relevant to the Ammonium Nitrate Security Program. The Department's Ammonium Nitrate Security Program Privacy Impact Assessment can be found online, at <http://www.dhs.gov/privacy>. DHS encourages members of the public to read the Privacy Impact Assessment, and submit comments on this NPRM regarding the risks and safeguards that is addresses. The Department is particularly interested in receiving comments addressing privacy risks associated with use of public computers or unsecured internet connections as part of the proposed registration process, and comments addressing how DHS and registration applicants can protect personal information and sensitive information transmitted online.

In summary, the Department proposes that registration applications be collected only through an online web portal. The Department seeks public comments on this proposed Internet-only approach, and on potential alternative approaches. DHS will consider alternatives submitted in selecting which type of registration system to implement as part of the final rule.

#### 10. Initial Applications

Upon accessing the AN User Registration Portal, DHS proposes in section 31.220(c)(1) that each applicant will be asked a series of questions

designed to allow the Department to vet the individual against the TSDB, and to subsequently enable point of sale verifications. The Department is proposing in section 31.220(c)(1) that each applicant provide his/her name, address, telephone number, photo identification document type, photo identification document issuing entity, photo identification document number, place of birth, date of birth, citizenship, and gender, along with any other information deemed necessary by the Department to carry out TSDB vetting.

To ensure that appropriate user roles are assigned to each AN Registered User Number, DHS proposes in section 31.220(b) that each applicant would also be asked to declare his/her ammonium nitrate user status in general terms (*i.e.*, AN Seller; AN Facility Representative; Designated AN Facility POC; AN Purchaser). In section 31.220(b), the Department proposes to allow an applicant the ability to register as both an AN Seller and an AN Purchaser. The Department is interested in receiving comments on the utility of this proposal.

The Department is also proposing in section 31.220(c)(3) that each AN Seller, AN Facility Representative, and Designated AN Facility POC would be required to submit information identifying all AN Facilities at or for which he/she serves as an AN Seller, AN Facility Representative, or Designated AN Facility POC.

Under section 31.220(c)(1) of the proposed rule the Department may also collect information necessary to enable it to verify applicants' enrollments in other TSDB vetting programs. The Department is considering exercising its authority under 6 U.S.C. 488a(i)(6)(A) to recognize the results of equivalent TSDB vetting conducted on applicants enrolled in other appropriate DHS programs where possible. This approach would limit the number of instances in which different DHS programs may vet the same applicant against the TSDB. The Department would appreciate comments regarding whether or not this or other information would be worthwhile to collect, and regarding the burden on the regulated community of such collection. The Department also welcomes public comment on the totality of this proposed registration application process, including public comment discussing potential alternative processes.

Pursuant to the Privacy Act, 5 U.S.C. 552a(e)(3), DHS intends to provide notice to individuals submitting information to DHS through the AN User Registration Portal about the authority for DHS's collection of

application information, the purposes for collecting application information, the uses of application information, and the impacts on individuals by providing or failing to provide application information. DHS expects to provide this notice electronically, within the AN User Registration Portal.

#### 11. Applicant Vetting Process

In section 31.225, the Department proposes to vet applicants against the TSDB and/or verify each applicant's enrollment in a Department program that conducts equivalent TSDB vetting prior to issuing him/her an AN Registered User Number. *See* 6 U.S.C. 488a(i)(2)(A) (requiring TSDB vetting). Under section 31.230(b)(1) of the proposed rule, applicants whose identifying information appears in the TSDB may be denied AN Registered User Numbers. *See* 6 U.S.C. 488a(i)(2)(B). Each applicant who applies for an AN Registered User Number will be vetted against the TSDB before being approved to purchase, sell, transfer, or provide application services for ammonium nitrate.

The Department is aware that some applicants may have already been vetted against the TSDB as part of other DHS programs prior to submission of their AN Registered User Number applications. Sections 31.220 and 31.230 of the proposed rule would enable, but would not require, DHS to recognize the results of TSDB vetting completed by other DHS programs as part of AN Registered User Number application reviews. The Department is interested in receiving comments on the utility of this proposal.

The Department welcomes public comment on the means by which it proposes to accomplish vetting, and on any other aspects of the proposed approach to vetting applicants for AN Registered User Numbers. At a date after publication of the Ammonium Nitrate Security Program NPRM in the **Federal Register**, but prior to final rule implementation, the Department will publish in the Federal Register both a System of Records Notice (SORN) for the Ammonium Nitrate Security Program and a separate Notice of Proposed Rulemaking proposing to exempt the Ammonium Nitrate Security Program from certain Privacy Act requirements. The Department will also publish, on the Department's Web site, a Privacy Impact Assessment. In these documents the Department will outline the potential privacy impacts of the proposed rule, including the privacy impacts of the vetting process and the circumstances under which DHS intends to share information collected

under the Ammonium Nitrate Security Program with Federal law enforcement agencies as a part of law enforcement investigations into terrorist ties of applicants for AN Registered User Numbers.

#### 12. Notification of Approval or Denial

Consistent with 6 U.S.C. 488a(i)(3)(A) and 6 U.S.C. 488a(i)(3)(B), to the extent practicable, the Department intends to approve or deny each application for an AN Registered User Number, and to issue each AN Registered User Number, not later than 72 hours after the time the Department receives a complete application. The Department may deny an applicant an AN Registered User Number if that applicant's name or identifying information appears in the TSDB. *See* 6 U.S.C. 488a(i)(2)(B). The Department proposes in section 31.230(c) to provide notification of registration application approval or denial to each applicant electronically.

If a registration application is approved, the notification of such approval will contain a unique AN Registered User Number assigned to the applicant. The Department is considering including in the notification issued to each successful applicant a certificate including the AN Registered User Number that he/she can print and keep as part of his/her records and use to facilitate the AN Purchaser verification process.

The Department welcomes public comment on the efficiency and sufficiency of notifying applicants of AN Registered User Number approvals and denials via e-mail or other electronic means, and also welcomes public comment addressing potential alternative means for providing such notice, such as notification via telephone or letter. The Department also welcomes public comment addressing the appropriate contents of registration approvals and denials.

The Department intends to issue or deny AN Registered User Numbers within 72 hours of application, as required by Subtitle J. *See* 6 U.S.C. 488a(i)(3). When this is not practicable, or when the Department determines in the interest of national security that additional time is needed to review an application, the Department proposes to provide notice of delay to applicants whose registration determinations are delayed in the same manner as approvals or denials will be issued, as stated in section 31.230(e) of the proposed rule. The Department welcomes public comment on the efficiency, sufficiency, costs and benefits of this manner of providing notice of delay, and also welcomes

public comment addressing potential alternative means of providing such notice.

#### 13. Revocation of Registration Numbers

Under section 31.245 of the proposed rule, the Department proposes to revoke an individual's AN Registered User Number upon determining that it is in the interest of national security to revoke that AN Registered User Number based on the results of the activities described in section 31.225 of the proposed rule, or that the AN Registered User holding that AN Registered User Number obtained it by submitting fraudulent or false information. *See* 6 U.S.C. 488a(i)(7)(A). To support these determinations, in section 31.225(b) the Department proposes to recurrently vet individuals who have previously been issued AN Registered User Numbers. *See* 6 U.S.C. 488a(i)(7)(A). As appropriate, before revoking an individual's AN Registered User Number, the Department must provide notice to the individual, and after the revocation of the AN Registered User Number, the Department must provide the affected individual an opportunity to appeal. *See* 6 U.S.C. 488a(i)(7)(B). In sections 31.245(b) and (c), DHS proposes that notification of revocation will be provided to each affected individual in writing, along with instructions on the process for appealing the Department's revocation decision. The appellate process will mirror that provided to individuals whose initial applications for AN Registered User Numbers are denied, as described below in the following section and in section 31.250 of the proposed rule. The Department welcomes public comment on the efficiency and sufficiency of this method of providing notice of revocation and on the proposed appeals process, and also welcomes public comment on potential alternative means for either.

#### 14. Appealing Registration Denials and Registration Revocations

This section discusses proposed appeal procedures for persons denied AN Registered User Numbers and for persons whose AN Registered User Numbers are revoked under Subtitle J. These procedures can be found in section 31.250 of the proposed rule. A later section of this NPRM, section III.H, discusses proposed adjudication and appeal procedures for persons and entities issued civil penalties by the Department under Subtitle J. These two sets of procedures are mutually exclusive; the Department proposes that registration and revocation appeals will be governed only by the appeals

mechanisms described in this section of this NPRM, while civil penalty adjudications and appeals will be governed only by the mechanisms described in section III.H of this NPRM.

The reason for this mutual exclusivity is because registration denials and revocations are fundamentally different from imposition of civil penalties under the Department's proposed rule. Under the Department's proposal, individuals or other entities will only be issued civil penalties for violating the rules of the Ammonium Nitrate Security Program. Individuals or other entities will not be issued civil penalties for having their registrations denied or revoked. Adjudication or appeal of civil penalties will thus involve assessment of whether or not individuals or other entities have violated the final Ammonium Nitrate Security Program rules. On the other hand, appeal of denial or revocation of registration numbers will involve review of the completeness and accuracy of registration applications, and review of TSDB vetting results and national security interests if applicable. The appeal procedures listed in this section of the NPRM are intended to enable reviews of registration application denials and revocations of registration numbers, while the adjudication and appeal procedures listed in section III.H are intended to enable reviews of civil penalties and of alleged regulatory violations.

Subtitle J requires the Department to afford persons denied AN Registered User Numbers, and persons whose AN Registered User Numbers are revoked, the opportunity to appeal such denials and revocations in an expedited manner. *See* 6 U.S.C. 488a(i)(4). The Department proposes to fulfill this requirement by permitting each person to request copies of the materials on which denial or revocation was based, and to file statements explaining why he/she believes that he/she has been inappropriately denied registration and containing any applicable supporting evidence, to be reviewed by the Department. These proposed appeals procedures are based, in part, on appeals procedures the Department offers as part of the Transportation Worker Identification Credential (TWIC) and Hazardous Materials Endorsement (HME) programs. *See* 49 CFR 1515.9(a)–(b); 49 CFR 1515.5.

Specifically, the Department proposes that, after having received an ammonium nitrate registration denial or revocation, a person may initiate an appeal by filing a written Request for Materials requesting copies of the materials on which denial or revocation was based. The Department proposes to

require that each Request for Materials be submitted to the Department within 60 days of the date of denial or revocation.

The Department proposes that after the receipt of a Request for Materials, it will send the appellant a DHS Response containing copies of the releasable materials upon which denial or revocation was based. DHS will not include any classified information in this DHS Response nor will it include any other information or material protected from disclosure under law, although as appropriate it will include unclassified summaries of classified evidence supporting denial or revocation. The Department proposes that it will serve its DHS Response on the appellant within 60 days of Request for Materials receipt, unless additional time is required in the interest of national security.

Upon review of those releasable materials, the Department proposes that an appellant may reply to the Department with a Request for Appeal containing the rationale or information upon which he/she disputes the Department's denial or revocation determination. The Department proposes that an appellant will have 60 days from the date of the Department's Response in which to file such rationale or information. The Department proposes that after reviewing this rationale or information, it will serve the appellant with a Final Determination of the Department's resolution of his/her appeal. The Department proposes that it will perform this service within 72 hours of Request for Appeal receipt, to the extent practicable, as required by 6 U.S.C. 488a(i)(4)(A)(ii).

For good cause shown, the Department additionally proposes to grant appellants extensions of the 60-day appeals submission periods mentioned above. This will afford appellants the necessary time in which to work with other government agencies to correct records and materials contributing to the Department's denial/revocation determinations when those records and materials contain incorrect or outdated information.

The Department welcomes public comment on this appeals mechanism, and also welcomes public comment on potential alternative appeals mechanisms.

#### 15. Registration Updates and Expiration

Under Subtitle J, DHS may require registrants to update registration information submitted to DHS "as appropriate." See 6 U.S.C. 488a(6)(b). Pursuant to this authority, section

31.220(a)(2) proposes to require registration applicants and AN Registered Users to update submitted information within 30 days of a change to any of the information submitted as part of the application (e.g., name, address). An applicant or AN Registered User would be able to update his/her information through the proposed AN User Registration Portal. DHS seeks public comment on its proposed approach to updating registration information, including how often and under what circumstances to require registrants to update the information submitted to DHS as part of registration. DHS also requests public comments on potential alternative approaches to requiring registration information to be updated through the proposed AN User Registration Portal, including comments on the feasibility and practicality of allowing updates to be accomplished over the telephone or through the mail.

The Department proposes in section 31.235 of the proposed rule to make each AN Registered User Number issued under Subtitle J valid for five years after the date of issuance (unless revoked before expiration pursuant to 6 U.S.C. 488a(i)(7)). Under this proposal, the Department expects many applicants to apply to renew their AN Registered User Numbers every five years.

In proposing five years as the duration of each AN Registered User Number, the Department is seeking to balance the benefits of requiring renewals against the burdens to both the regulated community and the Department of the renewal process. As part of its evaluation of potential expiration and renewal processes, the Department has considered the expiration/renewal schedules for ATF's Federal Explosives Regulations (three years), for DHS programs that conduct TSDB vetting (e.g., five years for TSA's TWIC program and five years for U.S. Customs and Border Protection's Trusted Traveler programs), and for various State ammonium nitrate licensing regulations (generally one year). The Department believes that the five-year renewal cycle for AN Registered User Numbers is appropriate because it will minimize the burden on the regulated community, in comparison to screening programs with shorter renewal cycles. Additionally, a five-year validity period aligns with DHS's practice of recurrently vetting information against the TSDB for five years as part of certain transportation and critical infrastructure security programs.

The Department proposes in section 31.240 to allow each AN Registered User to apply for a five-year extension of his/her AN Registered User Number

via the proposed AN User Registration Portal anytime beginning 60 days prior to the expiration of his/her AN Registered User Number through one year after the expiration of his/her AN Registered User Number. After completion of the renewal process, each renewed AN Registered User Number will be valid for an additional five years. To facilitate this, the Department intends to maintain an AN Registered User's registration application information for a period of one year following the expiration of his/her AN Registered User Number. If an individual fails to renew his/her AN Registered User Number within one year of its expiration, the AN Registered User Number will be permanently retired. Such an individual will need to apply for a new AN Registered User Number to purchase, sell, transfer, or provide application services for ammonium nitrate after his/her initial AN Registered User Number has been permanently retired.

The Department seeks public comment on this proposed approach, including the utility, benefits, and costs of requiring re-registration of ammonium nitrate users in general, and on the proposed five-year time period in particular.

#### 16. Initial Six-Month Registration Period

6 U.S.C. 488e(e) specifies that persons do not need to be registered to purchase, sell, transfer, or receive ammonium nitrate until six months after the issuance of the final rule implementing Subtitle J. 6 U.S.C. 488a(i)(1)(B) directs the Department to take steps to maximize the number of registration applications that are submitted and processed during the six months following the issuance of the final rule. In order to accomplish this, the Department intends to engage in a concerted outreach effort both immediately prior to and immediately following the release of the final rule in an effort to raise awareness of Subtitle J's registration requirements and the process for completing them. The Department welcomes suggestions on both potential outreach targets and other steps the Department can take to maximize the number of registration applications that are submitted and processed during the initial six-month registration period.

*C. Purchaser Verification Activities (See Sections 31.300–31.310 of the Proposed Rule)*

#### 1. Overview

Subtitle J specifies that only individuals with valid AN Registered

User Numbers may purchase ammonium nitrate, and that AN Sellers would be required to refuse to sell ammonium nitrate to prospective AN Purchasers who do not possess valid AN Registered User Numbers. See 6 U.S.C. 488e(a)(2) and 6 U.S.C. 488e(a)(3). To this end, AN Sellers would be required to verify that each prospective AN Purchaser has a valid (*i.e.*, current and authentic) AN Registered User Number prior to transfer of ammonium nitrate. Subtitle J also requires AN Sellers to verify each prospective AN Purchaser's identity prior to transfer of ammonium nitrate to that prospective AN Purchaser. See 6 U.S.C. 488a(e)(2)(D). DHS therefore proposes to require that an AN Facility refuse to sell or transfer ammonium nitrate to a prospective AN Purchaser whose identity or AN Registered User Number the AN Seller is unable to verify. These proposed requirements can be found in section 31.300 of the proposed rule, and are further discussed throughout the remainder of section III.C of this NPRM.

In addition to verifying the identity and AN Registered User Number of a prospective AN Purchaser, if an AN Purchaser whose identity and AN Registered User Number has been verified uses an agent on his or her behalf at the point of sale, the AN Seller must also verify the identity of the agent. See 6 U.S.C. 488a(e)(2)(D). Identity verification of AN Purchasers (and, where applicable, their agents) by AN Sellers is to occur in accordance with procedures proposed in section 31.300.

AN Facilities would also be required to record certain information regarding prospective AN Purchasers (and, if applicable, the agents acting on their behalf) for each sale or transfer as part of Subtitle J's recordkeeping requirements. See 6 U.S.C. 488a(e)(2).

## 2. Manner of Sale or Transfer of Ammonium Nitrate

The Department is aware that the ways in which sales and transfers of ammonium nitrate are conducted can vary by AN Facility, and that differences in ammonium nitrate transaction protocols could impact the timing and performance of identity verification and other required point of sale activities. Through conversations with industry, the Department has identified three principal transaction formats commonly used to sell or transfer ammonium nitrate: (1) The AN Purchaser appears at an AN Facility and takes possession of ammonium nitrate from the AN Seller directly; (2) the AN Purchaser places an advanced order either in person or through other means (*e.g.*, telephone,

online), and the AN Seller delivers ammonium nitrate to the AN Purchaser; or (3) the AN Purchaser places an advanced order either in person or through other means (*e.g.*, telephone, online), and an agent acting on behalf of the AN Purchaser takes possession of the ammonium nitrate from the AN Seller. Other transaction formats are also possible.

In addition to the aforementioned approaches to transferring possession of ammonium nitrate as part of a sale or transfer, depending on the financial arrangements entered into between an AN Facility and an AN Purchaser, the payment of funds or other services in exchange for ammonium nitrate may occur prior to, concurrent with, or after the actual transfer of possession of ammonium nitrate.

The Department is interested in comments regarding the frequency of these various modes of delivery and payment, as well as any other transactional formats that are used to sell or transfer ammonium nitrate.

The verification activities described in section III.C of this NPRM are required for each sale or transfer of ammonium nitrate. The Department seeks comments on its proposed definition of "transfer," including what should be considered a transfer subject to Subtitle J. For purposes of this rule, the Department is proposing that "transfer" of ammonium nitrate be defined generally as "[t]he transfer of possession or ownership of ammonium nitrate from one person or entity to another person or entity for use outside of the AN Facility from which the ammonium nitrate is being transferred. Transfers of ammonium nitrate include transfers of possession or ownership that occur as part of sales and other business or commercial transactions, and also include transfers of possession or ownership that are not part of sales or other business or commercial transactions. The physical deposit of fertilizer onto turf, fields, crops, or other agricultural property is not a transfer of ammonium nitrate." Elaboration on this definition follows.

The Department is aware that transaction protocols may be different for sales or transfers that occur as part of imports or exports of ammonium nitrate than for purely domestic sales or transfers. As part of this proposed rule, DHS proposes to regulate all ammonium nitrate transfers that occur within the United States. As such, DHS would require the verification and recordkeeping activities described below whenever possession of ammonium nitrate changes hands inside the United States. For example, if an

individual brings ammonium nitrate into the country and transfers possession of it to another person within the United States, the verification and recordkeeping activities described below would be required. Similarly, if an individual in the United States transfers possession of ammonium nitrate to another person who intends to export that ammonium nitrate, the verification and recordkeeping activities described below would be required. Verification and recordkeeping would not be required, however, if an individual transports ammonium nitrate out of the country as long as there is no transfer of possession of the ammonium nitrate when it is inside the United States. Likewise, verification and recordkeeping would not be required if an individual brings ammonium nitrate into the country as long as there was no transfer of possession of that ammonium nitrate when it is inside the United States. DHS seeks comments on this proposal, on the methods of conducting ammonium nitrate imports and exports, and on any potential alternative treatments of imported or exported ammonium nitrate.

When ammonium nitrate is used or moved within a single AN Facility, or when possession of ammonium nitrate changes within a single AN Facility but that ammonium nitrate does not leave the AN Facility, the verification activities described below are not required. The reason for this is that, under Subtitle J, DHS is authorized only to regulate sales, transfers, and application services; how ammonium nitrate is stored, used, or processed within the confines of individual AN Facilities is not the subject of Subtitle J. As such, persons using or moving ammonium nitrate within an AN Facility, or obtaining possession of ammonium nitrate for use within the same AN Facility, would not need to be registered with DHS.

The application of ammonium nitrate fertilizer to property by an application service would not be regulated as a transfer under the Department's proposal. The Department does not believe that ammonium nitrate fertilizer is likely to be misused in acts of terrorism after it has been applied to agricultural property. Accordingly, farmers and other persons who have ammonium nitrate fertilizer spread on their agricultural property do not need to register with the Department, nor do their identities need to be verified by AN Sellers prior to their receipt of

application services.<sup>2</sup> Pursuant to the Department's proposal, however, transfer of ammonium nitrate from an AN Facility to a separate application service would be regulated. Regulation of application services is required under Subtitle J. See 6 U.S.C. 488(2). Specifically, the Department believes that regulation of transfers to application services is necessary in order to ensure that terrorists cannot easily obtain ammonium nitrate by infiltrating, posing as, or working for application services. The Department seeks comments on these proposals, and is particularly interested in comments discussing interactions between AN Facilities, application services, and ammonium nitrate end users.

Persons who transport ammonium nitrate from one AN Facility to a delivery location outside that AN Facility (e.g., truck drivers) conduct regulated transfers under this proposed rule, regardless of whether the AN Facility and delivery location are owned or operated by the same business or organization, and are therefore subject to this regulation. Ammonium nitrate transportation would be regulated in three ways under the proposed rule, depending upon particular transporters' relationships with AN Facilities or AN Purchasers. Any particular transportation would have to be regulated pursuant to one (and only one) of the three options listed immediately below.<sup>3</sup>

(1) *Transporters who are the agents of AN Purchasers.* Any person possessing valid photo identification could transport ammonium nitrate from an AN Facility to an AN Purchaser, pursuant to the Department's proposed rules for "AN Agents" as described in sections III.C.4 through III.C.9 of this NPRM. "AN Agent" transporters would not need to be registered with or vetted by DHS. Any AN Purchaser to which an "AN Agent" transporter delivers ammonium nitrate, however, would need to be registered with and vetted by the Department. Similarly, any AN Seller from whom an "AN Agent" transporter obtains ammonium nitrate

(i.e., any AN Seller who provides ammonium nitrate to be loaded into an "AN Agent" transporter's truck or other vehicle) would need to be registered with and vetted by the Department.

Before an "AN Agent" transporter can pick up or obtain possession of ammonium nitrate (i.e., before it can be loaded into his/her truck or other vehicle), his/her identity would need to be verified by the AN Facility from which he/she seeks to pick up ammonium nitrate, as described in sections III.C.8 and III.C.9 of this NPRM. Before an "AN Agent" transporter can pick up ammonium nitrate, the AN Facility from which he/she seeks to pick it up would also need to verify that he/she has legitimately been asked to serve as an "AN Agent" by a registered AN Purchaser. See sections III.C.7 and III.C.9 of this NPRM. Before an "AN Agent" transporter can pick up ammonium nitrate, the AN Facility from which he/she seeks to pick it up would also need to verify that the AN Purchaser to whom the "AN Agent" transporter plans to deliver the ammonium nitrate is properly registered with DHS. See sections III.C.4, 6, and 9 of this NPRM.

Under this proposed rule, an "AN Agent" transporter would not need to perform any identity verification or registration verification on the AN Purchaser to whom he/she delivers ammonium nitrate. Similarly, "AN Agent" transporters would not need to maintain any records or paperwork under this proposed rule.

(2) *Transporters who work for AN Facilities.* Transporters could work for or deliver ammonium nitrate on behalf of AN Facilities, and could register under the Department's proposed rules as AN Sellers for those facilities. See section III.B.3 of this NPRM. Transporters who register as AN Sellers would be vetted against the TSDB. See sections III.B.10 and III.B.11 of this NPRM.

Once registered as an AN Seller on behalf of a particular AN Facility, a transporter could pick up or obtain possession of ammonium nitrate from that AN Facility (i.e., it could be loaded into his/her truck or other vehicle at that AN Facility) without having to undergo the identity verification or AN Registered User Number verification activities described in sections III.C.3 through III.C.9 of this NPRM. Before a transporter who is registered as an AN Seller delivers or drops off ammonium nitrate to an AN Purchaser, however, he/she (or other registered employees of the AN Facility with which he/she is associated) would have to conduct registration verification and

identification verification on the AN Purchaser receiving the ammonium nitrate. See sections III.C.3 through III.C.9 of this NPRM. The AN Facility with which the transporter is associated would also have to maintain records of the transporter's delivery. See section III.D of this NPRM.

(3) *Independent transporters.* Transporters who fit into neither of the previous two categories would be regulated as both AN Purchasers and AN Sellers under the Department's proposed rule. As such, they would have to register with the Department and be vetted against the TSDB. See sections III.B.10 and III.B.11 of this NPRM. Any AN Seller from whom an independent transporter picks up or obtains ammonium nitrate (i.e., any AN Seller who provides ammonium nitrate to be loaded into the independent transporter's truck or other vehicle) would also need to be registered with and vetted by the Department. Similarly, any AN Purchaser to whom an independent transporter delivers ammonium nitrate would also need to be registered with and vetted by the Department.

Independent transporters would need to be registered as AN Purchasers in order to pick up or obtain ammonium nitrate (i.e., in order to have it loaded into their trucks or other vehicles). Before an independent transporter can pick up or obtain possession of ammonium nitrate (i.e., before it can be loaded into his/her truck or other vehicle), his/her identity would need to be verified and his/her AN Registered User Number would need to be verified by the AN Facility from which he/she seeks to pick up or obtain ammonium nitrate. See sections III.C.4, III.C.5, and III.C.9 of this NPRM.

Independent transporters would also need to be registered as AN Sellers in order to deliver ammonium nitrate to other AN Purchasers. Before an independent transporter delivers or drops off ammonium nitrate to an AN Purchaser, he/she (or other employees registered on behalf of his/her organization) would have to conduct a registration verification and identity verification on the AN Purchaser receiving the ammonium nitrate. See sections III.C.3 through III.C.9 of this NPRM. The AN Facility with which the independent transporter is associated would also have to maintain records of the transporter's delivery. See section III.D of this NPRM.

The Department is interested in comments addressing coverage of truck drivers and other transporters of ammonium nitrate. The Department is particularly interested in comments

<sup>2</sup> Persons who perform application services, however, must be registered with DHS under the proposed rule. For elaboration on this registration requirement, see section 31.210(c) of the proposed rule and see sections III.B.2 and 3 of this NPRM.

<sup>3</sup> Transporters of ammonium nitrate can also be subject to other Federal and State regulations regarding the transportation of hazardous materials. Registration and compliance with DHS's proposed Ammonium Nitrate Security Program would not relieve transporters of duties or registration requirements under USCG, TSA, or DOT rules, or under other Federal or State programs. See sections II.D.3 and II.D.4 of this document for descriptions of other select rules and programs.

addressing transporters' relationships to AN Facilities and AN Purchasers, and addressing transporters' abilities to perform the activities required of regulated persons. The Department specifically requests comments addressing the three types of transportation arrangements described above, including comments discussing whether any particular types of transportation arrangements should be exempt from proposed regulatory requirements, and if so, discussing why particular transportation arrangements should be exempt.

DHS proposes that transportation of ammonium nitrate where possession moves between different AN Facilities or other locations would be regulated as a transfer. Both of these types of transfers would require all the registration, verification, and recordkeeping activities required of transfers elsewhere in this NPRM. A person delivering ammonium nitrate from one AN Facility to another location would be regulated as part of one of the three transporter categories listed above, regardless of whether that person's delivery location is part of the same company or business as the AN Facility from which he/she obtains the ammonium nitrate transported.

By proposing to require that transportation between related business entities qualifies as a regulated transfer of ammonium nitrate, DHS would ensure that all entities from which transportation of ammonium nitrate originates have AN Registered Users on staff who are screened for terrorist ties who can be responsible for carrying out the security requirements of Subtitle J. Likewise, by proposing to require that transportation between related business entities qualifies as a regulated transfer of ammonium nitrate, DHS would also ensure that all entities receiving shipments of ammonium nitrate have AN Registered Users on staff who are screened for terrorist ties and who can be responsible for carrying out the security requirements of Subtitle J. Similarly, by proposing to require that transportation between related business entities qualifies as a regulated transfer of ammonium nitrate, DHS would also ensure that intra-company transportation of ammonium nitrate is conducted by AN Registered Users or "AN Agents." These features of the Department's proposed rule would help to ensure that persons screened for terrorist ties (or their agents) would be responsible for a given company's or business's ammonium nitrate during times when that ammonium nitrate might be most vulnerable to misappropriation.

The Department seeks comments on the proposal that transportation of ammonium nitrate would be regulated where possession moves between different locations but where ownership is not transferred (*i.e.*, where transfer takes place within a single corporate entity). DHS realizes, however, that this proposal could have a significant impact on businesses with multiple locations, and that it might not increase ammonium nitrate security for every AN Facility or entity to which it would apply. Accordingly, the Department seeks comments on this proposal. DHS also seeks comments suggesting alternative ways in which Subtitle J's requirements regarding the regulation of ammonium nitrate transfers could be achieved. The Department is interested in comments generally describing the organizational structures and transportation needs of the companies or other entities owning or operating AN Facilities, and in comments addressing whether transportation between locations owned or operated under the same corporate structure should be exempt from coverage under the Ammonium Nitrate Security Program.

### 3. Required Verification Activities

Based on statutory requirements and the Department's understanding of the ways in which sales and transfers of ammonium nitrate typically occur, the Department is proposing to require that an AN Seller perform the specific verification activities discussed below for each sale or transfer of ammonium nitrate.

The AN Seller would always be required to verify the currency and authenticity of the prospective AN Purchaser's AN Registered User Number.

The AN Seller would be required to verify the prospective AN Purchaser's identity as specified by DHS. The manner of verification of a prospective AN Purchaser's identity would vary depending on whether or not the AN Purchaser has opted to use an agent (an "AN Agent") to procure ammonium nitrate for him/her. If the AN Purchaser opted not to use an agent, then the AN Seller verifies the AN Purchaser's identity based upon the visual check of the AN Purchaser's photo identification. If the AN Purchaser opted to use an agent, then the AN Seller verifies the AN Purchaser's identity by submitting certain information provided by the AN Purchaser to the Department for comparison against information contained in the AN Purchaser's AN Registered User Number application.

In the event that a prospective AN Purchaser uses an agent to complete the

transaction, the AN Seller would also be required to verify both (1) the agent's identity based upon a visual check of the agent's photo identification, and (2) that the agent is acting on the approved AN Purchaser's behalf.

Each of these required verification activities is described in greater detail in the following sections of the NPRM. Although the Department proposes to require these verification activities for sales and transfers of ammonium nitrate, DHS proposes not to require these verification activities prior to provision of ammonium nitrate application services. The Department seeks comments on its proposal not to require verification activities prior to provision of ammonium nitrate application services.

### 4. Verification of the Currency and Authenticity of a Prospective AN Purchaser's AN Registered User Number

In order to bolster the effectiveness of AN Registered User Numbers in preventing the misappropriation of ammonium nitrate, DHS proposes that the AN Seller will be required to verify the currency and authenticity of a prospective AN Purchaser's AN Registered User Number prior to completing a sale or transfer of ammonium nitrate. DHS proposes in section 31.305(a) to provide each AN Seller the capability to verify the currency and authenticity of a prospective AN Purchaser's AN Registered User Number either electronically through a web portal designed by the Department (the "Purchaser Verification Portal") or telephonically through a call center maintained by the Department (the "Purchaser Verification Call Center"). The Department proposes in section 31.305(a)(3) to compare the prospective AN Purchaser's name and AN Registered User Number, which a prospective AN Purchaser would be required to provide an AN Seller for submission to DHS, to information contained in the Department's AN Registered User database, and to provide rapid confirmation or rejection of the prospective AN Purchaser's information to the AN Seller via the same mechanism (*i.e.*, the Purchaser Verification Portal or the Purchaser Verification Call Center). This approach provides a reasonable degree of confidence as to the currency and authenticity of the AN Purchaser's AN Registered User Number. Both the proposed Purchaser Verification Portal and the proposed Purchaser Verification Call Center are described in greater detail below.

Verification of a prospective AN Purchaser's AN Registered User Number would be required regardless of whether or not the AN Purchaser opts to use an agent on his or her behalf to take possession of ammonium nitrate.

5. Verification of a Prospective AN Purchaser's Identity When the AN Purchaser Opts Not To Use an Agent

Consistent with 6 U.S.C. 488a(e)(2)(D), the Department proposes that the AN Seller will be required to verify the prospective AN Purchaser's identity. If the AN Purchaser opts not to use an agent, DHS proposes in section 31.305(b) that the AN Seller would be required to verify, by performing a visual check of a photo identification document such as a driver's license or passport, the identity of the AN Purchaser no later than when the AN Purchaser directly takes possession of ammonium nitrate from the AN Seller at the completion of the sale or transfer.

The Department proposes using a definition of "photo identification document" similar to the definition used by the Department's Secure Flight Program, to establish what qualifies as an acceptable form of identification for this verification process. Specifically, in section 31.105, the Department proposes defining "photo identification document" as "[a]ny of the following documents containing a unique document number: (1) An unexpired passport issued by a foreign government which contains a photograph; or (2) An unexpired document issued by a U.S. Federal, State, or tribal government that includes the following information for the person: (i) Full name; (ii) date of birth; and (iii) photograph; or (3) Such other documents that the Department may designate as valid identification documents." *Cf.* 49 CFR 1560.3. The Department also assumes that each AN Purchaser and each AN Agent will possess a photo identification document. The Department seeks comments on this proposed requirement and assumption, including comment on the forms of identification that should be acceptable for purposes of the visual identification verification check.

6. Verification of a Prospective AN Purchaser's Identity When the AN Purchaser Opts to Use an Agent

Consistent with 6 U.S.C. 488a(e)(2)(D), the Department proposes in section 31.310(a) that the AN Seller will be required to verify the prospective AN Purchaser's identity with DHS when the prospective AN Purchaser chooses to use an agent to take possession of ammonium nitrate. Specifically, before completing a sale or

transfer of ammonium nitrate the AN Seller would have to provide certain prospective AN Purchaser information (e.g., name; photo identification document number; AN Registered User Number) to DHS either electronically through the Purchaser Verification Portal or telephonically through the Purchaser Verification Call Center. The Department proposes to compare this information, which a prospective AN Purchaser would be required to provide to an AN Seller for submission to the Department, to information contained in the Department's AN Registered User Database. The Department would provide rapid confirmation or rejection of the prospective AN Purchaser's information to the AN Seller via the same mechanism (i.e., the Purchaser Verification Portal or the Purchaser Verification Call Center). The Department believes that this confirmation or rejection would take about the same amount of time as it takes merchants to receive credit card authorizations at retail stores.

This approach would enable use of an agent when it is not possible to verify the identity of the AN Purchaser in person (i.e., by conducting a visual inspection of the photo identification of the AN Purchaser and comparing the photo identification with the AN Purchaser physically present). The Department seeks comments on this approach, including comments addressing whether AN Purchasers would be likely to provide identity verification information to AN Sellers themselves (e.g., by providing this information to AN Sellers over the telephone), or whether AN Purchasers would be likely to ask their agents to provide this information to AN Sellers in person. DHS also seeks comments on the advisability, costs, and benefits of enabling agents to provide AN Purchasers' identity verification information directly to AN Sellers, and seeks comments on possible alternative methods that could be employed to verify AN Purchasers' identities in sales or transfers involving AN Agents.

Both the proposed Purchaser Verification Portal and the proposed Purchaser Verification Call Center are described in greater detail below.

7. For Sales Involving Agents, Verification That the Agent Is Acting on Behalf of the AN Purchaser

Subtitle J limits registration and vetting requirements to AN Purchasers, and does not extend registration and vetting requirements to the agents of AN Purchasers. *See* 6 U.S.C. 488a(d) and 6 U.S.C. 488a(e). In order to help minimize the likelihood that agents

would be used to circumvent the intentions of Subtitle J, the Department believes it is imperative for AN Sellers to ensure that an agent is acting in the direction of a registered AN Purchaser before the AN Seller transfers possession of ammonium nitrate to that agent. To accomplish this, the Department is considering various approaches:

(1) Requiring AN Purchasers to submit the names of their agents to DHS via the AN User Registration Portal, and requiring the AN Seller to confirm with DHS, prior to transferring possession of ammonium nitrate to an agent, that the name of that agent has been previously submitted to DHS by the relevant AN Purchaser.

(2) Requiring the AN Seller to orally confirm with the prospective AN Purchaser prior to each transfer of ammonium nitrate that the agent is acting on behalf of the AN Purchaser.

(3) Allowing both options, whereby an AN Seller first should check with DHS to see if the prospective AN Purchaser has submitted the name of the agent to DHS. If not, then the AN Seller would be required to orally confirm with the prospective AN Purchaser that the agent is acting on his/her behalf. DHS proposes this third approach in section 31.310(b) of the proposed rule.

Under the first approach, each AN Purchaser would be required to provide to DHS the names of any agents that might act on his/her behalf at the point of sale. AN Purchasers would submit names of agents to DHS via the AN User Registration Portal. An AN Purchaser could submit an agent's name when he/she applies for an AN Registered User Number or at any other time prior to conducting a purchase involving that agent. Then, prior to transferring possession of ammonium nitrate to an agent, an AN Seller would need to verify with the Department that the prospective AN Purchaser has designated the agent as an approved agent to represent the AN Purchaser at the point of sale. This verification would occur through the same mechanism that is used for the other prospective AN Purchaser identity verification activities (i.e., the Purchaser Verification Portal or the Purchaser Verification Call Center). Note, however, that agent information that the AN Purchaser and AN Sellers provided to the Department would not be vetted against the TSDB or otherwise checked by the Department; rather, it would simply be maintained in the AN Registered User Database as a data field linked to the AN Purchaser for use in the agent verification process.

Under the second approach, the Department would require an AN Seller to verify with the prospective AN Purchaser that the agent is actually acting on behalf of the prospective AN Purchaser for each specific transaction. Much like the other verification activities contained in the proposed rule, this could occur at the time the prospective AN Purchaser places the order, when the agent arrives to take possession of ammonium nitrate, or any other time, so long as it occurs prior to the AN Seller transferring possession of ammonium nitrate to the prospective AN Purchaser's agent. Note, if this approach were adopted, the Department would propose requiring this confirmation to occur for each transaction/occurrence in which an agent is taking possession of ammonium nitrate; a blanket verification of an agent by an AN Purchaser would not be acceptable. Additionally, as an e-mail or letter can be easily forged, under this approach the Department would require that the AN Seller receive this verification orally (*e.g.*, in person, telephonically) from the prospective AN Purchaser.

The third approach—the option the Department proposes to use in this NPRM—is a combination of the first two approaches. Specifically, AN Purchasers would be expected to provide the Department with the names of their agent(s), and an AN Seller would be expected to verify either through the Purchaser Verification Portal or Purchaser Verification Call Center that the agent information has been provided by the AN Purchaser to the Department. As opposed to the first approach under which a sale cannot occur unless the agent's name has been provided to the Department by the prospective AN Purchaser, this third option would allow the AN Seller to complete a sale or transfer after either (1) verifying that the agent has been designated by the prospective AN Purchaser through the Purchaser Verification Portal or Purchaser Verification Call Center, or (2) orally confirming with the prospective AN Purchaser that the agent is acting on the prospective AN Purchaser's behalf for the sale or transfer at issue. The Department expects that in the majority of cases, this oral confirmation would occur telephonically. This third option has the benefit of minimizing the point of sale impact of the agent verification process while allowing a means for a sale or transfer to be completed even if a prospective AN Purchaser forgets or is otherwise unable to provide the Department with the agent's name prior to using the agent at the point of sale.

For these reasons, the Department proposes this third approach.

If DHS implements either the first approach or the third approach in an Ammonium Nitrate Security Program final rule, the Department will construct the AN User Registration Portal such that AN Purchasers could submit the names of their agents to DHS through that portal. If so, DHS would require AN Purchasers to notify agents that their names could be submitted to DHS in this manner. DHS seeks public comment on how such notification should be carried out, if the Department implements either the first approach or the third approach.

The Department seeks comment on the benefits, costs, economic impacts, and practicality of all these approaches, as well as any potential alternate approaches for verifying that an AN Agent is acting on behalf of a prospective AN Purchaser.

#### 8. Verification of the Agent's Identity Based on the Visual Check of the Agent's Photo Identification

Consistent with 6 U.S.C. 488a(e)(2)(D), DHS proposes in section 31.310(c)(1) that the AN Seller would be required to verify, by performing a visual check of a photo identification document such as a driver's license or passport, the identity of the agent taking possession of ammonium nitrate from the AN Seller at the completion of a sale or transfer. This visual check would mirror the process and requirements used by the AN Seller when performing a visual check on an AN Purchaser, when an AN Purchaser takes possession of ammonium nitrate.

#### 9. Timing of Verification Activities

All of the aforementioned verification activities would be required to occur before the AN Seller transfers possession of ammonium nitrate to the prospective AN Purchaser or the agent acting on the prospective AN Purchaser's behalf. Outside of that requirement, the time at which the AN Seller performs the verification activities would be entirely within the discretion of the AN Seller. For instance, in a situation where the AN Purchaser places an advance order for ammonium nitrate to be picked up at a later date, the AN Seller may perform these activities at the time of sale or at the time of transfer of possession.

The proposed rule would regulate all transfers of ammonium nitrate, including both transfers that involve payments or sales, and transfers that do not involve payments or sales. Note that AN Sellers may transfer possession of ammonium nitrate to AN Purchasers or

their agents only after the verification activities discussed above have been completed. Payment for transfer of possession may happen at any time, either before or after verification activities have been completed.

#### 10. Departmental Role in Verification Process

As part of the verification process, the Department proposes to require AN Sellers to provide the Department with sufficient information to verify (1) the currency and authenticity of prospective AN Purchasers' AN Registered User Numbers, and (2) prospective AN Purchasers' identities when AN Purchasers use agents. The Department also proposes to enable AN Sellers to verify through DHS, where applicable, that prospective AN Purchasers have submitted the names of the agents acting on their behalfs to the Department. To help AN Sellers accomplish this, the Department is considering developing a secure AN Purchaser verification web portal ("Purchaser Verification Portal") and a call center ("Purchaser Verification Call Center") through which AN Sellers can submit information to the Department that will allow the Department to nearly immediately (1) Verify or disaffirm prospective AN Purchasers' AN Registered User Numbers, (2) verify or disaffirm prospective AN Purchasers' identities, and, where applicable, (3) verify or disaffirm the preapproval of agents.

#### 11. Purchaser Verification Portal

The first option the Department is considering is to develop a Purchaser Verification Portal that would be available via the Internet to registered AN Sellers only. To gain access to the portal, AN sellers would be asked to provide their AN Registered User Number, a password, and potentially other identifying information. The Department proposes in sections 31.305 and 31.310 that, upon accessing the portal, an AN Seller would enter into the system, at a minimum, the prospective AN Purchaser's name and AN Registered User Number to verify the prospective AN Purchaser's AN Registered User Number. If the prospective AN Purchaser uses an agent, then the AN Seller would enter into the system the prospective AN Purchaser's photo identification document number (along with additional photo identification document information, such as type of photo identification document, and photo identification document issuing entity), to aid in verifying the prospective AN Purchaser's identity. This information



should allow the Department to verify for the AN Seller that the prospective AN Purchaser is who he/she claims to be and that he/she possesses a valid AN Registered User Number. The Department is interested in receiving comments on the information it proposes to collect for AN Purchaser verification purposes, including specific comments on potential photo identification document numbers that the Department may collect, such as driver's license or passport numbers.

The Department considered requiring individuals' Social Security Numbers in lieu of photo identification document numbers. The Department believes, however, that photo identification document numbers are preferable to Social Security Numbers for two significant reasons. First, photo identification document numbers are typically contained on physical identification cards that include photographs that could be visually checked by AN Sellers. Second, use of photo identification document numbers would minimize the potential privacy impact on AN Purchasers of having to share their Social Security Numbers. The Department seeks comments on the costs and benefits of Social Security Number use.

The Department is also considering requiring AN Sellers to enter additional information into the Purchaser Verification Portal, such as each quantity of ammonium nitrate sold or transferred and each prospective AN Purchaser's proposed use of the ammonium nitrate to be procured. Such additional information could help strengthen the AN Purchaser identification process and facilitate the performance of compliance audits and inspections, and would generally help to prevent the misappropriation or use of ammonium nitrate in acts of terrorism. Comments on the utility of collecting additional information, as well as the types of information that it may be worthwhile for the Department to collect, are welcome.

The Department proposes that information entered into the Purchaser Verification Portal will be transmitted to the Department which, upon receipt, will check the information against the AN Registered User records maintained by the Department. The Department would electronically notify the AN Seller of the result once the Department (1) verifies or disaffirms the prospective AN Purchaser's identity (*i.e.*, determines whether the identifying information provided matches the information submitted in the prospective AN Purchaser's AN Registered User Number application), if appropriate, (2) verifies

that the prospective AN Purchaser's AN Registered User Number is current and authentic (*i.e.*, matches the AN Registered User Number assigned to the prospective AN Purchaser), and (3) verifies that the prospective AN Purchaser has listed his/her agent with the Department as authorized to act on his/her behalf, if appropriate.

To support recordkeeping requirements, the Department is considering providing to the AN Seller, along with its web verification notice, a confirmation number and/or printable web verification notice record receipt. For recordkeeping requirements, see sections III.C.4–8. Comments on the utility, benefits, and costs of providing either a confirmation number or printable record receipt via the Purchaser Verification Portal are welcome.

The Department proposes that if the Department notified an AN Seller that the identity and AN Registered User Number of a prospective AN Purchaser were verified, then the AN Seller would proceed with the second portion of the identity verification—a visual check of the identification document of the individual taking possession of the ammonium nitrate (*i.e.*, the AN Purchaser or, where applicable, his or her agent).

If the Department were to discover that either (1) the prospective AN Purchaser's identity does not match the information of record for the given AN Registered User Number, or (2) the AN Registered User Number provided by the prospective AN Purchaser is not current and authentic, then the Department would issue a notice to the AN Seller indicating that the sale or transfer of ammonium nitrate to the prospective AN Purchaser is not authorized. The Department anticipates that the confirmation or denial notice resulting from the web verification process will typically be sent to and received by the AN Seller quickly, much like how merchants receive approval or denial notices prior to authorizing purchases via credit card.

As mentioned earlier, the Department is aware that sales and transfers of ammonium nitrate occur in many different ways, and that AN Facilities' varying ammonium nitrate sales procedures can impact the timing and performance of verification activities. Depending on the structure of the transaction, the manner in which the AN Seller goes about verifying the prospective AN Purchaser's identity, AN Registered User Number, and use of an agent may vary. In all cases, DHS proposes that the AN Seller will complete these verifications prior to

transferring possession of ammonium nitrate.

The Department welcomes public comment on the overall effectiveness, propriety, benefits, and costs of these Purchaser Verification Portal identity and registration verification mechanisms, and also welcomes public comment on or suggestion of potential alternative methods for identity and registration verification.

## 12. Purchaser Verification Call Center

The second option the Department is considering is to develop a Purchaser Verification Call Center. The overall principle behind a call center verification system is similar to the principle behind the Purchaser Verification Portal—that is, a prospective AN Purchaser's identity (for sales involving an agent) and possession of a current and authentic AN Registered User Number could be verified quickly prior to the transfer of possession of ammonium nitrate through use of a call center verification system. Under this approach, AN Sellers would call a toll-free phone number established by the Department where they would either talk to a person or be led through a series of telephone tree menus. During the phone call, each AN Seller would be expected to provide, at a minimum, his/her name, his/her AN Registered User Number, and the prospective AN Purchaser's name, AN Registered User Number, and, for sales involving an agent, the AN Purchaser's photo identification document number. The Department is also considering requiring or enabling AN Sellers to provide additional information, such as the quantity and intended use of the ammonium nitrate being sold or transferred. The operator or automated telephone system would enter the information provided into the Department's Registered User database system, wait for electronic confirmation, and then provide verbal confirmation to the caller along with a confirmation number for that specific transaction.

A call center may be preferable to a web portal, as presumably all AN Facilities have telephones while not all AN Facilities have computers with Internet access, particularly at the point of sale. There are some potential disadvantages, though, including the likelihood that the call center approach would take more time per transaction than the web portal approach, and that it would be significantly more costly for the Department to establish and operate a call center.

### 13. Purchaser Verification Portal and Call Center

A third option is for the Department to establish both a Purchaser Verification Portal and a Purchaser Verification Call Center. This is the approach the Department is proposing in sections 31.305 and 31.310. This approach is identical to the Purchaser Verification Portal option described above, integrated with the Purchaser Verification Call Center option. The advantage of this alternative is that all AN Facilities would be accommodated—those with telephone access only and those with both telephone and Internet access who find the verification web portal option more efficient. This approach, however, would be the most costly of the alternatives for the Department to establish and operate.

As indicated in sections 31.305 and 31.310 of the proposed rule, DHS proposes that as part of the verification processes described in section III.C of this NPRM, AN Purchasers and/or AN Agents will be required to provide information to AN Facilities in order to enable use of the Purchaser Verification Portal or the Purchaser Verification Call Center. DHS will require AN Facilities to notify the AN Purchasers and AN Agents providing this information about why it is collected. DHS will also require AN Facilities to notify AN Purchasers and AN Agents that the information they provide may be shared with DHS. DHS seeks public comment on how such notifications should be carried out.

The Department welcomes public comment on the overall effectiveness and propriety of these alternative identity and registration verification mechanisms, and also welcomes public comment on or suggestion of potential alternative methods for identity and registration verification.

### 14. Suspicious Purchases and Attempted Purchases of Ammonium Nitrate

Subtitle J encourages AN Sellers to be wary of suspicious purchases and attempted purchases of ammonium nitrate. See 6 U.S.C. 488c(c)(1) and 6 U.S.C. 488f. To this end, Subtitle J encourages AN Sellers to exercise their commercial rights to deny the sale or transfer of ammonium nitrate to prospective AN Purchasers when prospective AN Purchasers attempt to purchase ammonium nitrate under “suspicious” circumstances. See 6 U.S.C. 488f. Furthermore, Subtitle J encourages AN Sellers to contact law enforcement entities, as appropriate, in

response to “suspicious” purchases or “suspicious” attempted purchases. See 6 U.S.C. 488c(c)(1)(A). Moreover, Subtitle J provides that if an AN Seller refuses to sell or transfer ammonium nitrate to any person, or in good faith discloses to the Department or appropriate law enforcement authorities the actual or attempted purchase or transfer of ammonium nitrate, based on a reasonable belief that the person seeking to purchase or transfer ammonium nitrate may use the ammonium nitrate to create an explosive device to be employed in an act of terrorism or for another unlawful purpose, the AN Seller shall not be liable in any civil action relating to that refusal to sell or that disclosure. See 6 U.S.C. 488f(a).

To assist AN Sellers in determining what a “suspicious” circumstance is and what appropriate responsive actions are, Subtitle J requires the Department to issue guidance addressing “suspicious” circumstances. See 6 U.S.C. 488c(c)(1). The Department will issue such guidance, along with other statutorily required guidance, along with the final rule implementing the Ammonium Nitrate Security Program. The Department welcomes public comment on topics to be addressed in this guidance, including comment on “suspicious” purchases and attempted purchases. The Department also welcomes public comment on the formats in which its guidance materials should be published and the means of dissemination of guidance materials.

#### *D. Recordkeeping (See Sections 31.315 and 31.515 of the Proposed Rule)*

##### 1. Overview

Pursuant to Subtitle J, AN Facilities must maintain records of each sale or transfer of ammonium nitrate for a two-year period beginning on the date of that sale or transfer. See 6 U.S.C. 488a(e)(1). AN Facilities must take reasonable actions to ensure the protection of the information included in such records. See 6 U.S.C. 488a(e)(3). 6 U.S.C. 488b authorizes DHS to inspect and audit AN Facility records for the purpose of monitoring compliance with Subtitle J or for the purpose of deterring or preventing the misappropriation or use of ammonium nitrate in acts of terrorism.

##### 2. Entities Responsible for Keeping Records

Pursuant to Subtitle J and section 31.315(a) of the proposed rule, AN Facility Representatives must ensure that records of each sale or transfer of ammonium nitrate are maintained. See

6 U.S.C. 488a(e)(1). As discussed above, the Department is aware that there are many types of facilities selling or transferring ammonium nitrate, including but not limited to corporations, partnerships, cooperatives, and sole proprietorships. For many of these organizational forms, it may not be reasonable to expect an AN Facility Representative to be engaged in or have direct oversight over recordkeeping at the AN Facility. In recognition of this, the Department is proposing that while a facility’s AN Facility Representative or Representatives would be responsible for their AN Facility’s compliance with the proposed rule’s recordkeeping requirements, any facility employee, regardless of whether or not he/she is a registered AN Seller, could perform recordkeeping activities on behalf of the facility. The Department, however, is proposing in sections 31.315(d) and (e) to require each AN Facility Representative to ensure that his/her facility maintains records in compliance with the rule. DHS welcomes public comment on the propriety and effect of this proposal.

AN Purchasers are under no obligation to maintain records pursuant to Subtitle J.

##### 3. Records To Be Kept

For each sale or transfer of ammonium nitrate, the Department is proposing in section 31.315(a) of the proposed rule to require that the records kept by the AN Facility include the date of sale/transfer; form and amount of payment; quantity of ammonium nitrate sold/transferred; type of packaging; delivery location; the name, address, telephone number, AN Registered User Number, and photo identification document information of the AN Purchaser to whom it was sold/transferred; and, if the AN Purchaser uses an agent at the point of sale, the name, address, telephone number, and photo identification document information of the agent acting on behalf of the AN Purchaser.

In addition to keeping records containing the information listed above, DHS proposes to require AN Facilities to maintain records related to the verification of a prospective AN Purchaser AN Registered User Number’s currency and authenticity, and verification of a prospective AN Purchaser’s and (where applicable) agent’s identity. These requirements are discussed in sections 31.315(a)(8) and (9) of the proposed rule. Such requirements are important to allow the Department to monitor compliance under the regulations, to deter or

prevent the misappropriation or use of ammonium nitrate in acts of terrorism, and to support the investigation of reported theft or loss of ammonium nitrate. The Department welcomes comment on the benefits and costs of maintaining records regarding the AN Purchaser (and, where applicable, agent) verification process.

In addition to the proposed records requirements discussed above, the Department also is considering requiring AN Facilities to keep photocopies of each individual AN Purchaser's or agent's photo identification document and/or printouts of the Department's electronic verification of the authenticity and currency of each individual's AN Registered User Number (if the Department decides to use the Purchaser Verification Portal). The Department is interested in receiving public comment regarding what types of records should be considered adequate records for the purpose of showing completed verification activities, as well as what the costs and benefits of generating and maintaining these records would be.

In addition to transaction records and verification records, there are a variety of other records that may be necessary for AN Facilities to maintain in order to support compliance monitoring by the Department. These include: (1) Maintenance by each AN Facility of copies of the AN Registered User Number certificates of the AN Facility Representatives, Designated AN Facility POC, and/or all other AN Sellers employed by the facility (note, this presumes that the Department does in fact decide to issue approved applicants certificates along with their AN Registered User Numbers); (2) copies of reports of theft or loss made to the Federal Government pursuant to Subtitle J; (3) any reports showing the reconciliation of sales/transfers and inventory; and (4) any orders or other correspondence issued by the Department to an AN Facility regarding activities regulated by Subtitle J. These records all may have value in monitoring compliance with the regulations or in deterring or preventing the misappropriation or use of ammonium nitrate in acts of terrorism. The Department is considering requiring AN Facilities to maintain these records, and welcomes public comment on the value of each and the costs associated with each.

As indicated in sections 31.315(b) and (c) of the proposed rule, DHS proposes that as part of ammonium nitrate sales or transfers AN Purchasers and/or AN Agents will be required to provide some

of the information listed in this section of the NPRM to AN Facilities in order to enable facility recordkeeping. DHS will require AN Facility personnel to notify the AN Purchasers and AN Agents providing this information about why it is collected. DHS will also require AN Facility personnel to notify AN Purchasers and AN Agents that the information they provide may be shared with DHS. DHS seeks public comment on how such notifications should be carried out.

#### 4. Length of Retention of Records

Subtitle J provides that each record of sale or transfer of ammonium nitrate must be maintained by the relevant AN Facility for at least two years from the date of the transaction that generates that record. *See* 6 U.S.C. 488a(e)(1)(A). For consistency purposes, in section 31.315(d) of the proposed rule the Department proposes that an AN Facility would be required to maintain for two years all records required under this rule. The Department seeks comments on this proposal.

#### 5. Format and Storage of Records

Pursuant to 6 U.S.C. 488a(e)(3), and as proposed in section 31.315(e), an AN Facility must take "reasonable actions" to ensure protection of the information included in records maintained pursuant to Subtitle J. Subtitle J, however, does not explicitly prescribe any format or storage requirements. In an effort to minimize the burden on regulated AN Facilities and to provide flexibility to allow AN Facilities to leverage existing recordkeeping efforts to meet this regulatory requirement, the Department proposes allowing AN Facilities to choose methods of records storage for themselves. The Department is considering, however, providing AN Facilities the capability to create and maintain appropriate records in the web-based Purchaser Verification Portal. This would give AN Facilities the opportunity to use the portal to store their records, but would not require them to do so. The Department welcomes comments on this proposal.

DHS proposes that AN Facilities be allowed to maintain records in paper or electronic format, and that AN Facilities may use whatever template or form they choose for individual records. An AN Facility simply would be required to ensure that its records contain all of the data required by the final rule implementing the Ammonium Nitrate Security Program, and to make the records available for inspection by DHS officials as described in section 31.515 of the proposed rule. DHS proposes that each AN Facility be required to make

records available within the specified timeframes, and to take reasonable actions to protect the records. The Department proposes allowing an AN Facility to maintain records onsite or offsite, so long as the records are made available for inspection when DHS inspectors arrive for inspections where the AN Facility has received prior notice of the inspection or within four hours of inspectors' arrivals for unannounced inspections.

The Department also proposes giving AN Facilities flexibility to determine what constitutes "reasonable actions" for ensuring the protection of records, and is considering defining "reasonable actions" as actions commensurate with the actions that an AN Facility would take to secure sensitive or confidential business records. Typical actions could include storage in locked file cabinets for paper recordkeeping or password-protecting files for electronic recordkeeping.

The Department welcomes public comment on the proposed record formatting options, security standards, and production timeframes, as well as any potential alternative approaches or additional requirements the Department should consider.

### *E. Reporting of Theft or Loss of Ammonium Nitrate (See Sections 31.400–31.405 of the Proposed Rule)*

#### 1. Overview

Pursuant to Subtitle J, any AN Facility Representative who has knowledge of theft or unexplained loss of ammonium nitrate is required to report such theft or loss to Federal law enforcement authorities within 24 hours of the time at which knowledge of theft or loss is acquired. *See* 6 U.S.C. 488d. The Department additionally encourages all other individuals who have possession of or control over ammonium nitrate to report any thefts or unexplained losses of ammonium nitrate of which they become aware. Voluntary reporting is provided for in section 31.405(b) of the proposed rule.

#### 2. Who Must Report Theft or Loss

Although any employee at an AN Facility may report a theft or loss of ammonium nitrate, DHS proposes in section 31.400 that it will be the responsibility of each facility's AN Facility Representatives to ensure that theft or loss from the facility is reported in a timely fashion. Additionally, while there is no legal requirement for AN Purchasers or agents acting on their behalf to report thefts or unexplained losses of ammonium nitrate, the Department encourages them to do so

using the same procedures that AN Facility personnel would use.

### 3. Level of Theft or Loss Warranting Reporting

Any time an AN Facility Representative or any other individual employed by an AN Facility comes to believe that a theft of ammonium nitrate has occurred, AN Facility Representatives would be responsible for ensuring that that theft is reported using the procedures set forth in section 31.400. Determining when to report a loss, however, is not as straightforward a proposition, because it is typical for small percentages of bulk ammonium nitrate to be "lost" as part of normal bulk ammonium nitrate industrial and shipping business practices. While individually such losses may tend to be de minimis, in the aggregate they may amount to large amounts of lost ammonium nitrate. The Department seeks not to unduly burden individuals involved in the manufacturing, storage, transportation, or use of bulk ammonium nitrate, but on the other hand does seek to impose loss reporting requirements which will aid in preventing misappropriation of ammonium nitrate. Accordingly, the Department proposes to require that AN Facility Representatives ensure that losses of ammonium nitrate from their facilities be reported using the procedures described below when those losses deviate from the amount of loss that typically occurs during routine production, storage, transportation, or use of ammonium nitrate.

The Department seeks public comment on its proposed approach to defining the circumstances under which a theft or loss would be required to be reported and whether the theft/loss reporting requirements should apply only to theft or loss of ammonium nitrate above a minimum threshold amount. If a minimum threshold amount should apply, the Department is also interested in receiving comments addressing the level at which this amount should be set. The Department is particularly interested in public comments addressing how theft/loss reporting requirements should vary, if at all, based on AN Facility business size or other AN Facility business characteristics.

### 4. Process for Reporting Theft or Loss

The Department proposes in section 31.405(a) to require reporting of theft/loss to ATF. The Department will coordinate with ATF to ensure proper tracking and coordination of reported ammonium nitrate thefts and losses; however, ATF, not the Department, will

conduct appropriate law enforcement actions in response to theft/loss reporting, due to ATF's unique explosives-related law enforcement mission.

The Department welcomes public comment on this proposal to leverage ATF's theft/loss reporting and response capabilities, and welcomes public comment on potential alternative reporting mechanisms. The Department also welcomes public comment on the information to be required as part of each theft/loss report. The Department proposes to require that each theft/loss report be made to ATF in a manner prescribed by DHS after consultation with ATF, and contain information similar to that currently required by ATF for reports of theft or loss of explosives. This likely would involve modified versions of the process and tools established by ATF in support of the ATF regulations regarding the reporting of theft or loss of explosive materials. *See generally* 27 CFR 555.30. ATF requires reporting of the theft or loss of explosives by telephoning a nationwide toll free number, followed up with submission to ATF of a completed form detailing the incident. The Department would work with ATF to determine the appropriate information to be reported and the proper template for a form specific to reporting the theft or loss of ammonium nitrate. The Department welcomes public comment on this proposed approach for reporting theft and loss of ammonium nitrate, and also welcomes public comment addressing any potential alternative approaches or additional requirements the Department should consider.

Although there is no statutory requirement for AN Facility Representatives or other registered individuals who have knowledge of thefts or unexplained losses to report such incidents to local law enforcement, the Department encourages AN Facilities and individuals to do so in addition to reporting the theft or loss to ATF.

#### *F. Inspections and Audits (See Sections 31.500–31.515 of the Proposed Rule)*

Subtitle J states that DHS "shall establish a process for the periodic inspection and auditing of the records maintained by owners of ammonium nitrate facilities for the purpose of monitoring compliance \* \* \* or for the purpose of deterring or preventing the misappropriation or use of ammonium nitrate in an act of terrorism." *See* 6 U.S.C. 488b. As part of these inspections and audits, the Department proposes to inspect and audit the records required

to be maintained under the "recordkeeping" requirements of the final rule implementing the Ammonium Nitrate Security Program. (See section III.D of this NPRM for discussion of proposed recordkeeping requirements.) The Department welcomes public comment on the types of records and other items or activities it should review during inspections or audits.

The Department proposes to conduct inspections at AN Facilities and/or any other locations where records subject to the inspection/audit requirements are located. The Department also proposes that it conduct inspections during AN Facilities' regular business hours except when warranted by exigent circumstances. The Department welcomes public comment on inspections, including comments addressing how often inspections should be undertaken.

Generally speaking, the Department will provide an AN Facility, via its Designated AN Facility POC, with a minimum of 24 hours notice prior to conducting an inspection or audit, as proposed in section 31.505(a). The Department, however, proposes to reserve the right to conduct audits or inspections without prior notice when warranted by exigent circumstances or when delay in conducting an inspection might be seriously detrimental to security, as described in sections 31.505(a)(1) and (2). Such inspections, conducted without prior notice, will require approval by a supervisory manager at DHS.

The Department has also considered not providing notice prior to conducting inspections or audits in order to align with inspections processes carried out by other agencies, such as ATF. The Department welcomes comments addressing how much notice, if any, should be provided to AN Facilities prior to inspections or audits, including comments addressing whether the Department should align its notice procedures with ATF's (or with any other entity's) notice procedures.

When prior notice of an inspection has been provided to an AN Facility, DHS expects that the facility will have all records required to be maintained by this rule available for review/inspection/audit at the time of arrival of inspectors, as proposed in section 31.515(a). In cases where the Department has initiated an inspection or audit without giving an AN Facility prior notice, the facility will be expected to make all records required to be maintained by the final ammonium nitrate rule available to inspectors within four hours of receipt of an inspector request to review/inspect/

audit such records, as proposed in section 31.515(b).

Inspections and audits would be conducted by DHS personnel or by other Federal, State, local, or tribal government personnel authorized to perform AN Facility inspections pursuant to this rule. The Department may conduct remote inspections and audits in addition to in-person inspections and audits, as proposed in sections 31.500(b), 31.505(b), and 31.515(c)–(d). The Department welcomes comments and suggestions as to when a remote inspection would be reasonable, cost effective, and of benefit to AN Facilities or the Department.

#### G. Guidance Materials and Posters

Under Subtitle J, the Department is required to develop and provide to members of the regulated community several types of guidance documents and materials. First, 6 U.S.C. 488a(i)(4)(C) requires the Department to issue to any individual who is denied an AN Registered User Number guidance on the procedures for appealing that denial. Second, 6 U.S.C. 488c(c)(1) requires the Department to make available to owners of AN Facilities guidance on the identification of suspicious ammonium nitrate purchases, transfers, attempted purchases, and attempted transfers, as well as guidance on appropriate actions to be taken by AN Facilities with respect to such suspicious activities. Additionally, 6 U.S.C. 488c(c)(3) requires the Department to make available materials suitable for posting at locations where ammonium nitrate is sold that notify prospective AN Purchasers of Subtitle J's recordkeeping requirements and the penalties for violating those requirements.

As the procedures and requirements that will be detailed in these materials are to a large degree dependent on the final rule for Subtitle J, the Department is still gathering information, input, and data, which it will use to assist in developing these guidance materials and posters. It is the Department's intent to work with the regulated community to determine appropriate content and means of dissemination for these guidance materials and posters. The Department welcomes comments from the public on these matters.

#### H. Civil Penalties, Civil Penalty Adjudications, and Civil Penalty Appeals (See Sections 31.600–31.735 of the Proposed Rule)

This section discusses proposed requirements for adjudication and appeal procedures for the issuance and assessment of civil penalties by the

Department under Subtitle J. An earlier section of this NPRM, section III.B.14, discusses proposed appeal rights and procedures for persons denied AN Registered User Numbers and for persons whose AN Registered User Numbers are revoked under Subtitle J. These two sets of procedures are mutually exclusive; the Department proposes that civil penalty adjudications and appeals would be governed only by the mechanisms described in this section, while registration and revocation appeals would be governed only by the appeals mechanisms described in section III.B of this NPRM.

The reason for this mutual exclusivity is because registration denials and revocations are fundamentally different from imposition of civil penalties under the Department's proposed rule. Under the Department's proposal, individuals or other entities will only be issued civil penalties for violating the rules of the Ammonium Nitrate Security Program. Individuals or other entities will not be issued civil penalties for having their registrations denied or revoked. Adjudication or appeal of civil penalties will thus involve assessment of whether or not individuals or other entities have violated the final Ammonium Nitrate Security Program rules. On the other hand, appeal of denial or revocation of registration numbers will involve review of the completeness and accuracy of registration applications, and review of TSDB vetting results and national security interests if applicable. The adjudication and appeal procedures listed in this section of the NPRM are intended to enable reviews of civil penalties and of alleged regulatory violations, while the appeal procedures listed in section III.B are intended to enable reviews of registration application denials and revocations of registration numbers.

The Department is authorized to assess civil penalties against persons violating the rules promulgated under Subtitle J. See 6 U.S.C. 488e(b). In section 31.600, the Department proposes that, upon becoming aware of regulatory violations, the Department would authorize and order civil penalties of up to \$50,000 per regulatory violation against violating persons and entities much in the same way as the CFATS rules enable it to authorize and order civil penalties against chemical facilities violating CFATS. Specifically, the Department proposes to issue Orders Assessing Civil Penalty against persons (and, as appropriate, against entities owning or operating AN Facilities) for violating these rules. The Department proposes in section 31.700(a) that

subject persons/entities shall have the option of initiating adjudicatory proceedings to challenge the propriety of the Department's determinations. The Department also proposes in section 31.735(a) that subject persons/entities may appeal adverse adjudication decisions. The Department welcomes public comment on these mechanisms, and welcomes suggestions of possible alternatives or modifications to them.

Subtitle J requires the Department to consider a number of factors in issuing and setting the amounts of civil penalties against persons violating Subtitle J and its implementing regulations. See 6 U.S.C. 488e(c). The Department proposes to consider the factors listed in section 31.605, among other factors as justice requires, in issuing and setting the amounts of civil penalties. The Department welcomes public comment on additional factors that it should consider in issuing and setting civil penalties, and also welcomes public comment on the size of the civil penalties it should issue for different types of regulatory violations.

Subtitle J also requires the Department to afford each person potentially subject to civil penalties the opportunity to defend himself in an administrative hearing to be held "in the county, parish, or incorporated city of residence of that person." See 6 U.S.C. 488e(d). As such, the Department proposes in section 31.725(b) to conduct all hearings and adjudications in the counties, parishes, or incorporated cities of residence of the persons or entities seeking those hearings and adjudications, unless those persons or entities waive this right. The Department believes that it may be more expeditious, from time to time, for the Department and for subject persons to conduct hearings and adjudications elsewhere, or to conduct them via teleconferencing or videoconferencing, and accordingly thinks it economical to all to offer subject persons this option. The Department welcomes public comment on the efficiency of allowing subject persons to waive the statutory right to local hearing and adjudication.

#### I. Consultation Requirements

6 U.S.C. 488a(g) requires the Department to "consult with the Secretary of Agriculture, States, and appropriate private sector entities, to ensure that the access of agricultural producers to ammonium nitrate is not unduly burdened." Similarly, 6 U.S.C. 488a(b) requires the Department to consult "with the heads of appropriate Federal departments and agencies (including the Secretary of Agriculture)" when establishing a threshold

percentage for ammonium nitrate in a substance. Finally, in 6 U.S.C. 488a(i)(4)(B), Congress directed the Department to consult with appropriate stakeholders when developing the process for appealing the denial of an application for an AN Registered User Number.

During the development of this NPRM, the Department has identified relevant points of contact for consultation purposes within numerous Federal, State, and private sector entities. For example, the U.S. Department of Agriculture (USDA) assisted the Department with gaining a better understanding of the potentially affected population, and with understanding how agricultural users acquire and use ammonium nitrate. The Explosives Unit at the FBI provided substantial insight into the detonability of ammonium nitrate and mixtures containing ammonium nitrate. The Office of Enforcement Programs and Services at ATF outlined how ATF regulates ammonium nitrate and ammonium nitrate explosive mixtures as well as how ATF manages the reporting of theft or loss of explosives. The Department also met with State fertilizer control officials from over a dozen States who provided significant insight into how ammonium nitrate is used within their States and how they currently regulate ammonium nitrate. The Department also held listening sessions with numerous industry associations representing members of the likely regulated community, as well as with individual producers, distributors, and users of ammonium nitrate.

Subsequent to the release of this NPRM, the Department will continue to consult with Federal, State, and private sector entities as it develops the final rule. The Department intends to hold meetings, open to the public and to Federal and State government entities, at various locations across the country in order to further consult with ammonium nitrate stakeholders. The Department intends to publish the dates, times, and locations of these public meetings in the **Federal Register**.

#### *J. Delegation of Authority*

The Department may enter into cooperative agreements with USDA or any State department of agriculture to carry out certain provisions of Subtitle J. See 6 U.S.C. 488c(a)(1). Subtitle J further requires the Department, at the request of a governor of a State, to delegate to that State authority to carry out the administration and enforcement of select portions of Subtitle J, “if the Secretary [of Homeland Security]

determines that the State is capable of satisfactorily carrying out such functions.” See 6 U.S.C. 488c(b)(2). If the Department delegates any functions to a State, “subject to the availability of appropriations \* \* \* the Secretary shall provide to that State sufficient funds to carry out the delegated functions.” See 6 U.S.C. 488c(b)(3).

In regards to delegation of its authority to individual States, the Department proposes the following process: If a State is interested in performing the administration and enforcement activities required by Subtitle J, the governor of the State would submit a written request to the Department asking for delegation of those authorities and articulating the State’s ability to “satisfactorily carry out such functions.” See 6 U.S.C. 488c(b)(2). Upon receipt of the request, the Department would evaluate whether the State is “capable of satisfactorily carrying out such functions” and, upon completion of the evaluation, would provide the State with a written response informing it of the Department’s determination. In order to make a fair evaluation, the Department is likely to request information from the State and consult with the State before a final determination is made.

#### **IV. Regulatory Analyses**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866, as supplemented by Executive Order 13563, Regulatory Planning and Review (58 FR 51735, October 4, 1993; 76 FR 18134, January 18, 2011), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires agencies to consider the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to assess the effect of regulatory changes on foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international trade standards where appropriate, as the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal

mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation).

#### *A. Executive Order 12866 and Executive Order 13563: Regulatory Planning and Review*

This proposed rule is an economically significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563, because it could result in the expenditure of over \$100 million in any one year. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB). The OMB Circular A–4 Accounting statement is included in the separate Regulatory Assessment.

A Regulatory Assessment, which more thoroughly explains the assumptions used to generate the estimated costs and benefits of this proposed rule, is available in the docket as indicated under the **ADDRESSES** section. Interested persons are invited to provide comment on all aspects of the Regulatory Assessment. Comments that will provide the most assistance to the Department with the rulemaking include the economic impact (both long-term and short-term, quantifiable and qualitative) of the implementation of Subtitle J; the monetary and other costs anticipated to be incurred by AN Facility Representatives, AN Sellers, AN Purchasers, and anyone else potentially impacted by Subtitle J, any distributional effects on U.S. citizens; and the security benefits of the rulemaking.

Comments containing trade secrets, confidential commercial or financial information, CVI, or SSI should be appropriately marked and submitted per the directions in section I of this NPRM (Public Participation) above.

#### **1. Cost Impacts**

DHS estimates the number of entities that purchase ammonium nitrate to range from 64,950 to 106,200. These entities include farms, fertilizer mixers, farm supply wholesalers and co-ops, golf courses, landscaping services, explosives distributors, mines, retail garden centers, and lab supply wholesalers. The Department estimates between 2,486 and 6,236 entities sell ammonium nitrate, many of which also purchase ammonium nitrate as well. Entities that sell ammonium nitrate include ammonium nitrate fertilizer and explosive manufacturers, fertilizer mixers, farm supply wholesalers and co-ops, retail garden centers, explosives distributors, fertilizer applicator

services, and lab supply wholesalers. Individuals or firms that provide transportation services within the distribution chain may be categorized as sellers, agents, or facilities depending upon their business relationship with the other parties to the transaction. The total number of potentially regulated farms and other businesses ranges from 64,986 to 106,236 (including overlap between the categories).

The cost of the Ammonium Nitrate Security Program ranges from \$300 million to \$1.041 billion over 10 years at a 7% discount rate. The primary estimate is the mean, which is \$670.6 million. For comparison, at a 3% discount rate, the cost of the program ranges from \$364.2 million to \$1.3 billion with a primary (mean) estimate of \$814 million. The average annualized cost for the program ranges from \$43 million to \$148 million (with a mean of \$96 million), also employing a 7% discount rate. The largest cost component of the proposed rule is related to the point of sale. The point of sale activities account for approximately 55% to 80% of the total program cost. This is followed by registration activities, recordkeeping, inspections/audits, and reporting theft/loss.

## 2. Benefits of the Ammonium Nitrate Security Program

This rule will help secure the nation's supply of ammonium nitrate. According to a U.S. Department of Justice report, "[t]he April 19, 1995, bombing of the Alfred P. Murrah Federal Building (Murrah Building) in Oklahoma City sent shock waves throughout America. The bombing took its toll in human life and property damage and changed the community's and the Nation's general sense of safety and security. The explosion rocked downtown Oklahoma City, reduced the north face of the Murrah Building to rubble, and dealt extensive damage to each of the nine floors as they collapsed into the center, pancaking one on top of the other. When the dust cleared, one-third of the building lay in ruins. The force of the blast damaged 324 surrounding buildings, overturned automobiles, touched off car fires, and blew out windows and doors in a 50-block area. News reports indicated the explosion was felt 55 miles from the site and registered 6.0 on the Richter scale." See "Responding to Terrorism Victims: Oklahoma City and Beyond," U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, October 2000, available at <http://www.ojp.usdoj.gov/ovc/publications/infores/respterrorism/executive.html> and <http://www.ojp.usdoj.gov/ovc/>

[publications/infores/respterrorism/chap1.html](http://www.ojp.usdoj.gov/ovc/publications/infores/respterrorism/chap1.html). The attack, which occurred 16 years ago, killed 168 people (167 individuals were killed by the explosion and 1 additional death of an emergency worker occurred during the rescue and recovery operation) and an additional 592 people suffered non-fatal injuries. See "Physical Injuries and Fatalities Resulting From the Oklahoma City Bombing," JAMA, August 7, 1996 Sue Mallonee, RN, MPH; Sheryll Shariat, MPH; Gail Stennies, MD, MPH; Rick Waxweiler, PhD; David Hogan, DO; Fred Jordan, MD, pp 382-387 available at: <http://jama.ama-assn.org/cgi/reprint/276/5/382>; <http://jama.ama-assn.org/cgi/content/abstract/276/5/382> (estimates of injuries differ by source; DHS used the detailed JAMA article as it was based on survey and interview data and has thorough documentation).

There are several key benefits of the Ammonium Nitrate Security Program proposed rule:

- The Ammonium Nitrate Security Program will standardize and build upon successful industry "know your customer" initiatives and state regulations to prevent the misappropriation of ammonium nitrate.
- The Ammonium Nitrate Security Program will provide timely, accurate vetting of persons wishing to possess and transfer ammonium nitrate. By requiring individuals to be vetted against the TSDB, known bad actors may be stopped from legally purchasing ammonium nitrate.
- The Ammonium Nitrate Security Program will allow AN Sellers to identify non-authorized persons and requires them to deny sale of ammonium nitrate to these persons. By complying with the point of sale requirements to verify the accuracy and currency of a potential AN Purchaser's AN Registered User Number and an inspection of his/her photo identification document, AN Sellers will have the knowledge to allow or deny sale of ammonium nitrate.
- The Ammonium Nitrate Security Program will eliminate gaps in Federal oversight of ammonium nitrate supplies used in explosives manufacturing.

To better inform the comparison of the costs of implementing the ammonium nitrate program in the proposed rule with the benefits to homeland security it will afford due to reduced risk of successful terror attack involving ammonium nitrate, DHS performed a break-even analysis. In this break-even analysis, DHS compared the annualized costs of the proposed rule to the expected benefits of preventing an ammonium nitrate based terrorist attack, such as the attack on the Murrah federal

building. In order to estimate the impact of this attack in dollar terms, DHS must assume a value per statistical life (VSL). The Department emphasizes this VSL is not an estimate of what a particular life may be worth, but is only an estimate what one would be willing to pay to receive a reduction in mortality risk. The Department is assuming a VSL of \$6 million, which is equivalent to saying someone is willing to pay \$6 to receive a one-in-a-million reduction in the risk of death or \$60 to receive a one-in-a-one-hundred-thousand reduction in the risk of death.

Applying the \$6 million VSL to the 168 deaths from the Murrah attack plus the cost of other expenditures that are directly related to the attack (such as the cost of replacing the Murrah Building), DHS estimates the cost to society of the Murrah attack to be approximately of \$1.35 billion (2010 dollars). As this proposed rule is expected to cost society approximately \$95.5 million annually, this proposed rule would be cost effective if it prevented one terrorist attack similar to the Murrah building attack every 14.1 years (\$1.35 billion attack cost/\$95.5 million annual rulemaking cost). See the Regulatory Assessment in the public docket for more information on this break-even analysis.

In addition to reducing the possibility of an ammonium nitrate-based terrorist attack, promulgating this rulemaking provides the benefit of allowing DHS to comply with the law. Subtitle J states the "Secretary shall 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." Section II.A of this preamble provides a more detailed background discussion of the regulatory requirements expressly contained in Subtitle J, such as the registration requirement for certain ammonium nitrate sellers and purchasers. DHS believes this rulemaking allows the Department to comply with the regulatory requirements of Subtitle J.

## B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to consider the potential impacts of their rules on small entities. The RFA covers a wide

range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Although DHS does not believe the proposed rule will have a significant economic impact on a substantial number of small entities, the agency has prepared an Initial Regulatory Flexibility Analysis (IRFA) for public review and comment. DHS requests comments on this IRFA and the potential impacts of the proposed rule on small entities. Below is a summary of the IRFA.

1. Reasons for and Objectives of the Proposed Rule

*Reason for the Proposed Rule.* Section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act amends the Homeland Security Act of 2002 and provides DHS with the authority 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.” For additional information on the security hazards presented by the use of ammonium nitrate, see sections II.D.1 and 2 of this preamble.

*Objective of the Proposed Rule.* This proposed rule aims to prohibit a known or suspected terrorist from purchasing or legally acquiring ammonium nitrate from an AN Facility. Additionally, only individuals favorably vetted by the Department will be able to legally

acquire ammonium nitrate above the threshold level proposed by this rule.

2. Affected Small Business Population and Estimated Impact of Compliance

At this time, DHS’s preliminary estimate of the number of establishments that either sell, purchase, or sell and purchase ammonium nitrate that will be covered by the Ammonium Nitrate Security Program rules range from 64,986 to 106,236 facilities. This estimate is DHS’s best estimate based on listening sessions with industry representatives and plant food control officials, consultation with other Federal agencies and departments (e.g., USDA), and research across available information provided by industry and governmental sources. During the ANPRM, DHS did not receive any information on small nonprofits or small governmental jurisdictions that might be directly regulated by this rule. However, some of the entity types identified in the analysis of purchasers are similar to activities that could be conducted by small nonprofits or small governmental jurisdictions. DHS believes impacts on small nonprofits or small governmental jurisdictions would be similar as any other purchaser in this analysis. DHS invites comments from any small nonprofit or small governmental jurisdiction that believes it is being directly regulated by this rule. After AN Sellers and AN Purchasers register with DHS there will be a better

understanding of how many and which specific AN Facilities will be subject to the requirements under the Ammonium Nitrate Security Program. Consequently, without the benefit of having the AN Registered User Number results, it is very difficult to know which AN Facilities will have to undergo the burden of verifying AN Registered User Numbers, and maintaining records of transactions involving ammonium nitrate. In addition, the Department has offered some degree of flexibility when choosing the method of verifying AN Registered User Numbers and maintaining records. DHS expects that AN Facilities will take full advantage of this flexibility in order to minimize the cost of this proposed rule to their operations.

3. Number of Small Entities That Purchase Ammonium Nitrate

The Small Business Administration (SBA) classifies farms as a small business if it has receipts less than \$750,000. The USDA Census of Agriculture provides data on the number of farms by economic class based on the market value of agricultural products sold (excluding government payments). The next table shows that 94.5% of farms had receipts of \$0.5 million or less; 97.4% of farms had receipts less than \$1.0 million. Thus, it is clear that the majority of farms are small entities. Comments are requested concerning the provided information.

NUMBER OF U.S. FARMS BY THE MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD [2007]

Market value of agricultural products sold (\$)	Number of farms	Percent of total
Less than \$1000 .....	499,880	22.7
\$1000–\$2,499 .....	270,712	12.3
\$2500–\$5,000 .....	246,309	11.2
\$5,000–\$9,999 .....	254,834	11.6
\$10,000–\$24,999 .....	274,274	12.4
\$25,000–49,999 .....	163,500	7.4
\$50,000–\$99,999 .....	129,124	5.9
\$100,000–\$249,000 .....	149,049	6.8
\$250,000–\$499,999 .....	96,251	4.4
\$500,000–\$999,999 .....	63,567	2.9
More than \$1,000,000 .....	57,292	2.6
<b>Total Farms .....</b>	<b>2,204,792</b>	<b>100.0</b>

Source: 2007 Census of Agriculture, USDA (Table 3—page 10).

The next two tables show the primary North American Industrial Classification System (NAICS) codes,

descriptions and SBA definitions for small entities that purchase ammonium nitrate. This comparison shows that the

majority of businesses likely to purchase ammonium nitrate are small entities.



PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY PURCHASE AMMONIUM  
NITRATE  
[Employee size]\*

NAICS	Description	Establishments by employee size						
		0-4	5-9	10-19	20-99	100-499	(Subtotal) < 499	500+
2121 .....	Coal Mining .....	194	96	100	233	149	772	375
	% of total .....	17%	8%	9%	20%	13%	67%	33%
2122 .....	Metal Mining .....	131	39	18	26	21	235	72
	% of total .....	43%	13%	6%	8%	7%	77%	23%
2123 .....	Nonmetallic Mineral Mining and Quar- rying.	1,434	666	603	877	501	4,081	1,743
	% of total .....	25%	11%	10%	15%	9%	70%	30%
325314 ...	Fertilizer (Mixing Only) Manufacturing ....	111	64	56	89	62	382	94
	% of total .....	23%	13%	12%	19%	13%	80%	20%
42491 ....	Farm Supplies Merchant Wholesalers ....	2,473	983	673	948	765	5,842	1,901
	% of total .....	32%	13%	9%	12%	10%	76%	25%
42469 ....	Other Chemical & Allied Products Mer- chant Wholesalers.	3,352	1,155	846	1,082	648	7,083	2,405
	% of total .....	35%	12%	9%	11%	7%	74%	25%

\* Totals may be affected by rounding.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY PURCHASE AMMONIUM  
NITRATE  
[Sales size]\*

NAICS	Description	Establishments by sales size						
		<\$0.1 mill	\$.1-0.5 mill	\$0.5-1 mill	\$1-5 mill	\$5-10 mill	(Subtotal) < \$10 mill	> \$10 mill
213113 ...	Support services for Coal Mining .....	47	98	38	101	16	300	46
	% of total .....	14%	28%	11%	29%	5%	87%	13%
213114 ...	Support services for Metal Mining .....	19	26	14	20	.....	79	104
	% of total .....	10%	14%	8%	11%	0%	43%	57%
213115 ...	Support services for Nonmetallic Mining	24	47	17	40	8	136	15
	% of total .....	16%	31%	11%	26%	5%	89%	10%
44422 ....	Nursery, Garden Center, and Farm Sup- ply Stores.	1,872	5,004	2,675	3,941	830	14,322	3,461
	% of total .....	11%	28%	15%	22%	5%	81%	20%
56173 ....	Landscaping Services .....	23,993	36,446	6,935	5,095	490	72,959	1,249
	% of total .....	32%	49%	9%	7%	1%	98%	1%
71391 ....	Golf Courses & Country Clubs .....	1,172	3,802	2,041	3,333	588	10,936	906
	% of total .....	10%	32%	17%	28%	5%	92%	7%

\* Totals may be affected by rounding.

4. Number of Small Entities That Sell Ammonium Nitrate

In addition to regulating AN Purchasers, the proposed rule places additional burdens on entities that sell ammonium nitrate. These additional burdens include registration for AN

Registered User Number, verifying AN Purchasers' AN Registered User Number and photo ID at the point of sale, maintaining records of point of sale transactions for two years and reporting theft and loss of AN. AN Facilities that are in the middle of the supply chain from manufacturer to end-use consumer

both sell and purchase ammonium nitrate. The primary NAICS codes, descriptions, and definitions (both employee size and revenues) for small entities that sell ammonium nitrate are shown in the next two tables. The SBA classifies the majority of these AN Facilities as small entities.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY SELL AMMONIUM NITRATE  
[Employee size]\*

NAICS	Description	Establishments by employee size						
		0-4	5-9	10-19	20-99	100-499	(Subtotal) < 499	500+
325311 ...	Nitrogenous Fertilizer Manufacturing .....	46	19	23	15	11	114	31
	% of total .....	32%	13%	16%	10%	8%	79%	21%
325314 ...	Fertilizer (Mixing Only) Manufacturing ....	111	64	56	89	62	382	94
	% of total .....	23%	13%	12%	19%	13%	80%	20%
32592 ....	Explosives Manufacturing .....	8	4	10	16	13	51	31

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY SELL AMMONIUM NITRATE—  
Continued

[Employee size]\*

NAICS	Description	Establishments by employee size						
		0–4	5–9	10–19	20–99	100–499	(Subtotal) < 499	500+
42291 .....	% of total .....	10%	5%	12%	20%	16%	63%	38%
	Farm Supplies Merchant Wholesalers ....	2,473	983	673	948	765	5,842	1,901
42269 .....	% of total .....	32%	13%	9%	12%	10%	76%	25%
	Other Chemical and Allied Products Merchant Wholesalers.	3,352	1,155	846	1,082	648	7,083	2,405
	% of total .....	35%	12%	9%	11%	7%	74%	25%

\* Totals may be affected by rounding.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY SELL AMMONIUM NITRATE

[Sales size]\*

NAICS	Description	Establishments by sales size						> \$10 mill
		< \$0.1 mill	\$.1–0.5 mill	\$0.5–1 mill	\$1.5 mill	\$5–10 mill	(subtotal) < \$10 mill	
115112 ...	Soil Preparation, Planting, and Cultivating.	509	992	413	395	30	2,339	86
	% of total .....	21%	41%	18%	16%	1%	96%	4%
44422 .....	Nursery, Garden Center, and Farm Supply Stores.	1,872	5,004	2,675	3,941	830	14,322	3,461
	% of total .....	11%	28%	15%	22%	5%	81%	20%

\* Totals may be affected by rounding.

5. Alternatives Considered

The Department considered several alternatives when developing the Ammonium Nitrate Security Program proposed rule. The alternatives considered were: (a) Register individuals applying for an AN Registered User Number using a paper application (via facsimile or the U.S. mail) rather than through in person application at a local Cooperative Extension office or only through a web-based portal; (b) verify AN Purchasers through both an Internet based verification portal and call center rather than only a verification portal or call center; (c) communicate with applicants for an AN Registered User Number through U.S. Mail rather than only through e-mail or a secure web-based portal; (d) establish a specific capability within the Department to receive, process, and respond to reports of theft or loss rather than leverage a similar capability which already exists with the ATF; (e) require AN Facilities to maintain records electronically in a central database provided by the Department rather than providing flexibility to the AN Facility to maintain their own records either in paper or electronically; (f) require agents to register with the Department prior to the sale or transfer of ammonium nitrate involving an agent rather than allow

oral confirmation of the agent with the AN Purchaser on whose behalf the agent is working; and (g) exempt explosives from this regulation rather than not exempting them. Each of these alternatives is discussed below.

a. Registration

The Department considered using one or more of three potential approaches for AN Seller and AN Purchaser registration: paper applications submitted via facsimile or U.S. Mail; electronic applications via a web-based portal; or telephone application for a limited number of applicants. The Department is proposing the use of a web-based portal—the “AN User Registration Portal”—as the sole means for registering to be an AN Purchaser or AN Seller.

1. Registration through Facsimile or U.S. Mail

Paper registration via facsimile or U.S. Mail would require potential applicants to obtain and fill out an application form and fax it or mail it to the Department. The Department would then process the application and communicate the results back to the potential applicant via facsimile or U.S. Mail.

Registration through facsimile or U.S. Mail would have costs to both the industry and the Department. For the

industry, each prospective AN Seller or AN Purchaser applying for an AN Registered User Number would have to spend approximately 45 minutes reading about the rule and procedures for registration before completing the registration application. If the application is paper-based, DHS assumes it will take each applicant about 15 minutes to complete a paper application, fax or mail it to the Department, and file it for his or her records. For the Department, supporting paper submission of application materials via facsimile or U.S. Mail would require the hiring of staff to manually extract information from the submitted application form for performance of the TSDB check and submission into a registered user database maintained by the Department. The paper application process was not pursued or developed, as the Department believes that it would result in unacceptably lengthy application processing times, and unacceptable delays between submission of applications and receipt of AN Registered User Numbers.

2. Registration Through Local Cooperative Extension Office

During the ANPRM DHS received the suggestion to consider the USDA extension offices as an application

method. The USDA provided explanations why this was not feasible.

3. Registration Through the AN User Registration Portal

Through a Department developed website, potential applicants could apply for an AN Registered User Number online. With the widespread availability of the Internet, applicants could apply from home, a public library, or place of employment, for instance. Further, nothing in the proposed rule would prohibit an AN Facility from providing an Internet access point to potential applicants for use when applying for AN Registered User Numbers. Potential applicants would go to the Department's website and access the AN User Registration Portal. There, potential applicants would apply online for an AN Registered User Number and submit their application directly to the Department. The Department would receive the information, process it, and communicate back to the applicant via e-mail.

Online registration through a Department developed, operated, and maintained website would have costs to both the industry and the Department. Each prospective AN Seller or AN Purchaser applying for an AN Registered User Number will spend approximately 45 minutes reading about the rule and procedures for registration before completing the registration application. If the application is online, the Department assumes it will take the

applicant approximately 15 minutes to find the website, enter information, submit the information to the Department, and print and file a copy for his or her records. Both the individual applicant and government costs are developed in the relevant sections of the evaluation. The Department intends to leverage the Chemical Security Assessment Tool developed and deployed in support of CFATS, thus significantly lowering both the initial development costs and the annual operating and maintenance costs.

The Department is proposing that registration be done through an online web portal. See section III.B.1 of this preamble. While not every potential applicant may have personal access to the Internet, the Internet is widely available, and the Department believes that there are significant benefits to using an online approach. The benefits to both the applicant and the Department of an online approach include: (1) Substantially quicker response from the Department, thereby minimizing the time during which the applicant would not be able to purchase or sell ammonium nitrate; (2) the ability for an applicant or registered user to access, view, update, and manage their personally identifiable information; (3) and greater control over managing their participation in the Ammonium Nitrate Security Program, such as ease in renewing their AN Registered User Number. The Department proposes that

neither paper registration applications nor in person applications at local Cooperative Extension offices be offered.

Registration Via a Telephone Application Process

The applicant would contact the AN Helpdesk and ask to register over the phone. The Helpdesk operator would collect all the information necessary to complete an application for an AN Registered User Number. The IT system would then route the application as if it were an application through the web portal. The evaluation of the vetting against the TSDB would be the same.

Once a decision had been made as to whether or not to approve or deny an application, the system would identify the response to be mailed to the applicant. The system would route the information to a vendor to process the letter. The vendor would print and mail the letter. The letter would require tracking, signature, certification (i.e., verification of identity), and next day delivery. DHS would also require evidence of delivery from the vendor. These are required to ensure delivery and receipt of the AN Registered User Number to the correct individual.

DHS is not recommending the telephone option but invites public comment on the concept. The following tables provide information on the costs that vary between the recommended web-portal approach and the phone approach.

DIFFERENCES BETWEEN ALTERNATIVES COSTS

[\$ millions, 10-year total costs, 7 percent discount]

	Web-portal	Phone option	Difference
Registration Costs .....	71.3	20.3	51.0
Federal Costs .....	55.3	81.5	- 26.2
All Other Costs .....	544.0	540.7	3.3
<b>Total Costs .....</b>	<b>670.6</b>	<b>642.5</b>	<b>28.1</b>

b. Verification

The Department considered three potential approaches to verify a prospective AN Purchaser; establishing a web-based portal (i.e., Purchaser Verification Portal), establishing a call center, and establishing both capabilities. The Department is proposing to establish both a web-based portal and call center.

1. Purchaser Verification Portal

Verifying AN Purchaser status through a web-based portal will have costs to both industry and the Department. The Department will bear the cost of developing and maintaining the verification portal and related guidance on its use and proper verification processes. The cost to industry of this activity is having a computer and access to the Internet. Beyond that, cost to the industry is the incremental time spent during an

ammonium nitrate transaction to verify the identity and AN Registered User Number of the prospective AN Purchaser. Accordingly, the overall cost would depend on the number of ammonium nitrate transactions that occur and the time it takes to perform a simple identity check and enter basic AN Purchaser information into the web-portal. Based upon the detailed data in the evaluation, the following table summarizes the average costs per transaction.

POINT OF SALE AVERAGE COST SUMMARY\*

	Low total estimate	High total estimate	Mean
Total POS Annual Costs (\$)	23,886,565	120,516,567	72,201,566
Purchaser POS Costs (\$)	3,488,523	18,112,934	10,800,728
Seller POS Costs (\$)	20,398,042	102,403,633	61,400,837
Transactions	5,486,000	29,340,000	17,413,000
Sellers	2,486	6,236	4,361
Purchasers	64,950	106,200	85,575
Transactions/Seller/Week	42.4	90.5	66.5
Transactions/Purchaser/Week	1.6	5.3	3.5
Seller Cost/Transaction (\$)	3.7	3.5	3.5
Purchaser Cost/Transaction (\$)	0.64	0.62	0.62

\* Data is for all entities and comes from the detailed evaluation, particularly Tables 9, 10, 26–29, 35–36.

2. Purchaser Verification Call Center

The Department also considered a Purchaser Verification Call Center. Under this approach, AN Sellers would use a telephone to call a toll-free phone number established by the Department where they would either talk to a person or be led through a series of telephone tree menus. During the phone call, the AN Seller would be expected to provide information about the AN Purchaser. The operator or automated telephone system would enter the information provided into the Department’s Registered User database system, wait for electronic confirmation, and then provide verbal confirmation to the caller along with a confirmation number for that specific transaction.

Verifying AN Purchaser status through a call center will have costs to both industry and the Department. The burden to the industry for the call center option rests upon having a telephone and the time spent relaying the relevant AN Purchaser information to the call center. The cost to the Department is the establishment of the call center and potentially employing staff to standby and field calls regarding AN purchases.

3. Purchaser Verification Portal and Call Center

The Department proposes to establish both a Purchaser Verification Portal and a Purchaser Verification Call Center. See section III.C.13. This approach is identical to the Purchaser Verification Portal described above, integrated with the Purchaser Verification Call Center capability. This approach presumably would be the cheapest for the regulated community as each AN Facility likely would choose to employ the most cost-effective means of verification; however, it would be the most costly of the alternatives for the Department to establish and operate as it would bear the costs associated with the development and maintenance of both a web verification portal and call center.

When creating a manner in which AN Sellers can verify the required information on a potential ammonium nitrate purchase by an AN Purchaser, the Department found both advantages and disadvantages to each option considered. A call center may be preferable to a web portal, as presumably all AN Facilities have telephones while not all AN Facilities have computers with Internet access, particularly at the point of sale. However, there are some potential disadvantages. For instance, the call center approach would take more time per transaction than the web portal approach, and it would be significantly more costly for the Department to establish and operate a call center. The advantage of this alternative is that all AN Facilities would be accommodated—those with telephone access only and those with both telephone and Internet access who find the verification web portal option more efficient. As a result, the Department proposes to offer both online and call center options despite the higher costs to the Department.

c. Communication With Applicants

The Department must communicate with applicants throughout the registration process. The Department considered two alternatives to communicating with applicants: (1) communication by U.S. Mail, and (2) communication by electronic means. The Department proposes to communicate with applicants by electronic means.

1. U.S. Mail

The U.S. Mail could act as the communication medium between the Department and the regulated community. If the U.S. Mail were chosen as the communication mechanism, the Ammonium Nitrate Security Program would be paper-based. While there would be some minimal cost to the industry (e.g., postage), the

time to complete paperwork would be equivalent to the submission of information electronically. The costs to the Department, however, would be more substantial. The Department would have to hire or devote staff to process incoming correspondence.

2. Electronic Means

The other option for communication could be by electronic means. Program communication would occur through e-mail and secure web portals. The cost to the industry can be broken down to computer and Internet access. The cost to the Department hinges on developing web portals and databases to securely store information.

The Department assumes that most applicants have Internet access with one exception. Based upon information from the USDA, approximately 60% of farms have Internet access. Thus, DHS assumes that in the agricultural sector, approximately 60% of farms have computers with Internet access. The Department therefore estimated that 40% of these individuals will have to travel a short distance to public library, or other location where access to the Internet is available to apply for an AN Registered User Number. Further, DHS assumes that for applicants without Internet access, two trips will be required; one to complete the AN Registered User Number application, and a second trip after 72 hours to retrieve the e-mail containing the AN User Registration Number. The Department has assumed farmers without Internet access will make two trips. The Department assumes that the round trip distance is 50 miles per trip and has used the IRS mileage rate of \$0.55 per mile. DHS assumes the total extra time for each trip will average approximately one hour each way. Each trip will include an additional hour for the Internet access and registration. Multiplying 50 miles times two trips times \$0.55 per mile totals \$55 per individual for the two trips associated

with applying for and receiving an AN Registered User Number. Additionally, DHS included approximately \$1.9 million for farmers who attempt to make a purchase without knowing about the regulation and must then make one extra trip. These calculations are detailed in Tables 11 and 12 in Section 7 of the full evaluation. Because of the minimal time and effort it takes to apply for and receive an AN Registered User Number, the Department believes this approach to be a cost-effective way to prevent misappropriation of ammonium nitrate.

The Department considered using the U.S. Mail as the primary medium for communication; however, the Department ultimately rejected this approach due to the additional time it would take to notify applicants of their AN Registered User Number. The Department also cited the significant availability of the Internet. Therefore, the Department is proposing to use electronic means as the primary medium for communication. Additionally, the Department believes that electronic communication is more secure and faster than U.S. Mail.

#### d. Reporting Theft or Loss

The Department considered two alternatives pursuant to Subtitle J, which requires an AN Facility Representative who has knowledge of theft or unexplained loss of ammonium nitrate to report such theft or loss to Federal law enforcement authorities within 24 hours of the time at which knowledge of theft or loss is acquired. The Department considered requiring an AN Facility Representative to report to either the Department or ATF. The Department proposes to require reporting of theft/loss to ATF.

Under either option, there is a burden to the industry. The cost to industry of this activity will be the time to gather details and report the theft or loss of AN. Because of the seriousness of theft or loss of AN, the total time to report a theft or loss is assumed to include two hours each for an inventory manager and sales person, plus one hour for the general manager. This includes the time for the reporter to organize useful details for law enforcement and conduct a brief investigation. There will likely be additional time for a necessary follow-up investigation. Strictly for purposes of this analysis, the Department assumes that two percent of AN Facilities and AN Purchasers will report loss or theft once per year. Based on these assumptions, there will be 88 reports of theft or loss annually, at a total annual cost to industry of \$13,350.

#### 1. ATF Reporting

One of the many responsibilities of ATF is regulating the use of explosives. Because pure ammonium nitrate does not fall within the scope of the statutory definition of "explosives" set forth at 18 U.S.C. 841(d), it is not subject to ATF's controls on importation, manufacture, distribution or storage; however, ammonium nitrate explosive mixtures and ANFO are included in ATF's List of Explosive Materials. ATF has an existing program for reporting the theft or loss of explosives. Individuals that discover the theft or unexplained loss of ammonium nitrate would contact ATF by phone and facsimile and provide the pertinent information. The costs to the industry for reporting to ATF the theft or unexplained loss of ammonium nitrate would be minimal. The costs to the Department would be minimal as well, unless DHS funded ATF efforts.

#### 2. DHS Reporting

Similar to ATF's method for reporting theft or loss of explosives, individuals upon discovering the theft or unexplained loss of ammonium nitrate would contact DHS. The costs to the industry for reporting the theft or unexplained loss of ammonium nitrate to DHS would be minimal. The costs to the Department would be greater than when compared to the ATF reporting requirement. DHS would be required to create and establish the theft/loss reporting policies, procedures, and infrastructure.

The Department is proposing to require reporting of theft/loss to ATF. See section III.E of this preamble. ATF already possesses the unique experience in collecting and responding to the theft/loss of explosive related materials. Additionally, DHS wishes to avoid duplicative efforts at the Federal level.

#### e. Recordkeeping

The Department considered two options to maintain records: (1) Mandatory use of a central electronic database, and (2) the flexibility to maintain records in paper format or in electronic format. The Department proposes allowing AN Facilities to select the method of records storage for themselves. See section III.F of this preamble.

The Department selected this alternative because the burden to submit and maintain electronic records in a central database would increase the burden on the industry without measurable benefit to the industry. The benefit would be limited to the confidence an AN Facility would have, that if it maintained its records in a

central database, it would meet Department recordkeeping requirements.

The costs to industry associated with this alternative are the costs of the time spent during each transaction collecting and recording the information required under the regulations, the costs of the time spent on ongoing recordkeeping activities throughout the year, and any capital investment costs an AN Facility incurs in acquiring equipment to facilitate the safe storage of the AN transaction records.

#### f. Agents

The Department considered three options to minimize the likelihood that agents are used to circumvent the intentions of Subtitle J. Specifically, the Department believes it is imperative for AN Sellers to ensure that an agent is acting at the direction of a registered AN Purchaser before the AN Seller transfers possession of ammonium nitrate to that agent. To accomplish this, the Department is considering the following alternatives:

1. Requiring AN Purchasers to submit the names of their agents to DHS via the AN User Registration Portal, and requiring the AN Seller to confirm with DHS, prior to transferring possession of the ammonium nitrate, that the prospective AN Purchaser has submitted the name of the agent to DHS;

2. Requiring the AN Seller to orally confirm with the prospective AN Purchaser prior to each sale that the agent is acting on behalf of the AN Purchaser;

3. A combination of the first two options, whereby an AN Seller first should check with DHS to see if the prospective AN Purchaser has submitted the name of the agent to DHS and, if not, then the AN Seller must orally confirm with the prospective AN Purchaser that the agent is acting on his/her behalf. DHS is proposing this third approach.

Under the first approach, each AN Purchaser would be required to provide to DHS the names of any agents that might act on his/her behalf at the point of sale. The AN purchaser would submit names of agents to DHS via the AN User Registration Portal. An AN Purchaser could submit an agent's name when he/she applies for an AN Registered User Number or at any other time prior to conducting a purchase involving that agent. Then, prior to transferring possession of ammonium nitrate to an agent, an AN Seller would need to verify with the Department that the prospective AN Purchaser has designated the agent as an approved agent to represent the AN Purchaser at

the point of sale. This verification would occur through the same mechanism that is used for the other prospective AN Purchaser verification activities (*i.e.*, the Purchaser Verification Portal or the Purchaser Verification Call Center). The agent's information provided to the Department by AN Purchasers and AN Sellers would not be vetted against the TSDB nor otherwise checked by the Department; rather, it would simply be maintained in the AN Registered User Database as a data field linked to the AN Purchaser for use in the agent verification process.

Under the second approach, the Department would require the AN Seller to verify with the prospective AN Purchaser that the agent is actually acting on behalf of the prospective AN Purchaser for each specific transaction. Much like the other verification activities, this could occur at the time the prospective AN Purchaser places the order, when the agent arrives to take possession of ammonium nitrate, or any other time, so long as it occurs prior to the AN Seller transferring possession of ammonium nitrate to the prospective AN Purchaser's agent. If this approach were adopted, the Department would propose requiring this confirmation to occur for each transaction/occurrence in which an agent is taking possession of ammonium nitrate; a blanket verification of an agent by an AN Purchaser would not be acceptable. Additionally, as an e-mail or letter can be easily forged, under this approach the Department would require that the AN Seller must receive this verification orally (*e.g.*, in person; telephonically) from the prospective AN Purchaser.

The third approach—the option the Department is proposing in this NPRM—is a combination of the first two approaches. Specifically, AN Purchasers would be expected to provide the Department with the names of their agent(s), and an AN Seller would be expected to verify either through the Purchaser Verification Portal or Purchaser Verification Call Center that the agent information has been provided by the AN Purchaser to the Department. As opposed to the first approach, under which a sale cannot occur unless the agent's name has been provided to the Department by the prospective AN Purchaser, under this third option the AN Seller would be allowed to complete the sale or transfer after either (1) verifying the agent has been designated by the prospective AN Purchaser in the Purchaser Verification Portal or Purchaser Verification Call Center, or (2) orally confirming with the prospective AN Purchaser that the agent is acting on the prospective AN Purchaser's behalf

for this individual sale. The Department expects that in the majority of cases this oral confirmation would occur telephonically. This third option has the benefit of minimizing the point of sale impact of the agent verification process, while allowing a means for a sale or transfer to be completed even if a prospective AN Purchaser forgets or is otherwise unable to provide the Department with the agent's name prior to using the agent at the point of sale. For these reasons, this third approach is the option proposed by the Department.

#### g. Exemption of Explosives Regulated by ATF

Pursuant to Subtitle J, the Department has the discretion to exempt from regulation persons producing, selling, or purchasing ammonium nitrate exclusively for use in the production of explosives under a license or permit issued under the Federal explosives laws, 18 U.S.C. Chapter 40, and associated regulations. ATF is responsible for enforcing Federal explosives laws, and has established regulations for doing so. The Department is proposing to exempt from regulation ammonium nitrate mixtures that are "explosives" subject to ATF regulation (*i.e.*, ANFO). The Department also considered two other approaches. The first option is to apply these rules to individuals who purchase, sell, or transfer ammonium nitrate for use in the production of explosives. The other option considered is to entirely exempt from Subtitle J requirements facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives, as they are already regulated by ATF.

#### 1. Exempt AN Mixtures That Are "Explosives" Subject to ATF Regulation

Under this approach, entities and individuals that purchase, sell, or transfer ANFO, but who do not produce ANFO or possess ammonium nitrate for other reasons, would be exempt from all Subtitle J requirements and would be subject solely to ATF regulation. This approach minimizes cost to the industry as well as the Department.

#### 2. Regulate Individuals Who Purchase, Sell, or Transfer AN for the Production of Explosives

Under this approach, such individuals would be subject to regulation by both DHS under Subtitle J and ATF under the Federal explosives laws. By not exempting ammonium nitrate used in explosives, DHS would be treating all individuals who purchase, sell, or transfer ammonium nitrate—whether as part of ANFO

mixtures or not—the same. This approach would ensure that there are no gaps in coverage of ammonium nitrate as it moves through the supply chain—ammonium nitrate would be captured under DHS's ammonium nitrate program both before and after being combined with fuel oil to create ANFO, and would be captured under ATF's regulations after being combined with fuel oil to create ANFO. There could potentially be heightened costs to the industry due to potentially duplicative regulation. The costs to the Department would hinge upon a greater number of AN Facilities to regulate.

#### 3. Entirely exempt from Subtitle J requirements facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives

Under this approach, facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives would be entirely exempt from Subtitle J requirements, as they are already regulated by ATF. In this model, facilities and persons that are licensed by ATF to mix ammonium nitrate with fuel to create ANFO which do not purchase, sell, or transfer ammonium nitrate for other purposes would not be subject to these regulations. This approach, however, could create a considerable gap in regulatory coverage throughout the ammonium nitrate supply chain, as ATF regulations apply solely to ANFO and not the ammonium nitrate used to create it. The costs to the industry, as well as the Department, would be low because certain individuals and facilities would not fall under the regulation.

The Department proposes to exempt from all Subtitle J requirements entities and individuals that purchase, sell, or transfer ANFO, but who do not produce ANFO or possess ammonium nitrate for other reasons. These entities and individuals are regulated by ATF. This approach avoids duplicative regulation yet it does not create a potential regulatory gap in the ammonium nitrate supply chain.

#### 6. Average Costs per AN Facility

The largest cost driver is activities related to the point of sale. While variation in cost by facility is largely driven by the number of point of sale transactions that each AN Facility conducts, it is helpful to examine the average cost per AN Purchaser and AN Facility.

The average costs per entity that purchases ammonium nitrate are presented in the following tables. Both

the lower and upper bounds of the estimate are provided. In either case, the highest cost will be for farms without Internet access. The cost of compliance to AN Purchasers is the time to apply for an AN Registered User Number with the Department of Homeland Security

and additional time during the purchase. This registration cost averages \$57 to \$700 once every five years. DHS believes for even the smallest farms, other businesses, nonprofits, and small jurisdictions that only purchase ammonium nitrate, this registration cost

does not represent a significant economic impact. DHS invites comments on this impact, particularly impacts related to the point of sale costs.

#### AVERAGE COST PER ENTITY THAT PURCHASES AMMONIUM NITRATE—LOW POPULATION/LOW TRANSACTIONS ESTIMATE \*

	Purchaser registration (\$)	Appeals (\$)	Purchase opportunity cost (\$)	Total purchaser cost (\$)	Number of entities	Average cost per entity (\$)
Farms with internet access .....	2,079,500	28,100	1,674,500	3,782,100	30,000	126
Farms w/o internet access .....	12,998,000	18,700	1,116,300	14,133,000	20,000	707
Golf courses .....	169,000	3,500	334,900	507,400	6,000	85
Landscaping services .....	144,000	2,900	251,200	398,100	4,500	88
Blasting services .....	16,000	200	14,000	30,200	300	121
Mines .....	71,000	1,500	97,700	170,200	1,800	97
<b>Total .....</b>	<b>15,477,500</b>	<b>54,900</b>	<b>3,488,500</b>	<b>19,020,900</b>	<b>62,500</b>	<b>304</b>

\* Totals may not add due to rounding.

#### AVERAGE COST PER ENTITY THAT PURCHASES AMMONIUM NITRATE—HIGH POPULATION/HIGH TRANSACTIONS ESTIMATE \*

	Purchaser registration (\$)	Appeals (\$)	Purchase opportunity cost (\$)	Total purchaser cost (\$)	Number of entities	Average cost per entity (\$)
Farms with internet access .....	3,119,300	42,100	8,150,800	11,312,200	45,000	251
Farms w/o internet access .....	19,497,500	28,100	5,433,900	24,959,500	30,000	832
Golf courses .....	339,000	6,900	2,173,600	2,519,500	12,000	210
Landscaping services .....	287,000	5,800	1,630,200	1,923,000	9,000	214
Blasting services .....	33,000	700	90,600	124,300	500	249
Mines .....	142,000	2,800	634,000	778,800	3,500	223
<b>Total .....</b>	<b>23,417,800</b>	<b>86,400</b>	<b>18,112,900</b>	<b>41,617,100</b>	<b>100,000</b>	<b>416</b>

\* Totals may not add due to rounding.

The average per AN Facility cost to comply with the proposed rule ranges from \$6,400 for laboratory suppliers

(low population/low transactions scenario) to \$23,800 for an explosives

distributor (high population/high transactions scenario).

#### AVERAGE COST PER AN FACILITY—LOW POPULATION/LOW TRANSACTIONS ESTIMATE \*

	Reg. activities (\$)	Appeals (\$)	Point of sale (Web portal) (\$)	Record-keeping (\$)	Reporting theft/loss (\$)	Audits/inspections (\$)	Total seller cost (\$)	Number of AN facilities	Average cost (\$)
AN fert. manuf. ....	8,000	0	125,800	43,100	100	2,700	179,700	0	6,900
AN expl. manuf. ....	3,000	0	50,800	17,400	0	1,100	72,400	0	7,200
Fertilizer mixers .....	83,000	1,700	1,935,500	663,200	1,100	41,500	2,726,000	400	6,800
Explosives dist. ....	102,000	2,100	5,494,500	834,200	1,500	51,600	6,486,000	500	13,000
Farm whol./co-ops .....	92,000	1,800	4,524,100	742,100	1,600	52,600	5,414,100	500	10,800
Retail garden ctrs. ....	72,000	1,300	3,791,900	703,400	1,600	49,200	4,619,400	500	9,200
Fertilizer app. ....	73,000	1,300	4,254,800	717,100	1,400	50,100	5,097,700	500	10,200
Lab. supply .....	9,000	0	220,700	83,400	100	5,600	318,800	100	6,400
<b>Total .....</b>	<b>442,000</b>	<b>8,200</b>	<b>20,398,100</b>	<b>3,803,900</b>	<b>7,400</b>	<b>254,400</b>	<b>24,914,100</b>	<b>2,500</b>	<b>10,000</b>

\* Totals may not add due to rounding.

#### AVERAGE COST PER AN FACILITY—HIGH POPULATION/HIGH TRANSACTIONS ESTIMATE \*

	Reg. activities (\$)	Appeals (\$)	Point of sale (Web portal) (\$)	Record-keeping (\$)	Reporting theft/loss (\$)	Audits/inspections (\$)	Total seller cost (\$)	Number of AN facilities	Average cost (\$)
AN fert. manuf. ....	8,000	0	311,200	43,100	100	2,700	365,100	0	14,000
AN expl. manuf. ....	3,000	0	125,700	17,400	0	1,100	147,300	0	14,700
Fertilizer mixers .....	123,000	2,600	7,181,800	994,800	1,700	62,200	8,366,000	600	13,900
Explosives dist. ....	202,000	4,200	21,807,900	1,668,500	3,100	103,200	23,788,900	1,000	23,800

AVERAGE COST PER AN FACILITY—HIGH POPULATION/HIGH TRANSACTIONS ESTIMATE \*—Continued

	Reg. activities (\$)	Appeals (\$)	Point of sale (Web portal) (\$)	Record-keeping (\$)	Reporting theft/loss (\$)	Audits/inspections (\$)	Total seller cost (\$)	Number of AN facilities	Average cost (\$)
Farm whol./co-ops .....	184,000	3,400	17,841,300	1,484,200	3,200	105,100	19,621,100	1,000	19,600
Retail garden ctrs. ....	357,000	6,000	37,281,300	3,517,200	7,900	246,100	41,415,400	2,500	16,600
Fertilizer app. ....	146,000	2,800	16,764,200	1,434,200	2,900	100,100	18,450,200	1,000	18,500
Lab. supply .....	19,000	500	1,090,400	166,800	300	11,100	1,288,200	100	12,900
Total .....	1,042,000	19,500	102,403,800	9,326,200	19,200	631,600	113,442,200	6,200	18,200

\* Totals may not add due to rounding.

7. Identification of Duplication, Overlap and Conflict With Other Federal Rules

A thorough discussion of the relationship to other rules is provided earlier in section II.D of this preamble.

C. Executive Order 13132: Federalism

Executive Order 13132 requires DHS to develop a process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” To meet this requirement, the Department has, and will continue to, consult with State fertilizer control officials, members of the American Association of Plant Food Control Officials, and others throughout the development of these regulations. Such consultation is expressly required by 6 U.S.C. 488a(g). Consultation with the aforementioned groups has informed the Department on potential regulatory avenues, and on the use and movement of ammonium nitrate through its life cycle within the potentially regulated community. Additionally, the Department is hereby specifically requesting comments from State and local officials on regulatory policies that have federalism implications.

Chief among potential federalism implications is preemption of State ammonium nitrate regulations. As discussed in Part II.D of this preamble, a number of States currently regulate the security of ammonium nitrate. Subtitle J explicitly addresses preemption of such regulations, and “preempts the laws of any State, to the extent that such laws are inconsistent with [Subtitle J], except that [Subtitle J] shall not preempt any State law that provides additional protection against the acquisition of ammonium nitrate by terrorists or the use of ammonium nitrate in explosives in acts of terrorism or for other illicit purposes, as determined by the [Department].” See 6 U.S.C. 488g(b). The Department specifically seeks comment on the interaction of the proposed rule with existing State and local laws and regulations, including comment on any laws that may be inconsistent with Subtitle J and laws

that provide additional protections against the acquisition of ammonium nitrate or its use in terrorist attacks.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The primary cost estimate for this proposed rulemaking would not impose such an unfunded mandate on State, local, or tribal governments, but the upper end of the estimate would show an unfunded mandate in excess of \$100 million (adjusted for inflation) on the private sector. The analysis required under Title II of UMRA is satisfied by the regulatory impact assessment prepared in conjunction with this NPRM.

The Department recognizes that some AN Facilities of entities that purchase ammonium nitrate may be owned by state or local government entities. These entities would be required to comply with the provisions of this proposed rule.

Further, under Subtitle J, the Department may enter into cooperative agreements with the USDA or any State department of agriculture to carry out the provisions of Subtitle J. See 6 U.S.C. 488c(a)(1). Subtitle J further requires the Department, at the request of a governor of a State, to delegate to that State the authority to carry out the administration and enforcement of Subtitle J, if the Department determines that the State is capable of satisfactorily carrying out such functions. See 6 U.S.C. 488c(b)(2). If the Department delegates any functions to a State, subject to the availability of appropriations, the Department must provide to the state

sufficient funds to carry out those functions. See 6 U.S.C. 488c(b)(3).

The Department proposes the following process for evaluating requests from governors: If a State is interested in performing the administration and enforcement activities required by Subtitle J, the governor of the State must submit a written request to the Department asking for delegation of those authorities. Upon receipt of the request, the Department will initiate an evaluation to determine if the State is capable of satisfactorily performing those functions and, upon completion of the evaluation, will provide the State with a written response informing it of the Department’s determination. In order to make a fair evaluation, the Department is likely to request information from the State and consult with the State before a final determination is made. Because the responsibility would be transferred only at the request of the state, and only when funding is available, no unfunded mandate would be created.

E. National Environmental Policy Act

The Department has analyzed this proposed rule for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) under Department of Homeland Security Directive 023–01—Environmental Planning Program, and has concluded that this proposed rule comes within Categorical Exclusion A3 “promulgation of rules \* \* \* (a) of a strictly administrative or procedural nature.” We find no basis for believing that there are extraordinary circumstances which would require further analysis; however, we invite comment on this conclusion.

F. Paperwork Reduction Act

This NPRM contains collection of information requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). “Collection of information,” as defined in 5 CFR 1320.3(c), includes reporting, record



keeping, monitoring, posting, labeling, and other similar actions.

Subtitle J provides DHS with authority to regulate the sale and transfer of ammonium nitrate. This collection will enable 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.” See 6 U.S.C. 488a(a).

This NPRM introduces a new collection with OMB Control Number 1670–NEW. The Ammonium Nitrate Security Program information collection has eight new instruments: Ammonium

Nitrate Registration; Appeals for Denial or Revocation of AN Registered User Numbers; Purchaser Verification; Ammonium Nitrate Helpdesk; Electronic Recordkeeping Database; Reporting Theft and Loss; Adjudication or Appeal of an Order Assessing Civil Penalty; and Inspections and Audits.

This NPRM includes a solicitation for comments for a new information collection, 1670–NEW. Any comments submitted will be reviewed by DHS and OMB prior to publication of a final rule, and prior to OMB approval of this new information collection. This NPRM describes the nature of the information collection, the categories of

respondents, and estimated burdens and costs.

Under the protections provided by the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The Department will begin collecting information as soon as an OMB control number is issued, or as soon as the mechanism for collecting information is publicly available, or when the rule implementing the Ammonium Nitrate Security Program becomes effective, whichever is latest.

TABLE 1—ESTIMATES OF ANNUALIZED BURDEN HOURS AND COSTS

Instrument	Number of respondents	Responses per respondent	Avg. burden per response (in hours)	Total annual burden (in hours)	Total annual respondent cost (in dollars)
Ammonium Nitrate Registration .....	116,800	1	2.02	235,912	11,114,000
Appeals for Denial or Revocation of AN Registered User Numbers .....	223	1	6.00	1,336	49,500
Purchaser Verification .....	6,236	4,705	0.08	2,445,001	93,262,600
Ammonium Nitrate Helpdesk .....	248,460	119	0.02	551,114	20,680,100
Electronic Recordkeeping Database .....	6,236	4,705	0.02	448,992	8,591,600
Reporting of Theft & Loss .....	125	1	2.80	349	18,300
Adjudication or Appeal of an Order Assessing Civil Penalty .....	Less Than 10	N/A	N/A	N/A	N/A
Inspections and Audits .....	1,559	1	12.00	18,708	621,100

*Title:* Ammonium Nitrate Registration  
*Summary of Collection of Information:* Information is collected through a web-based portal directly from each applicant who wishes to apply for an AN Registered User Number. The information collected will be used to determine if the applicant is eligible for an AN Registered User Number. Specifically, 6 U.S.C. 488a(i)(2)(A) requires the Department to conduct a check of identifying information of all applicants against identifying information that appears in the TSDB.

Consistent with 6 U.S.C. 488a(i)(3)(A) and 6 U.S.C. 488a(i)(3)(B), to the extent practicable, the Department intends to approve or deny each registration application, and to issue each AN Registered User Number, not later than 72 hours after the time DHS receives a complete registration application. DHS may deny an applicant an AN Registered User Number if the TSDB indicates that the applicant may pose a threat to national security. See 6 U.S.C. 488a(i)(2)(B).

As proposed in section 31.215(a), at least one individual who is designated to act on behalf of a facility for purposes of compliance with this regulation must (1) apply for an AN Registered User

Number, and (2) register as a Designated AN Facility POC for the AN Facility. In addition, sections 31.210 and 31.215 would allow any individual who has an ownership interest in an AN Facility; is designated to act on behalf of a facility for purposes of compliance with this regulation, such as, possibly, a site manager, sales manager, or corporate officer; is involved in the sale or transfer of ammonium nitrate at an AN Facility, such as a sales clerk or cashier; or performs ammonium nitrate application services to register as an AN Seller. Sections 31.210 and 31.215 would require that any person who individually performs a sale or transfer of ammonium nitrate on behalf of an AN Facility, or who performs ammonium nitrate application services, must be registered. Pursuant to section 31.205 of the proposed rule, any person who intends to purchase ammonium nitrate must also be registered.

*Use of:* The information collected will be used to (1) conduct a check of identifying information of applicants against identifying information that appears in the TSDB, and (2) issue the Department’s approval or denial of each registration application.

*Need for Information:* The information collected is needed to

comply with section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act, which requires the Department to issue AN Registered User Numbers.

*Description of the Respondents:* DHS anticipates that there will be an average of 116,800 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* Each respondent is estimated to have a burden of 2.02 hours to register, update, and subsequently renew his/her AN Registered User Number. The annual hour burden is estimated to be 235,912 hours.

*Title:* Appeals for Denial or Revocation of AN Registered User Numbers.

*Summary of Collection of Information:* Individuals who have had their AN Registered User Numbers denied or revoked may appeal the Department’s denials or revocations, pursuant to section 31.250 of the proposed rule. Each individual requesting an appeal is required to file a Request for Materials, a Request for Appeal, and other filings as necessary.

*Use of:* The information collected will be used to process appeals.

*Need for Information:* The Department needs the collected

information to ensure that all necessary information is collected in order to process appeals and records correction requests.

*Description of the Respondents:* DHS anticipates that there will be an average of 223 respondents annually.

*Frequency of Response:* On occasion.  
*Annual Burden Estimate:* Each respondent is estimated to have a burden of 6 hours to complete the necessary filings. The annual hour burden is estimated to be 1,336 hours.

*Title:* Purchaser Verification.

*Summary of Collection of Information:* AN Sellers will be required to conduct verification of AN Purchaser's identities and AN Registered User Numbers prior to sales and transfers of ammonium nitrate, as required by sections 31.305, 31.310, and 31.315 of the proposed rule. Verification will involve the submission to DHS by AN Sellers of prospective purchasers' AN Registered User Numbers, of matching information (e.g., names and drivers' license numbers) from AN Purchasers' photo identification documents, and of the names of AN Agents taking possession of ammonium nitrate on behalf of prospective purchasers. As part of this information collection AN Sellers will also submit information identifying themselves, including their own AN Registered User Numbers, to DHS. AN Sellers will submit this information to DHS through the Purchaser Verification Portal or the Purchaser Verification Call Center. The Purchaser Verification Portal or Purchaser Verification Call Center will compare information submitted as to each AN Purchaser or AN Seller against the information on record for that AN Purchaser or AN Seller.

*Use of:* The information collected will be used to conduct verification of AN Registered User Numbers and of AN Purchasers' and AN Agents' identities, prior to transfer of ammonium nitrate, as required by sections 31.305, 31.310, and 31.315 of the proposed rule.

*Need for Information:* The Department needs the information to verify that ammonium nitrate is only sold or transferred by individuals authorized by the Department to individuals authorized by the Department.

*Description of the Respondents:* DHS anticipates that there will be an average of 6,236 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* Each respondent is estimated to have a burden of 0.08 hours to complete AN Registered User Number verification. The annual hour burden is estimated to be 2,445,001 hours.

*Title:* Ammonium Nitrate Helpdesk.

*Summary of Collection of Information:* The Ammonium Nitrate Helpdesk will respond to questions from industry and the public.

*Use of:* The information collected will be used to respond to questions from industry and the public.

*Need for Information:* The Department needs to collect the information from the individuals contacting the Ammonium Nitrate Helpdesk to respond to their questions.

*Description of the Respondents:* DHS anticipates that there will be an average of 248,460 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* Each respondent is estimated to have a burden of 0.02 hours per AN Helpdesk contact. The annual hour burden is estimated to be 551,114 hours.

*Title:* Electronic Recordkeeping Database.

*Summary of Collection of Information:* To collect information to support AN Facilities with the recordkeeping requirements proposed in section 31.315 of the proposed rule.

*Use of:* The information collected will be used to support AN Facilities with the recordkeeping requirements proposed in section 31.315 of the proposed rule.

*Need for Information:* Under section 31.315, AN Facilities would be required to keep various records. The use of this recordkeeping instrument, however, is voluntary.

*Description of the Respondents:* DHS anticipates that there will be an average of 6,236 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* Each respondent is estimated to have a burden of 0.02 hours. The annual hour burden is estimated to be 448,992 hours.

*Title:* Reporting Theft and Loss.

*Summary of Collection of Information:* To report a theft or loss of ammonium nitrate, an individual would contact ATF. ATF will collect information and other details for a report of a theft or loss of ammonium nitrate, pursuant to sections 31.400 and 31.405 of the proposed rule.

*Use of:* The information collected would be used to track and potentially respond appropriately to the theft or loss of ammonium nitrate.

*Need for Information:* The information collected is needed to track and potentially respond appropriately to the theft or loss of ammonium nitrate.

*Description of the Respondents:* DHS anticipates that there will be an average of 125 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* Each respondent is estimated to have a

burden of 2.8 hours to complete a theft or loss of ammonium nitrate report. The annual hour burden is estimated to be 349 hours.

*Title:* Adjudication or Appeal of an Order Assessing Civil Penalty.

*Summary of Collection of Information:* Pursuant to section 31.700 of the proposed rule, any person or entity against whom an Order Assessing Civil Penalty has been issued is entitled to a hearing and adjudication, by a Presiding Officer, on any issue of material fact relevant to any civil penalty issued against such person or entity. Pursuant to section 31.735 of the proposed rule any person or entity having received an Initial Decision has the right to appeal.

*Use of:* The information collected will be used to conduct hearings, adjudications, and appeals.

*Need for Information:* The information collected is needed to conduct hearings, adjudications, and appeals.

*Description of the Respondents:* DHS anticipates that there will be fewer than 10 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* The Department did not estimate the annual burden.

*Title:* Inspections and Audits

*Summary of Collection of Information:* Pursuant to section 31.500 of the proposed rule, the Department is authorized to enter AN Facilities, or other locations where records are stored, to inspect and audit the records proposed in section 31.315. DHS may also inspect and audit any other records that pertain to misappropriation or preventing misappropriation of ammonium nitrate, and to inspect and audit any other records required by the Assistant Secretary to be maintained pursuant to Subtitle J. During an inspection or audit the Department may copy such records. DHS may also take original copies of pertinent records out of the subject AN Facilities for duplication. DHS may also perform remote inspections or audits, and require AN Facilities, AN Facility Representatives, and Designated AN Facility POCs to make the records available to the Department by facsimile, mail, or e-mail.

*Use of:* The information collected will be used to perform inspections or audits.

*Need for Information:* The information collected is needed to perform inspections or audits.

*Description of the Respondents:* DHS anticipates that there will be an average of 1,559 respondents annually.

*Frequency of Response:* On occasion.

*Annual Burden Estimate:* Each respondent is estimated to have a burden of 12 hours to prepare for and comply with an inspection or audit. The annual hour burden is estimated to be 18,708 hours.

#### Solicitation of Comments

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of the proposed rule to OMB for its review of the collections of information. DHS is soliciting comments to:

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments to DHS or OMB on the information collection requirements by October 3, 2011. Direct information collection comments to the DHS or OMB addresses listed in the **ADDRESSES** section of this NPRM. A comment is most effective if DHS or OMB receives it within 30 days of the publication of this NPRM.

#### G. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as security, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. In addition, the general benefits and desirability of free trade influenced the development of this notice of proposed rulemaking to remove or diminish, to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

As entities that purchase or sell ammonium nitrate, or as individual AN Purchasers and AN Sellers, importers

and exporters would be required to register with the Department and comply with the requirements of the NPRM in the same manner as their domestic counterparts when ammonium nitrate physically changes possession, as a part of sales or transfers by ammonium nitrate facilities, within the jurisdiction of the United States. Thus, DHS has assessed the potential effect of this NPRM and has determined that it would not create unnecessary barriers to international trade.

For the reasons set forth in the preamble, the Department of Homeland Security proposes to add Part 31 to Title 6, Code of Federal Regulations, to read as follows:

#### Title 6—Domestic Security

##### Chapter 1—Department of Homeland Security, Office of the Secretary

#### PART 31—AMMONIUM NITRATE SECURITY PROGRAM

##### Subpart A—General

Sec.

- 31.100 Purpose.
- 31.105 Definitions.
- 31.110 Applicability.
- 31.115 Severability.

##### Subpart B—Registration of AN Purchasers, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs

- 31.200 Permitted Applicants, Generally.
- 31.205 Permitted AN Purchasers.
- 31.210 Permitted AN Sellers.
- 31.215 AN Facility personnel registration requirements.
- 31.220 Registration procedures and registration updates.
- 31.225 AN Registered User number applicant vetting.
- 31.230 Registration approval and denial.
- 31.235 Registration expiration.
- 31.240 Registration extension.
- 31.245 Registration revocation.
- 31.250 Appealing registration denial or revocation determination.

##### Subpart C—Point of Sale Requirements

- 31.300 General transfer and sale restrictions.
- 31.305 Verification of AN Purchaser AN Registered User numbers and identities—purchases not involving AN Agents.
- 31.310 Verification of AN Purchaser AN Registered User numbers and identities—purchases involving AN Agents.
- 31.315 Recordkeeping requirements.

##### Subpart D—Reporting Theft and Loss

- 31.400 Reporting obligations.
- 31.405 Reporting.

##### Subpart E—Inspections and Audits

- 31.500 Authority.
- 31.505 Manner of inspections and audits.
- 31.510 Inspectors.
- 31.515 Records availability requirements.

#### Subpart F—Civil Penalties

- 31.600 Orders Assessing Civil Penalty, generally.
- 31.605 Setting Civil Penalty amounts.
- 31.610 Procedures for issuing Orders Assessing Civil Penalty.

#### Subpart G—Adjudications and Appeals

- 31.700 Neutral adjudications, generally.
- 31.705 Appointment of presiding officers.
- 31.710 Commencement of adjudication proceedings.
- 31.715 Prohibition on ex parte communications during adjudication.
- 31.720 Burden of proof.
- 31.725 Hearing and adjudication procedures.
- 31.730 Completion of adjudication procedures.
- 31.735 Appeals.

#### Subpart H—Other

- 31.800 State law preemption.

Authority: Pub. L. 110–161, sec. 563.

#### Subpart A—General

##### § 31.100 Purpose.

The purpose of this part is to enhance the security of the Nation by regulating the sale and transfer of ammonium nitrate, and to implement Section 563 of the Fiscal Year 2008 Consolidated Appropriations Act, Public Law 110–161 (December 26, 2007).

##### § 31.105 Definitions.

*Ammonium nitrate (AN).* (1) Notwithstanding paragraph (2) of this definition, ammonium nitrate is—

- (i) Solid ammonium nitrate that is chiefly the ammonium salt of nitric acid, that contains not less than 33 percent nitrogen by weight, or
- (ii) Any mixture containing 30 percent or more solid ammonium nitrate, by weight, that is chiefly the ammonium salt of nitric acid. The solid ammonium nitrate in the mixture must contain not less than 33 percent nitrogen by weight.

(2) The following are not ammonium nitrate:

- (i) Mixtures containing less than 30 percent ammonium nitrate; or
- (ii) Mixtures classified as “explosives” under 27 CFR 555.11; or
- (iii) Ammonium nitrate or mixtures containing ammonium nitrate weighing less than 25 pounds; or
- (iv) Cold packs.

*AN Agent.* Any person who obtains possession of ammonium nitrate on behalf of an AN Purchaser.

*AN Facility.* Any person or entity that produces, sells or otherwise transfers ownership of, or provides application services for, ammonium nitrate.

*AN Facility Representative.* Any AN Facility operator, owner, or employee who is designated as an AN Facility

Representative by the subject AN Facility.

*AN Purchaser.* Any person, other than an AN Agent, who purchases or obtains ammonium nitrate from an AN Facility.

*AN Registered User.* A person who possesses a valid AN Registered User Number for the purpose(s) of acquiring, possessing, producing, purchasing, selling, transferring ownership or possession of, and/or providing application services for ammonium nitrate.

*AN Registered User Number.* A registered user number issued by the Department of Homeland Security under subpart B of this part to a person intending to acquire, possess, produce, purchase, sell, transfer ownership or possession of, and/or provide application services for ammonium nitrate.

*AN Seller.* Any person designated as an AN Seller by the AN Facility at which he/she works or with which he/she is associated, for the purpose(s) of performing sales or transfers of ammonium nitrate or for performing certain other regulatory compliance activities under this Part.

*Applicant.* Any person who has submitted an application for an AN Registered User Number for the purpose(s) of acquiring, possessing, producing, purchasing, selling, transferring ownership or possession of, and/or providing application services for ammonium nitrate.

*Application services.* The provision of services related to the physical deposit of fertilizer onto turf, fields, crops, or other agricultural property, where these services are provided by a person or entity other than the person or entity owning or operating the property upon which the fertilizer is deposited. The provision of application services is not a sale or transfer of ammonium nitrate.

*Assistant Secretary.* The Assistant Secretary for Infrastructure Protection of the United States Department of Homeland Security, or any successors to that position within the Department, or such other Department officials as may be designated by the Assistant Secretary to act on his/her behalf.

*Cold pack.* A small, commercially-available package commonly used as a replacement for ice in the application of first aid, containing unmixed water and ammonium nitrate that, immediately prior to use, can be manipulated to cause the comingling of the water and the ammonium nitrate resulting in an endothermic reaction that significantly lowers the temperature of the package.

*Department.* The United States Department of Homeland Security.

*Designated AN Facility POC.* An AN Facility Representative who is designated by an AN Facility as that AN Facility's chief point of contact (POC) for communications with the Department for purposes of compliance with this Part.

*Office of the General Counsel.* The Office of the General Counsel of the United States Department of Homeland Security.

*Photo identification document.* Any of the following documents containing a unique document number:

(1) An unexpired passport issued by a foreign government which contains a photograph; or

(2) An unexpired document issued by a U.S. Federal, State, or tribal government that includes the following information for the person:

(i) Full name;

(ii) Date of birth; and

(iii) Photograph; or

(3) Such other documents that the Department may designate as valid identification documents.

*Secretary.* The Secretary of Homeland Security or such other Department officials as may be designated by the Secretary of Homeland Security to act on his/her behalf.

*Subtitle J.* Subtitle J of the Homeland Security Act of 2002, as created by Section 563 of the Fiscal Year 2008 Consolidated Appropriations Act, Public Law 110-161 (December 26, 2007).

*Transfer.* The transfer of possession or ownership of ammonium nitrate from one person or entity to another person or entity for use outside of the AN Facility from which the ammonium nitrate is being transferred. Transfers of ammonium nitrate include transfers of possession or ownership that occur as part of sales and other business or commercial transactions, and also include transfers of possession or ownership that are not part of sales or other business or commercial transactions. The physical deposit of fertilizer onto turf, fields, crops, or other agricultural property is not a transfer of ammonium nitrate.

*Under Secretary.* The Under Secretary for National Protection and Programs of the United States Department of Homeland Security, or any successors to that position within the Department, or such other Department officials as may be designated by the Under Secretary to act on his/her behalf.

#### **§ 31.110 Applicability.**

This Part applies to any person or entity that possesses, acquires, purchases, sells, transfers, or provides application services for ammonium nitrate.

#### **§ 31.115 Severability.**

If a court finds any portion of this Part to have been promulgated without proper authority, the remainder of this Part will remain in full effect.

#### **Subpart B—Registration of AN Purchasers, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs**

##### **§ 31.200 Permitted applicants, generally.**

Only persons who intend to acquire, possess, produce, purchase, sell, transfer ownership or possession of, and/or provide application services for ammonium nitrate may register or attempt to register under this Subpart.

##### **§ 31.205 Permitted AN Purchasers.**

No person may purchase or take ownership of ammonium nitrate, or request that an AN Agent take possession of ammonium nitrate on his/her behalf, without a valid AN Purchaser AN Registered User Number issued under this Subpart.

##### **§ 31.210 Permitted AN Sellers.**

(a) Only persons registered under this Subpart as AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may sell or transfer possession of ammonium nitrate to any person or entity.

(b) Only persons registered under this Subpart as AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may, as required by this Part, verify AN Registered User Numbers of AN Purchasers, the identities of AN Purchasers, and the identities of AN Agents.

(c) Only persons registered under this Subpart as AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may perform ammonium nitrate application services.

##### **§ 31.215 AN Facility personnel registration requirements.**

(a) Designated AN Facility POC. (1) Each AN Facility must have one Designated AN Facility POC registered on its behalf.

(2) Only one Designated Facility POC can be registered for each AN Facility.

(b) *AN Facility Representatives.* Each AN Facility must have at least one AN Facility Representative registered on its behalf.

(c) *AN Sellers.* Any person affiliated with an AN Facility, who is neither a Designated AN Facility POC nor an AN Facility Representative, must register under this Subpart as an AN Seller in order to perform the activities described in 6 CFR 31.210.

**§ 31.220 Registration procedures and registration updates.**

(a) *Submission of Application Information.* (1) Applications for registration under this Subpart must be submitted to the Department through an online web portal to be developed by the Department. The web address of this online web portal will be announced by the Department in a future notice published in the **Federal Register**.

(2) Each applicant and AN Registered User must notify the Department of any changes to his/her submitted application information, within 30 days of any such changes, through the online web portal used for registration application.

(b) *Application Information Identifying Type of Applicant.* In order for an applicant to be considered for registration, he/she must identify whether he/she is applying as an AN Seller, AN Facility Representative, Designated AN Facility POC, and/or AN Purchaser. An applicant may apply for more than one role.

(c) *Application Information—General.* (1) In order for an applicant to be considered for registration, his/her registration application must include his/her name, address, telephone number, photo identification document type, photo identification document issuing entity, photo identification document number, place of birth, date of birth, citizenship, gender, any other information deemed necessary by the Department to carry out vetting under 6 CFR 31.225, and, as appropriate, any other information deemed necessary by the Department to verify the applicant's enrollment in a Department program that conducts equivalent TSDB vetting.

(2) Each AN Purchaser applicant's registration application must also include a description of the intended use of the ammonium nitrate planned to be purchased or acquired by the applicant.

(3) Each AN Seller, AN Facility Representative, and Designated AN Facility POC must also submit information identifying all AN Facilities at or for which he/she will serve as an AN Seller, AN Facility Representative, or Designated AN Facility POC.

(d) *Identifying AN Agents.* (1) AN Purchasers and AN Purchaser applicants may, through the online web portal mentioned in 6 CFR 31.220(a), identify any AN Agents whom they authorize to obtain ammonium nitrate on their behalves.

(2) When a person named as an AN Agent is no longer authorized to obtain ammonium nitrate on behalf of an applicant or AN Purchaser, the applicant or AN Purchaser must notify

the Department through the online web portal within 30 days of the date on which the AN Agent becomes unauthorized to obtain ammonium nitrate.

**§ 31.225 AN Registered User number applicant vetting.**

(a) The Department will vet applicants' identifying information against the Terrorist Screening Database (TSDB) and/or verify each applicant's enrollment in a Department program that conducts equivalent TSDB vetting.

(b) The Department will compare each AN Registered User's identifying information against new and/or updated TSDB records as those new and/or updated records become available.

**§ 31.230 Registration approval and denial.**

(a) *Registration approval.* The Department will issue AN Registered User Numbers based on the results of TSDB vetting and the submission of complete registration applications by applicants.

(b) *Registration denial.* A registration applicant may be denied an AN Registered User Number if:

(1) Based on TSDB vetting and/or verification of previous TSDB vetting results under 6 CFR 31.225, the Assistant Secretary determines that it is in the interest of national security to deny the registration application; or

(2) The applicant submits an incomplete registration application; or

(3) Information contained in the registration application is fraudulent or false.

(c) *AN Registered User number issuance.* The Department will provide AN Registered User Numbers to approved applicants by e-mail or by an online web portal to be developed by the Department.

(d) *Notice of registration denial.* The Assistant Secretary will provide Notice of Registration Denial to denied applicants by e-mail or by an online web portal to be developed by the Department. This Notice will include the date of denial, and will also include instructions about how to appeal such a denial pursuant to 6 CFR 31.250.

(e) *Notice of delay.* (1) When the Department is unable to approve or deny a registration application within 72 hours of receipt, the Department will provide Notice of Delay to the applicant by e-mail or by an online web portal to be developed by the Department.

(2) When the Department determines that, in the interest of national security, longer than 72 hours is required to review a registration application or to issue or deny an AN Registered User Number, the Department will provide

Notice of Delay to the applicant by e-mail or by an online web portal to be developed by the Department.

**§ 31.235 Registration expiration.**

An AN Registered User Number issued under this subpart expires five years after the date it is issued.

**§ 31.240 Registration extension.**

(a) *Extension prior to registration expiration.* An AN Registered User can apply for an extension of his/her AN Registered User Number not more than 60 days before its scheduled expiration.

(b) *Extension after registration expiration.* An AN Registered User can apply for an extension of his/her AN Registered User Number after the expiration date of that AN Registered User Number for up to one year from the date of expiration.

(c) *Application for new number after registration expiration of more than one year.* An AN Registered User with an AN Registered User Number that has been expired for more than one year must apply for, and obtain, a new AN Registered User Number before engaging in the acquisition, purchase, sale, or transfer of ammonium nitrate, or before providing ammonium nitrate application services.

(d) *Extension procedures.* An AN Registered User can apply for an extension of his/her AN Registered User Number by following the registration procedures set forth in 6 CFR 31.220. Extensions will be issued or denied using the registration issuance and denial procedures and criteria set forth in 6 CFR 31.230.

**§ 31.245 Registration revocation.**

(a) The Assistant Secretary may revoke an AN Registered User Number if he/she determines that:

(1) It is in the interest of national security to revoke that AN Registered User Number based on the results of the activities described in 6 CFR 31.225; or

(2) The AN Registered User holding that AN Registered User Number obtained it by submitting fraudulent or false information.

(b) The Assistant Secretary will provide Notice of Revocation to each AN Registered User whose AN Registered User Number is revoked. Notice of Revocation will be provided prior to the effective date of revocation, unless the Assistant Secretary determines that it is in the interest of national security to revoke an AN Registered User Number prior to or at the same time as provision of Notice of Revocation. Notice of Revocation will include both the date on which the subject AN Registered User Number is

to be revoked and the means by which revocation can be appealed.

(c) Notices of Revocation will be disseminated to subject AN Registered Users by e-mail, by an online web portal to be developed by the Department, or by other written communication.

**§ 31.250 Appealing registration denial or revocation determination.**

(a) *Appealing registration denial.* A person whose application for registration has been denied may appeal the Assistant Secretary's denial of his/her application under this subsection.

(b) *Appealing revocation.* A person who has received a Notice of Revocation may appeal the Assistant Secretary's revocation determination under this subsection.

(c) *Appellant's request for materials.* To appeal a denial or revocation determination, a person whose registration application is denied, or whose AN Registered User Number is revoked, must initiate an appeal by filing a Request for Materials with the Office of the General Counsel. This Request for Materials must be submitted to the Office of the General Counsel within 60 days of the date of denial or revocation.

(d) *The department's response.* The Department will serve the appellant with copies of the releasable materials upon which denial or revocation was based within 60 days of receipt of a Request for Materials, unless the Department determines that additional time is required in the interest of national security. The Department will not include any classified information in this Response, nor will it include any other information or material protected from disclosure under law. As appropriate, the Department will include in this Response unclassified summaries of classified evidence supporting denial or revocation.

(e) *Appellant's request for appeal.* To appeal the denial or revocation, the appellant must serve upon the Office of the General Counsel a Request for Appeal within 60 days of service of the Department's Response under paragraph (d) of this section. The appellant's Request for Appeal must be written and include the rationale and information upon which the appellant disputes the basis of denial or revocation.

(f) *Correcting materials.* The Request for Appeal must include any corrections, additions, or clarifications to the materials provided by the Department under paragraph (d) of this section if the appellant believes that his/her denial or revocation was based on materials or information that he/she believes to be erroneous or incomplete.

(g) *Final determination.* (1) After reviewing an appellant's Request for Appeal, the Department will serve the appellant with a Final Determination.

(2) A Final Determination will be signed by the Under Secretary, and will:

- (i) Uphold the denial or revocation; or
- (ii) Reverse the denial or revocation.

(3) To the extent practicable, the Department will issue a Final Determination within 72 hours of receipt of the appellant's Request for Appeal, unless the Department determines that additional time is required in the interest of national security. The Department will not include any classified information in this service, nor will it include any other information or material protected from disclosure under law.

(4) Following a Final Determination reversing a registration denial, the Department will issue to the appellant an AN Registered User Number as described in 6 CFR 31.230(c).

(h) *Extension of time.* For good cause shown, the Department may grant an appellant an extension of time to file a Request for Materials or Request for Appeal. An appellant's request for an extension of time must be in writing and must be received by the Office of the General Counsel within a reasonable time before the due date to be extended; or an appellant may request an extension after the passing of a due date by sending a written request describing why the failure to file within the prescribed time limits should be excusable.

(i) *Final agency action.* For purposes of judicial review, a Final Determination constitutes final agency action by the Department. A Notice of Registration Application Denial or a Notice of Registration Revocation constitutes final agency action if not timely appealed pursuant to this section.

**Subpart C—Point of Sale Requirements**

**§ 31.300 General transfer and sale restrictions.**

(a) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may only transfer possession of ammonium nitrate to an AN Purchaser in possession of a valid AN Registered User Number issued under subpart B of this part, or to a person acting as an authorized AN Agent under this Part.

(b) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may only transfer possession of ammonium nitrate to an AN Purchaser or AN Agent after verification of his/her identity as required by this subpart.

(c) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may not transfer possession of ammonium nitrate to an AN Agent when such AN Agent is attempting to obtain ammonium nitrate on behalf of an AN Purchaser whose registration is deficient under this Part.

(d) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may only transfer possession of ammonium nitrate to an AN Agent after confirming with either the Department or the AN Purchaser that the AN Agent is authorized to act on the AN Purchaser's behalf.

**§ 31.305 Verification of AN Registered User Numbers and Identities—purchases or transfers not involving AN Agents.**

(a) *AN Purchaser electronic or telephonic verification.* Prior to transferring possession of ammonium nitrate, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must obtain the unexpired AN Registered User Number and the name of the AN Purchaser seeking to take possession of ammonium nitrate.

(1) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must submit this collected information to the Department by telephone or through an online web portal to be developed by the Department.

(2) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must also submit information identifying the AN Facility from which ammonium nitrate is being transferred, as well as his/her own name and his/her own AN Registered User Number, to the Department by telephone or through the online web portal mentioned in 6 CFR 31.305(a)(1).

(3) Upon receipt of this information, the Department will determine whether the information provided indicates that the AN Seller, AN Facility Representative, or Designated AN Facility POC submitting this information is authorized to sell or transfer ammonium nitrate. The Department will also determine whether the information provided indicates that the person attempting to purchase or obtain ammonium nitrate is authorized under Subpart B of this Part to do so.

(4) The Department will then notify the AN Seller, AN Facility Representative, or Designated AN Facility POC, by telephone or through the online web portal mentioned in 6 CFR 31.305(a)(1), of the determinations made pursuant to 6 CFR 31.305(a)(3).

The AN Seller, AN Facility Representative, or Designated AN Facility POC may not transfer ammonium nitrate unless and until each of these determinations indicates that the Department has authorized the sale or transfer.

(b) *AN Purchaser visual verification.* Prior to transferring possession of ammonium nitrate, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must examine the photo identification document of the AN Purchaser seeking to take possession of ammonium nitrate.

(1) The photo identification document must contain a photograph of the person attempting to take possession of the ammonium nitrate. AN Sellers, AN Facility Representatives, or Designated AN Facility POCs must not transfer possession of ammonium nitrate to any person unable to provide a photo identification document. No AN Purchaser may take possession of, or attempt to take possession of, ammonium nitrate without presenting a photo identification document.

(2) The AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must not transfer possession of ammonium nitrate unless he/she determines, to the best of his/her ability, that the person attempting to take possession of ammonium nitrate is the same person as the person who is depicted on the examined photo identification document.

**§ 31.310 Verification of AN Registered User Numbers and Identities—purchases or transfers involving AN Agents.**

(a) *AN Purchaser electronic or telephonic verification.* An AN Seller, AN Facility Representative, or Designated AN Facility POC, prior to transferring possession of ammonium nitrate to an AN Agent, must obtain the name, the unexpired AN Registered User Number, the photo identification document type, the photo identification document issuing entity, and the photo identification document number of the AN Purchaser.

(1) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must submit this collected information to the Department by telephone or through an online web portal to be developed by the Department.

(2) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must also submit information identifying the AN Facility from which

ammonium nitrate is being transferred, as well as his/her own name and his/her own AN Registered User Number, to the Department by telephone or through the online web portal discussed in 6 CFR 31.310(a)(1).

(3) Upon receipt of this information, the Department will determine whether the information provided indicates that the AN Seller, AN Facility Representative, or Designated AN Facility POC submitting this information is authorized to sell or transfer ammonium nitrate. The Department will also determine whether the information provided indicates that the AN Purchaser is authorized under Subpart B of this Part to purchase or obtain ammonium nitrate. The Department will not determine that the AN Purchaser is authorized to purchase or obtain ammonium nitrate unless the photo identification document information provided matches the photo identification document information previously provided by that person to the Department under 6 CFR 31.220(a)(2) or (c)(1).

(4) The Department will then notify the AN Seller, AN Facility Representative, or Designated AN Facility POC, by telephone or through the online web portal mentioned in 6 CFR 31.310(a)(1), of the determinations made pursuant to 6 CFR 31.310(a)(3). The AN Seller, AN Facility Representative, or Designated AN Facility POC may not transfer ammonium nitrate unless and until each of these determinations indicates that the Department has authorized the transfer.

(b) *Confirmation of agency.* An AN Seller, AN Facility Representative, or Designated AN Facility POC, prior to transferring possession of ammonium nitrate to an AN Agent, must obtain confirmation from the Department or from the AN Purchaser that the AN Agent is authorized to act on the AN Purchaser's behalf. This confirmation must be obtained in either of two ways:

(1) By submitting the name of the AN Agent to the Department by telephone or through the online web portal mentioned in 6 CFR 31.310(a)(1). If the named AN Agent has been previously authorized by the AN Purchaser to take possession of ammonium nitrate on his/her behalf, pursuant to 6 CFR 31.220(d), then the Department will provide a notice of confirmation, by telephone or through online web portal, to the AN Seller, AN Facility Representative, or Designated AN Facility POC making this submission.

(2) Orally from the AN Purchaser. Oral confirmation may be obtained by an AN Seller, AN Facility

Representative, or Designated AN Facility POC representing the AN Facility conducting the transfer. Such oral confirmation must be obtained in person or by telephone, prior to transfer of possession to the AN Agent.

(c) *AN Agent visual verification.* Prior to transferring possession of ammonium nitrate to an AN Agent, an AN Seller, AN Facility Representative, or Designated AN Facility POC must examine the photo identification document of the AN Agent seeking to take possession of ammonium nitrate.

(1) The photo identification document must contain a photograph of the person attempting to take possession of the ammonium nitrate. AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may not transfer possession of ammonium nitrate to persons unable to provide photo identification documents. An AN Agent must not take possession of, or attempt to take possession of, ammonium nitrate without presenting a photo identification document.

(2) The AN Seller, AN Facility Representative, or Designated AN Facility POC must not transfer possession of ammonium nitrate unless he/she determines, to the best of his/her ability, that the person attempting to take possession of the ammonium nitrate is the same person as the person who is depicted on the examined photo identification document, and is the same person as confirmed to be an authorized AN Agent under 6 CFR 31.310(b).

**§ 31.315 Recordkeeping requirements.**

(a) An AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must each ensure that the AN Facility maintains records pertaining to each sale or transfer of ammonium nitrate consisting, at a minimum, of the following:

- (1) Date of sale or transfer;
- (2) Form and amount of payment, if any;
- (3) Quantity of ammonium nitrate sold or transferred;
- (4) Type of packaging of the ammonium nitrate sold or transferred;
- (5) Location where the AN Purchaser, or if applicable AN Agent, will take possession of the ammonium nitrate sold or transferred;
- (6) Name, address, telephone number, AN Registered User Number, photo identification document type, photo identification document issuing entity, and photo identification document number of the AN Purchaser purchasing or taking possession of the ammonium nitrate sold or transferred;

(7) If an AN Agent takes possession of ammonium nitrate, name, address, telephone number, photo identification document type, photo identification document issuing entity, and photo identification document number of the AN Agent taking possession of the ammonium nitrate sold or transferred;

(8) If an AN Agent takes possession of ammonium nitrate, a record of the date and means by which confirmation of agency was received pursuant to 6 CFR 31.310(b); and

(9) Confirmation numbers or confirmation records, if any, received from the Department as part of the notification processes described in 6 CFR 31.305(a)(4) and 6 CFR 31.310(a)(4).

(b) In sales or transfers not involving AN Agents, AN Purchasers must provide the information required by 6 CFR 31.315(a)(6) to AN Facility personnel prior to transfer of ammonium nitrate. AN Facilities, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs must not transfer possession of ammonium nitrate to any persons failing to provide this information prior to transfer.

(c) In sales or transfers involving AN Agents, AN Purchasers and/or the AN Agents obtaining ammonium nitrate on their behalves must provide the information required by 6 CFR 31.315(a)(6) and (7) to AN Facility personnel prior to transfer of ammonium nitrate. AN Facilities, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs must not transfer possession of ammonium nitrate to any AN Agent if this information has not been provided prior to transfer.

(d) An AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must each ensure that the AN Facility maintains the records required by 6 CFR 31.315(a), as to each sale or transfer of ammonium nitrate, for a minimum of two years from the date of sale or transfer.

(e) An AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must each take reasonable actions to ensure that the AN Facility secures the records required by 6 CFR 31.315(a) from damage, theft, and loss.

#### Subpart D—Reporting Theft and Loss

##### § 31.400 Reporting obligations.

(a) Any AN Facility Representative or Designated AN Facility POC who has knowledge of the theft or unexplained loss of ammonium nitrate must report such theft or loss to the Bureau of Alcohol, Tobacco, Firearms and Explosives of the U.S. Department of

Justice (ATF), or direct other AN Facility personnel to report such theft or loss to ATF, as provided in 6 CFR 31.405.

(b) Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must ensure that the AN Facility implements internal reporting procedures which require all AN Facility Representatives, AN Sellers, and other AN Facility personnel (as appropriate) to notify the appropriate AN Facility Representative or Designated AN Facility POC of any theft or unexplained loss of ammonium nitrate, to report such theft or loss directly to ATF, or both.

##### § 31.405 Reporting.

(a) *General reporting requirements.* Persons required to report theft or loss under this Subpart must report each theft or loss to ATF by telephone and by facsimile, not later than 24 hours after becoming aware of such theft or loss. If facsimile is not available, persons required to report theft or loss under this Subpart must report each theft or loss to ATF by telephone and U.S. mail, not later than 24 hours after becoming aware of such theft or loss.

(b) *Voluntary reporting.* Persons not required to report theft or loss under this Subpart may report theft or loss of ammonium nitrate by contacting ATF by the same means described in paragraph (a) of this section.

#### Subpart E—Inspections and Audits

##### § 31.500 Authority.

(a) *On-site inspections and audits.* In order to assess compliance with the requirements of this part and with the requirements of subtitle J, and in order to prevent the misappropriation or use of ammonium nitrate in acts of terrorism, authorized Department officials may enter AN Facilities, or other locations where records are stored, to inspect and audit the records required to be maintained pursuant to 6 CFR 31.315, to inspect and audit any other records that pertain to misappropriation or preventing misappropriation of ammonium nitrate, and to inspect and audit any other records required by the Assistant Secretary to be maintained pursuant to Subtitle J.

(b) *Remote inspections and audits.* In order to assess compliance with the requirements of this part and with the requirements of subtitle J, and in order to prevent the misappropriation or use of ammonium nitrate in acts of terrorism, the Department may require AN Facilities, AN Facility Representatives, and Designated AN

Facility POCs to make the records mentioned in 6 CFR 31.500(a) available to the Department by facsimile, mail, or e-mail.

##### § 31.505 Manner of inspections and audits.

(a) *On-Site inspections and audits.* Authorized Department officials will conduct on-site inspections and audits at reasonable times and in reasonable manners. The Department will provide a minimum of 24 hours notice to an AN Facility, if possible through its Designated AN Facility POC, before any on-site inspection and audit, except when:

(1) The Assistant Secretary determines that an on-site inspection and audit without such notice is warranted by exigent circumstances and approves such on-site inspection and audit; or

(2) Any delay in conducting an on-site inspection and audit might be seriously detrimental to security, and the Assistant Secretary determines that an on-site inspection and audit without notice is warranted, and approves an Inspector to conduct such on-site inspection and audit.

(b) *Remote inspections and audits.* Authorized Department officials will conduct remote inspections and audits at reasonable times and in reasonable manners. The Department will provide a minimum of 24 hours notice to an AN Facility, if possible through its Designated AN Facility POC, before that AN Facility is required to remotely submit records to the Department. The Department may provide less than 24 hours notice before an AN Facility is required to remotely submit records to the Department only when:

(1) The Assistant Secretary determines that a remote inspection and audit without such notice is warranted by exigent circumstances and approves such remote inspection and audit; or

(2) Any delay in conducting a remote inspection and audit might be seriously detrimental to security, and the Assistant Secretary determines that a remote inspection and audit without notice is warranted, and approves an Inspector to conduct such remote inspection and audit.

##### § 31.510 Inspectors.

(a) Inspections and audits will be conducted by personnel duly authorized and designated for that purpose as “Inspectors” by the Assistant Secretary, or any person who is authorized by the Department to perform inspections pursuant to a cooperative agreement or a delegation of authority established under subtitle J.



(b) An Inspector will, on request, present his or her credentials for examination by AN Facility personnel during an on-site inspection and audit, but these credentials may not be reproduced or retained by any AN Facility, by any AN Facility personnel, by any AN Seller, by any AN Facility Representative, or by any Designated AN Facility POC.

**§ 31.515 Records availability requirements.**

(a) *Records availability during on-site inspections and audits for which the department has provided at least 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must make all records required to be maintained by this Part available to Inspectors immediately upon the commencement of an on-site inspection and audit. Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must provide Inspectors with the use of photocopiers, computers, and other equipment necessary to copy such records, if subject AN Facilities have access to such equipment. If Inspectors deem that photocopying or other reproduction of records is necessary, but subject AN Facilities do not have access to necessary photocopying/reproduction equipment, Inspectors must be permitted to take original copies of pertinent records out of the subject AN Facilities for duplication and prompt return.

(b) *Records availability during on-site inspections and audits for which the department has provided less than 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must make all records required to be maintained by this Part available to Inspectors as quickly as possible upon the commencement of an on-site inspection and audit. Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must make such records available, at a maximum, within four hours of the commencement of an on-site inspection and audit. Inspectors must be provided with the use of photocopiers, computers, and other equipment necessary to copy such records, if subject AN Facilities have access to such equipment. If Inspectors deem that photocopying or other reproduction of records is necessary, but subject AN Facilities do not have access to necessary photocopying/reproduction equipment, Inspectors must be permitted to take original copies of pertinent records out of the subject AN

Facilities for duplication and prompt return.

(c) *Records availability for remote inspections and audits for which the department has provided at least 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must remotely submit any and all records requested by the Department under this Part to the Department by the time prescribed in the Department's notice.

(d) *Records availability for remote inspections and audits for which the department has provided less than 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must remotely submit all records requested by the Department under this Part to the Department as quickly as possible after, and in no case more than four hours later than, receipt of the Department's notice.

**Subpart F—Civil Penalties**

**§ 31.600 Orders Assessing Civil Penalty, generally.**

When the Assistant Secretary determines that any person or entity has violated any provision or provisions of this Part, the Assistant Secretary may issue an Order Assessing Civil Penalty against such person or entity making such person or entity liable to the United States for a civil penalty of not more than \$50,000 per violation of this part.

**§ 31.605 Setting civil penalty amounts.**

In determining the amount of a civil penalty, the Assistant Secretary will consider: The nature and circumstances of the violation(s) underlying the civil penalty; the history of prior violations by the person or entity determined to have committed the violation underlying the civil penalty; the ability to pay of the person or entity determined to have committed the violation underlying the civil penalty; the ability to continue to do business of the person or entity determined to have committed the violation underlying the civil penalty; and any other matters that the Assistant Secretary determines that justice requires.

**§ 31.610 Procedures for issuing Orders Assessing Civil Penalty.**

(a) At a minimum, each Order Assessing Civil Penalty will be signed by the Assistant Secretary, dated, and include as to each person or entity subject to such Order Assessing Civil Penalty:

(1) The name, address, and (where applicable) AN Registered User Number of such person or entity;

(2) A listing of the provision(s) of this Part alleged to have been violated;

(3) A statement of facts upon which the alleged instances of violation are based;

(4) A statement of the amount of the civil penalty assessed;

(5) A statement of the date by which such person or entity must pay the civil penalty assessed, and a statement of the date by which such person or entity may file a Notice for Application for Review pursuant to Subpart G of this Part, as an alternative to civil penalty payment;

(6) A statement of the means by which such person or entity may file a Notice for Application for Review pursuant to Subpart G of this Part; and

(7) A statement of the means by which payment may be made.

(b) The Assistant Secretary may establish procedures for issuance of Orders Assessing Civil Penalty.

(c) Each person or entity subject to an Order Assessing Civil Penalty must comply with the terms of such Order Assessing Civil Penalty by the date specified in such Order Assessing Civil Penalty unless such person or entity has filed a timely Notice for Application for Review under Subpart G of this Part.

(d) An Order Assessing Civil Penalty issued under this section becomes a final agency action when the time specified in such Order Assessing Civil Penalty to file a Notice for Application for Review has passed without such filing.

**Subpart G—Adjudications and Appeals**

**§ 31.700 Neutral adjudications, generally.**

(a) Any person or entity against whom an Order Assessing Civil Penalty has been issued is entitled to a hearing and adjudication, by a Presiding Officer, on any issue of material fact relevant to any civil penalty issued against such person or entity under this Part.

(b) A Presiding Officer will issue an Initial Decision on any material issue related to an Order Assessing Civil Penalty before any such issue is reviewed on appeal pursuant to 6 CFR 31.735.

**§ 31.705 Appointment of Presiding Officers.**

(a) Immediately upon the filing of any Notice for Application for Review under 6 CFR 31.710, the Secretary shall appoint an attorney, who is employed by the Department and who has not performed any investigative or prosecutorial function with respect to the matter, to act as a neutral adjudications officer or Presiding Officer for the compilation of a factual

record and the recommendation of an Initial Decision for each Proceeding.

(b) Notwithstanding paragraph (a) of this section, the Secretary may appoint one or more attorneys who are employed by the Department and who do not perform any investigative or prosecutorial function with respect to this subpart, to serve generally in the capacity as Presiding Officer(s) for such matters pursuant to such procedures as the Secretary may hereafter establish.

**§ 31.710 Commencement of Adjudication Proceedings.**

(a) Any person or entity against whom an Order Assessing Civil Penalty has been issued may institute proceedings to review the propriety of such civil penalty by filing a Notice for Application for Review specifying that such person or entity requests a hearing and adjudication.

(b) Each person or entity requesting a hearing and adjudication must serve each Notice for Application for Review and all subsequent filings on the Office of the General Counsel.

(c) Each Notice for Application for Review must be accompanied by all appropriate legal memoranda, declarations, affidavits, other documents and other evidence supporting the position asserted by the person or entity requesting a hearing and adjudication.

(d) The Assistant Secretary will file and serve a Response, accompanied by all appropriate legal memoranda, declarations, affidavits, other documents and other evidence supporting the position asserted by the Assistant Secretary, within 14 calendar days of the filing and service of the Notice for Application for Review and all supporting papers.

**§ 31.715 Prohibition on ex parte communications during adjudication.**

(a) At no time after the designation of a Presiding Officer for a proceeding and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.735(e) will the designated Presiding Officer, or any person who will advise that official in the decision on the matter, discuss ex parte the merits of the proceeding with any interested person outside the Department, with any Department official who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

(b) If, after the designation of a Presiding Officer and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.735(e), the designated Presiding Officer, or any

person who will advise that official in the decision on the matter, receives from or on behalf of any party, by means of an ex parte communication, information which is relevant to the decision of the matter and to which other parties have not had an opportunity to respond, a summary of such information will be served on all other parties, who will have an opportunity to reply to the ex parte communication within a time set by the designated Presiding Officer.

(c) The consideration of classified or Sensitive But Unclassified information or materials pursuant to an in camera procedure does not constitute a prohibited ex parte communication for purposes of this subpart.

**§ 31.720 Burden of proof.**

The Assistant Secretary bears the initial burden of proving the facts necessary to support the challenged Order Assessing Civil Penalty at every proceeding instituted under this subpart.

**§ 31.725 Hearing and adjudication procedures.**

(a) Following filing and receipt of Notice for Application for Review and Response, the assigned Presiding Officer will conduct scheduling conferences or issue scheduling orders as appropriate; accept or order pre-hearing memoranda, motions, and briefings as appropriate; and order discovery as appropriate.

(b) Any hearing and adjudication will be held as expeditiously as possible in the county, parish, or incorporated city of residence of the person or entity filing the Notice for Application for Review instituting the hearing and adjudication, at a precise location to be determined by the assigned Presiding Officer, or, with the consent of such person or entity, at any other location conducive to a prompt presentation of any necessary testimony or other proceedings.

(c) Videoconferencing and teleconferencing may be used where appropriate at the discretion of the assigned Presiding Officer.

(d) Each party offering the affirmative testimony of a witness must present that testimony by declaration, affidavit, or other sworn statement submitted in advance as ordered by the assigned Presiding Officer.

(e) Any witness presented for examination will be asked to testify under oath or affirmation.

(f) The hearing and adjudication will be recorded verbatim.

(g) A person or entity may appear to be heard on his own behalf or through any counsel of his choice.

(h) A person or entity, individually or through counsel, may offer relevant and material information including written direct testimony which that person or entity believes should be considered in opposition to the Order Assessing Civil Penalty at issue.

(i) A person or entity, individually or through counsel, may conduct cross-examination as may be specifically allowed by the assigned Presiding Officer for a full determination of relevant facts.

**§ 31.730 Completion of adjudication procedures.**

(a) The assigned Presiding Officer will close and certify the record of the adjudication promptly upon the completion of the hearing and upon the submission of post-hearing briefs, if any are ordered by the assigned Presiding Officer.

(b) The assigned Presiding Officer will issue an Initial Decision based on the certified record, and the decision will be subject to appeal pursuant to 6 CFR 31.735.

(c) An Initial Decision will become a final agency action on the expiration of the time for an appeal pursuant to 6 CFR 31.735.

(d) An Initial Decision will specify the time by which the subject person or entity must pay the ordered civil penalty, or the Presiding Officer's modification of such penalty, if any. Such deadline will be stayed, however, during the pendency of any appeal pursuant to 6 CFR 31.735.

**§ 31.735 Appeals.**

(a) *Right to appeal.* The Assistant Secretary, or any person or entity having received an Initial Decision under this Subpart, has the right to appeal to the Under Secretary acting as a neutral appeals officer.

(b) *Procedure for appeals.* (1) The Assistant Secretary, or any person or entity who has received an Initial Decision under this Subpart, may institute an appeal by filing a Notice of Appeal with the Office of the General Counsel.

(2) A Notice of Appeal must be filed within seven calendar days of the service of the Presiding Officer's Initial Decision. Where the Assistant Secretary initiates an appeal, the Assistant Secretary will serve a copy of this Notice of Appeal on the appellee.

(3) An Initial Decision is stayed from the timely filing of a Notice of Appeal until the Under Secretary issues a Final Decision.

(4) The appellant must file a Brief with the Office of the General Counsel within 28 calendar days of the filing of

the Presiding Officer's Initial Decision. Where the Assistant Secretary initiates an appeal, the Assistant Secretary will serve a copy of this Brief on the appellee.

(5) The appellee must file its/his/her Opposition Brief with the Office of the General Counsel within 28 calendar days of the filing of the appellant's Brief. Where the Assistant Secretary is an appellee, the Assistant Secretary will serve a copy of this Opposition Brief on the appellant.

(c) *Expedited appeals.* The Under Secretary may provide for expedited appeals for appropriate matters.

(d) *Ex parte communications.* (1) At no time after the filing of a Notice of Appeal and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.735(e) will the Under Secretary, his designee, or any person who will advise that official in the decision on the matter discuss ex parte the merits of the proceeding with any interested person outside the Department, with any Department official who performs a prosecutorial or

investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

(2) If, after the filing of a Notice of Appeal and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.375(e), the Under Secretary, his designee, or any person who will advise that official in the decision on the matter receives from or on behalf of any party, by means of an ex parte communication, information which is relevant to the decision of the matter and to which other parties have not had an opportunity to respond, a summary of such information will be served on all other parties, who will have an opportunity to reply to the ex parte communication within a time set by the Under Secretary or his/her designee.

(3) The consideration of classified or Sensitive But Unclassified information or materials pursuant to an in camera procedure does not constitute a prohibited ex parte communication for purposes of this subpart.

(e) *Final decisions.* The Under Secretary will issue a Final Decision and serve it upon the parties. A Final Decision made by the Under Secretary constitutes final agency action.

(f) *Conduct of appeals.* The Secretary may establish procedures for the conduct of appeals pursuant to this subpart.

#### **Subpart H—Other**

##### **§ 31.800 State law preemption.**

Subject to subtitle J, the laws of any State are preempted to the extent that such laws are inconsistent with this part or with subtitle J, except that this section shall not preempt any State law that provides additional protection against the acquisition of ammonium nitrate by terrorists or the use of ammonium nitrate in explosives in acts of terrorism or for other illicit purposes, as determined by the Secretary.

**Janet Napolitano,**

*Secretary.*

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