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May 3, 2017

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Ave, N.W.
Washington, D.C. 20210

Dear Secretary Acosta,

On behalf of the Agricultural Retailers Association (ARA), we wish to congratulate and welcome you to your new role as Secretary of Labor. As a part of the regulated community, agricultural retailers from across the country look forward to a healthy and robust working relationship with you and the rest of the Department of Labor.

ARA is a not-for-profit trade association that represents America's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers which include: fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Agricultural retail and distribution facilities are found in every state and range in size from small family-held businesses to farmer cooperatives to large companies with multiple outlets.

Fertilizer Safety and Health Partners Alliance

In February of 2015, ARA and the Occupational Safety and Health Administration (OSHA), along with the U.S. Environmental Protection Agency (EPA) and other industry stakeholders, such as The Fertilizer Institute (TFI), agreed to initiate the Fertilizer Safety and Health Partners Alliance (Alliance). The Alliance was intended to provide a forum for regulators and industry stakeholders to work together to protect the health, safety, and security of workers, emergency responders, and the communities surrounding establishments in the agricultural retail and supply industry, with a focus on matters concerning the storage and handling of ammonium nitrate and anhydrous ammonia fertilizers. To do so, the signatories agreed to work together on relevant OSHA and EPA rulemakings and enforcement activities.

Process Safety Management "Retail Exemption"

On July 22, 2015, OSHA issued an unlawful memorandum that purported to change the definition of "retail facility" within the "retail exemption" in OSHA's Process Safety Management (PSM) standard. This change, if implemented, would have upended a definition that had been relied on for 23 years. It would have subjected an additional 4,800 facilities to the PSM standard; more than 70% of the facilities – 3,800 – would have been agricultural retail facilities. Neither ARA nor any of the other industry stakeholders were given any advance warning of

OSHA's issuance of this memorandum; we had hoped that the aforementioned Alliance would provide a way for advance consultation and coordination but it did not occur in this case.

Once we became aware of the change we requested a meeting with OSHA leaders in early August 2015 but were not able to convince them to reconsider. OSHA's implementation timeframe was unrealistic and its estimate of cost impact was artificially low by at least a factor of 10 according to research we conducted with our membership.

In September 2015, ARA and TFI filed a petition for review under the OSH Act against OSHA, alleging the memorandum was a *de facto* standard, and that OSHA was therefore required to go through notice-and-comment rulemaking prior to issuance. In September 2016, a three-judge panel on the D.C. Circuit Court of Appeals unanimously granted the petition, concluding the memorandum was an OSH Act standard issued without following notice-and-comment requirements, and vacated the memorandum.

At this time, the Department of Labor and Solicitor General's Office are currently deciding whether to file a petition for issuance of a writ of certiorari with the U.S. Supreme Court. The Solicitor General's office has twice sought extensions of time to file a petition and the deadline runs out on May 19, 2017.

ARA believes that a decision by the Department of Labor to seek issuance of a writ of certiorari would be misplaced. No circuit split exists and no issue of important federal question exists. As a result, the petition would almost certainly be denied and would only be a waste of scarce resources for the federal government and agricultural retailers. There is little dispute that the D.C. Circuit's opinion was narrowly drafted, was premised exclusively upon the OSH Act, and explicitly declined to address any arguments under the Administrative Procedure Act (APA).

Further, nothing in the decision limits OSHA's (or any other governmental agency's) ability to issue guidance. Instead, the Circuit Court determined the basic function of the memorandum increased the reach of the PSM standard. Thus, the memorandum was in fact a standard for the purposes of the OSH Act; not an interpretation. OSHA maintains the ability to issue interpretations and guidance without the need for notice-and-comment rulemaking so long as an interpretation does not increase the scope of a standard.

In addition to the legal arguments, there are numerous reasons why the memorandum was ill-advised. The memorandum was in response to the 2013 explosion at an agricultural retailer's facility in West, Texas. That tragedy, which was the result of arson according to the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, involved ammonium nitrate, not anhydrous ammonia. But the memorandum only addressed the storage and handling of anhydrous ammonia under the PSM standard; not ammonium nitrate. Applying PSM to anhydrous ammonia has no relationship to the incident at West.

We urge the Department of Labor to not seek certiorari from the Supreme Court and urge it to maintain the "retail exemption" of the PSM standard under its current definition of retail establishment and terminate the effort to apply PSM to ammonia retail facilities.

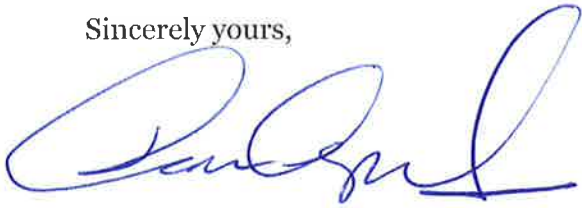
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We look forward to a collaborative relationship with your Department of Labor to best achieve a work environment that protects the health and safety of workers. The agricultural retail industry looks forward to working with OSHA (and the rest of the Department) on issues of mutual interest including Personal Protective Equipment (PPE) standards, Globally Harmonized Standard for Hazardous Communications, and many others. We would like to meet with you and/or others at the Department of Labor in the near future to discuss these important issues to American agriculture. Kyle Liske on our staff would be the best contact for scheduling this meeting; he can be reached at (202)595-1706 or kyle@aradc.org.

Sincerely yours,



W. Daren Coppock
President & CEO