AGRICULTURAL RETAILERS ASSOCIATION

October 19, 2020

The Honorable James Comer
Ranking Member
Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Ranking Member Comer:

On behalf of the membership of the Agricultural Retailers Association (ARA), we submit the following comments in response to your letter that requested information on government regulations that have a negative economic impact on our industry. We appreciate the opportunity to comment on several regulations that concern agricultural retailers and distributors.

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 includes fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 states and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

The following regulations continue to negatively impacting retailers' income, or they are proposals being considered that are concerning to the agricultural retail and distribution industry:

Transportation

Agricultural retailers heavily depend on commercial drivers for "just in time" delivery of farm supplies and other essential products and services to their farm and ranch customers. Commercial truck traffic is a vital component to the nation's economic prosperity. Our industry, like many others, are experiencing a growing driver shortage and higher shipping prices due to increased regulatory costs and burdens from Hours of Service (HOS) regulations do not work for today's agricultural industry and the Electronic Logging Device (ELD) requirements. There is also a growing driver shortage due to retirements or departures to other industries due to increased regulations. An issue was brought up to ARA recently by agricultural retail member relates to more flexibility on the utilization of the Restricted CDL for Farm-Related Services, which is a critical program exemption for our industry. Due to the heavy rains several years ago, agricultural retailers were not able to fully utilize these temporary drivers who operate

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under the Restricted Ag CDL. In addition, during the beginning of the Covid-19 related shutdowns on state Department of Motor Vehicle (DMV) offices many drivers were unable to obtain a Restricted Ag CDL.

For example, in the state of Indiana the Seasonal period(s) must be at least 30 days but not more than 180 days. The combination of two seasonal periods must not exceed 180 days. The Ag retailer must pick the beginning of Seasonal Period 1 when the clock begins on days that can be utilized. Same for Seasonal Period 2. The main problem arises, like this year, when an Ag retailer submits for the use of a 30 day period but due to extreme weather such as heavy rains they are only able to utilize the Restricted CDL driver for 5 days out of the 30 yet all of the days count towards their 180 maximum.

The current Gross Vehicle Weight (GVW) limit for Federal Interstate Highways of 80,000 lbs. on 5 axles was established in 1982, prior to the standardization of anti-lock brakes and significant progress that has been made in vehicle safety and pavement technology. Due to outdated weight restrictions as resulted in more trucks hauling over 80,000 lbs. traveling on local roads and less than ideal infrastructure.

The U.S. agricultural industry also heavily depends on a healthy, efficient and competitive freight rail system that is essential to the nation's economic growth. Rail service plays a critical role in distributing crop nutrient and crop protection materials. In the past 40 years, rail carriers have consolidated to the point where just four control over 90 percent of the freight rail traffic. The Surface Transportation Board (STB) is an economic regulatory agency responsible for overseeing the rail marketplace. Since 2001, rail rates have doubled due to a lack of competition and reliable freight rail service for many manufacturers, agricultural retailers, distributors, farmers, and energy producers across the country. In the past 15 years, rail rates for anhydrous ammonia have gone up over 200 percent. Without STB regulatory reform, the nation's agriculture productivity will be stalled, and consumers will continue to be affected by increased food and energy costs. We support practical regulatory reforms that promote competitive freight rail service for all stakeholders.

Request to Congress:

- **HOS Agricultural Exemption:** Support legislation eliminating the HOS ag exemption's planting and harvesting season provision. Over 30 states already have a year-round "planting and harvesting season" designation. Eliminating this provision ensures the HOS ag exemption is year-round for all states, promoting regulatory consistency and alleviating unnecessary regulatory burdens highlighted by the ELD mandate. We also request support for expanding the current air mile radius from 150 up to 300 following a FMCSA pilot program to collect safety data to address continued industry consolidation and driver shortages.
- **Drive Safe Act:** Support legislation (H.R. 1374 / S. 569) to create an apprenticeship training program that allows for the operation of commercial motor vehicles by CDL drivers between the ages of 18 to 20 in interstate commerce.
- **Restricted Ag CDL:** Industry needs more flexibility under the 180-day limit. Currently the Restricted Ag CDL can only be used in seasonal windows. Days may be lost due to weather related issues where you have idle drivers not working

but the 180-day clock is still counting down. ARA recommends allowing the Restricted Ag CDL driver to maintain a log and only days they actually / drive and work count against the 180-day limit. 2) Remove the restricted that a Restricted Ag CDL holder is not able to hold an unrestricted CDL at the same time. This will allow the industry to hire other drivers such as school bus drivers, etc. or Class A CDL drivers looking for seasonal work. Drivers are not willing to give up their more permanent CDL for the Restricted Ag CDL if they will be required to lose it.

- **Truck Weights:** Support the creation of a voluntary program under which up to 10 states could opt-in to allowing 91,000 lb., 6 axle, bridge formula compliant trucks on Federal Interstate Highways within their borders and collect additional safety data regarding the GVW and axle configurations of Class-8 and Class-9 commercial vehicles involved in accidents resulting in any serious injuries or fatalities.
- **Railroad Reforms:** Reject rail industry attempts to maintain the status-quo and urge the STB to continue working to reform its outdated regulations to enhance rail competition and modernize its oversight of rail-shipper disputes.

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

The Federal Fungicide, Insecticide and Rodenticide Act (FIFRA) has been amended by Congress on several occasions to strengthen the regulatory standard for safety – most recently by the Food Quality Protection Act (FQPA) that added specific protections for infants and children. FIFRA provides for federal regulation of pesticide distribution, sale, and use and establishes stringent safety standards and oversight. All pesticides distributed or sold in the United States must be registered by the U.S. Environmental Protection Agency (EPA), and then reregistered every fifteen years. EPA is required to review the most current scientific data on health and environmental impacts for all pesticide products, and impose requirements to minimize any risks, before they are made available for sale and use. The data must show that products work as intended and can be used safely. Product label restrictions and instructions are designed to ensure a product is used effectively and safely in a manner that mitigates any identified risks. FIFRA already requires EPA to consider economic, social, and environmental benefits *and* risks, and FQPA added special considerations for risks to infants and children, when determining if a product can be registered. While reregistration is required to occur at least every fifteen years, it can and often does occur more frequently. EPA can initiate a review if scientific data becomes available that questions the safety of a product.

ARA is concerned with legislation that has been introduced that would gut decades of federal regulation and scientific progress, undermining the work of EPA's career scientists in the evaluation of pesticide safety and oversight of pesticide registration and use. The bills would jeopardize the continued availability and innovation of pesticide products by imposing an unscientific and unbalanced process that could unnecessarily remove pest control options from those who need them to safely grow crops, protect homes and infrastructure, and control pathogens and disease vectors. Anti-pesticide groups have also tried to use the federal courts, especially the 9th Circuit Court of Appeals, to ban or severely limit the use of several key pesticide products.

Request to Congress:

- **Protect FIFRA:** Please protect FIFRA and the current risk-based, peer reviewed science data driven process the covers the registration and re-registration of the sale, distribution, storage and use of pesticide products. Products used in the U.S. should continue to be regulated by U.S. law – which follows the most comprehensive risk assessment process of any country in the world.
- **Preemption:** *Patchwork policies don't work anywhere.* Pesticide regulation under FIFRA includes states, which have delegated authority from EPA to review and register pesticides for use in states, recognizing unique use conditions and patterns. State lead agencies, that include Departments of Agriculture, Departments of Environment Protection, and Departments of Environmental Conservation, conduct product registration activities, applicator testing and licensing, and enforcement.

DHS Chemical Facility Anti-Terrorism Standards (CFATS) Program
The Chemical Facility Anti-Terrorism Standards (CFATS) program ensures facilities that possess certain Chemicals of Interest (COI) have security measures in place to reduce the security risks associated with these chemicals. Some agricultural retailers sell certain fertilizers, necessary for food production, that have been identified by the Department of Homeland Security (DHS) as having potential security risks. As such, these fertilizers are listed in CFATS Appendix A. A facility must comply with CFATS regulations if a COI listed in Appendix A is held at the site above a certain quantity. Thousands of agricultural retailer sites are regulated by CFATS. In July 2020, the CFATS program was reauthorized for three more years.

Request to Congress:

- **<u>Maintain CFATS program focus on site security</u>:** Established in 2007, the CFATS program is the only federal program focused on site security at facilities with certain chemicals, and this must remain the program's sole purpose. ARA members are required to comply with various regulatory programs administered by other agencies (e.g.: Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA)) to ensure the safety of the communities in which they live and serve. Potential expansion of the CFATS program into areas regulated by the EPA, OSHA, the Department of Transportation, or the Bureau of Alcohol, Tobacco, Firearms & Explosives, would result in duplicative, confusing and contradictory regulatory requirements—therefore eroding the purpose of this program: to secure our nation's high-risk chemical facilities from terrorist exploitation.

- **<u>Clearly define ammonium nitrate and ammonium nitrate mixtures</u>:** The CFATS Appendix A defines an ammonium nitrate mixture as a "*nitrogen* concentration of *23% nitrogen* or grater." (CFATS Appendix A (*emphasis added*)). In October 2016, DHS issued a guidance (FAQ Number: 1773) that blatantly ignored the "23% nitrogen" statement in Appendix A. Instead, DHS stated that "facilities should use the percentage of solid *ammonium nitrate* in a mixture to determine whether the mixture meets the minimum concentration of *33%* to be counted towards the Screening Threshold

Quantity (STQ)." (DHS FAQ Number: 1773, October 4, 2016 (*emphasis added*)). Nowhere in the regulation or Appendix A does it state that the concentration of ammonium nitrate should be used to determine an ammonium nitrate mixture. Nor is the percentage of 33 used in either the regulation or Appendix A. In short, DHS amended Appendix A in 2016 via guidance without notice-and-comment-rulemaking. We ask Congress to define ammonium nitrate mixtures as it is defined in Appendix A: "nitrogen concentration of 23% nitrogen or greater."

- **<u>Ensure changes to Appendix A: COI are transparent</u>:** Changes to Appendix A should be subject to notice-and-comment rulemaking requirements of the Administrative Procedures Act.

North American Industrial Classification System (NAICS) Code: Definition for Farm Supply Retailers

The North American Industry Classification System (NAICS) was developed as the standard for use by federal statistical agencies in classifying business establishments for the collection, analysis, and publication of statistical data related to the business economy of the United States. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the old Standard Industrial Classification (SIC) system. There is no central government agency with the role of assigning, monitoring, or approving NAICS codes for establishments. Individual establishments are assigned NAICS codes by various agencies for various purposes using a variety of methods. The U.S. Census Bureau has no formal role as an arbitrator of NAICS classification.

The NAICS categories and definitions were not developed to meet the needs of regulatory applications. However, certain federal agencies such as OSHA and EPA are using the NAICS code to try to capture certain types of agri-businesses such as agricultural retailers (i.e. farm supply retailers) under regulations designed for manufacturers even though it does not fit the original intent of these regulations established by Congress. Farm Supply Retailers do not manufacture fertilizer at their facilities. Farm supply retailers are primarily engaged in the retail distribution of farm supplies, such as animal feed, fertilizers (including custom blended and mixed products), agricultural chemicals, pesticides, plant seeds, and plant bulbs to agricultural producers (i.e. farmers and ranchers). However, because there was not a good definition under the NAICS code for farm supply retailers, most facilities/businesses have been using the code 424910: Farm Supplies Merchant Wholesalers, as it was the closest to describe the products they sold to farmers. Currently there is not a code classification under 44-45 Retail Trade that adequately covers the sale of farm supplies. The NAICS code needs to be immediately fixed to prevent OSHA, EPA and other federal agencies from attempting to treat farm supply retailers as manufacturers, or it will have far-reaching, adverse financial ramifications for the agricultural industry.

Proposed New NAICS Code Definition Under 44-45 Retail Trade

Farm Supply Retailers: This industry comprises establishments primarily engaged in the retail distribution of farm supplies, such as animal feed, fertilizers (includes custom blended and mixed products), agricultural chemicals, pesticides, plant seeds, and plant bulbs to agricultural producers (e.g. farmers, ranchers) and other end users. Also included are those retailers that provide services to their farmer customers, such as nutrient planning, soil testing, and/or on farm fertilizer or pesticide application.

Global Positioning Systems (GPS)

On April 22, 2020, the FCC released an Order and Authorization permitting Ligado Networks, LLC ("Ligado") to operate a low-power terrestrial nationwide network in the 1526-1536 MHz, 1627.5-1637.5 MHz, and 1646.5-1656.5 MHz bands.
This decision threatens GPS reliability for millions of Americans who rely on these technologies. Numerous businesses and industry stakeholders expressed their concerns about the FCC's action. And the FCC issued this Order despite concerns raised by federal Agencies that rely on GPS to protect our national and economic security. The Departments of Defense, Commerce, Interior, Justice, Homeland Security, Energy, and Transportation have raised concerns about Ligado's plans, along with NASA, the National Science Foundation, the Coast Guard and the Federal Aviation Administration. These agencies are the GPS experts, as GPS is central to the critical government functions and private sector activities they oversee and support.

Leading agriculture organizations representing farmers and interests across all 50 states have announced their support for the Keep GPS Working Coalition. The coalition was launched in June to protect GPS users from harmful interference resulting from the Federal Communications Commission's decision to permit Ligado Networks to operate a terrestrial wireless network in the band adjacent to GPS. New coalition members include the Agricultural Retailers Association (ARA), American Soybean Association (ASA), Equipment Dealers Association (EDA), Iowa-Nebraska Equipment Dealers Association, National Corn Growers Association (NCGA), National Cotton Council of America (National Cotton Council) and USA Rice Federation (USA Rice).

As a member of the Keep GPS Working Coalition, ARA appreciates your support on this important matter and your signing of the July 9, 2020 letter to the Federal Communications Commission (FCC) and FCC Chairman Pai.

Request to Congress:

Protect GPS: To better manage farming operations during these challenging times, farmers are increasingly relying on precision agriculture applications that deliver centimeter-level accuracy that enables farmers to maximize crop yields while lowering costs and environmental impact. From precise application of seeds, water, fertilizer and pesticides, to equipment efficiencies such as lowered fuel use and safeguarding animals through tracking and virtual fencing, GPS is ubiquitous on farms and ranches, both large and small. GPS also allows farms to operate before dusk and after dawn, maximizing what is often a set period in which crops can be planted and harvested.

Precision farming reduces costs for consumers, delivers economic benefits for rural economies and enables the efficient production of the foods required to meet a growing global demand for food, fiber and fuel. For farmers, GPS-enabled precision agriculture provides an estimated savings of $15 to $25 an acre. That savings is not insignificant for a family farm: A corn-producing farm of 1,000 acres would save $15,000 to $25,000 in operating costs through the use of GPS technology. This is also income that rolls through local rural economies.

Ag retailers often fill a role as trusted advisor to their farmer customers, suggesting new and emergent technologies in the precision ag space. Without the GPS location services needed for proper planning and implementation of these resources, farmers may not have the tools they need to increase crop yields, lower input loads and decrease inefficacies. ARA stands behind the coalition's work to protect GPS as a valuable resource to farmers.

Conclusion

Thank you for reviewing government regulations and the effect that they have on agricultural retailers and their farmer customers. ARA is concerned with outdated federal regulations that directly impact our industry. Please contact me at 202-595-1699 or richard@aradc.org if you have any questions or need additional information.

Sincerely,

Richard D. Gupton
Senior Vice President, Public Policy & Counsel