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Re: **Opposition to Section 9131 of House Farm Bill (H.R. 2),
Definition of Retail Facilities**

Dear Farm Bill Conferees:

We, the undersigned law professors, write to urge you to oppose Section 9131 of the House Farm Bill, the Agriculture and Nutrition Act of 2018 (H.R. 2), and to ensure this language is eliminated from the final Farm bill. The language in Section 9131 would codify a dangerous exemption of high-risk retail facilities that sell highly hazardous chemicals to commercial end users from the Occupational Safety and Health Administration's (OSHA's) Process Safety Management (PSM) standard, posing a serious threat to the safety of workers at such facilities and to the surrounding communities and environment.

The PSM standard helps identify and address risks from uncontrolled releases of any of roughly 140 highly hazardous chemicals. OSHA issued the PSM standard in 1992 to protect workers employed at facilities with processes that involve these highly hazardous chemicals.

By protecting workers inside of establishments, it also provides protection to the surrounding community and environment. When OSHA issued the PSM standard, it exempted “retail facilities” but failed to define the term.¹ OSHA explained in the preamble to the PSM standard that the agency “believe[d] that chemicals in retail facilities are in small volume packages, containers and allotments, making a large release unlikely.”² Subsequently, OSHA issued an interpretive letter, clarifying that it considered exempted from the standard facilities that sell more than 50 percent of its chemicals to an end user.³

In the wake of the April 2013 explosion of ammonium nitrate fertilizer stored at West Fertilizer in West, Texas, which killed 15 people, injured hundreds, and leveled the community surrounding the establishment, the nation saw firsthand the real-world consequences of OSHA’s broad-based exemption from the PSM standard. OSHA’s interpretation had the effect of exempting any establishment that met its 50 percent test, regardless of whether or not it stored large amounts of hazardous chemicals for wholesale distribution to commercial end users. Accordingly, under OSHA’s interpretation of the exemption, West Fertilizer was considered an exempt retail facility not subject to the standard, despite the fact that it maintained large quantities of a highly hazardous chemical for bulk distribution to farmers.

Following this incident, in July 2015, OSHA revised its interpretation of the “retail facility” exemption, aligning it with the North American Industry Classification System (NAICS) definition of “retail,” concluding that the retail facility exemption applies only to facilities “organized to sell merchandise in small quantities to the general public.”⁴ OSHA explained that its earlier interpretation “has no relationship to [its] original intent for application of the exemption” and the exemption “should never have been interpreted to cover facilities engaged distinctly in wholesale activities.”⁵ Thus, OSHA determined that protecting workers from the significant risk of death or injury due to uncontrolled releases of highly hazardous chemicals — and preventing another catastrophe like what happened in West, TX — required it to narrow its prior interpretation of the standard. Justifiably, under the new interpretation, facilities like West Fertilizer, which sell highly hazardous chemicals to commercial end users, would now be subject to the PSM standard.

Despite the clear policy rationale for narrowing the exemption, the Agricultural Retailers Association and Fertilizer Institute sued OSHA after it issued its 2015 memorandum, claiming the agency’s interpretation was effectively a new standard that must undergo notice-and-comment rulemaking. The D.C. Circuit agreed, holding that OSHA’s definition was invalid without rulemaking.⁶ The court felt compelled to note, “[N]othing in our decision necessarily calls into question the substance of OSHA’s decision to narrow the exemption for retail facilities and correspondingly to expand the scope of the PSM Standard. We hold only that, insofar as OSHA does so, it must follow the notice-and-comment procedures for standards set forth in the OSH Act.”⁷

Alarming, and without proper assessment of the risks to workers, surrounding communities, or the environment, Section 9131 of H.R. 2 seeks to ignore the lessons learned from West, TX, and to the contrary, directs OSHA to codify its flawed, overly broad

pre-West interpretation of the PSM exemption. The result would be to allow facilities like West Fertilizer to fall under the exemption once again, despite the enormous risk such facilities pose to the safety of their workers and surrounding communities.

Shortly after the West, TX, catastrophe, OSHA issued a Request for Information⁸ to identify issues related to modernizing the PSM standards to prevent similar incidents in the future. Unfortunately, OSHA's regulatory agenda has listed this as a Long-Term Action for the past several years, despite the urgency for which action is needed to protect workers and communities. Thus, instead of mandating OSHA return to its earlier, flawed interpretation, Congress should (separately from the Farm Bill) consider legislation compelling OSHA to move forward with developing a stronger rule that better protects against catastrophic risks from highly hazardous chemicals.

We therefore strongly oppose Section 9131 of H.R. 2 and urge you to ensure this language does not remain in the final Farm Bill.

Sincerely,

Thomas McGarity

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¹ Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6359 (Feb. 24, 1992) (codified at 29 C.F.R. §1910.119 (2017)).

² 57 Fed. Reg. at 6369.

³ Letter from Patricia K. Clark, Dir., Directorate of Enf't Programs, OSHA, to Gary Myers, President, The Fertilizer Inst. (June 19, 1992), <https://www.osha.gov/laws-regs/standardinterpretations/1992-06-19-0>.

⁴ OSHA Memorandum from Thomas Galassi, Dir., Directorate of Enf't Programs, to Regional Administrators, Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 C.F.R. §1910.119(a)(2)(i)) (July 22, 2015).

⁵ *Id.*

⁶ Agricultural Retailers Association v. Department of Labor, No. 15-1326, at 3 (D.C. Cir. Sept. 23, 2016), [https://www.cadc.uscourts.gov/internet/opinions.nsf/0/8A21F27B6B8AA5EF85258037004E678D/\\$file/15-1326-1637299.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/0/8A21F27B6B8AA5EF85258037004E678D/$file/15-1326-1637299.pdf).

⁷ *Id.* at 10.

⁸ Request for Information, Process Safety Management and Prevention of Major Chemical Accidents, 78 Fed. Reg. 73,756 (Dec. 9, 2013).