

Dated: March 25, 2019.

William P. Barr,

Attorney General.

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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 555

[Docket No. ATF 2002R-226F; AG Order No. 4418-2019]

RIN 1140-AA27

Separation Distances of Ammonium Nitrate and Blasting Agents From Explosives or Blasting Agents

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to remove the reference to an outdated guidance document in an explanatory note following the table of separation distances of ammonium nitrate and blasting agents from explosives or blasting agents. This final rule also clarifies that those separation distance requirements apply to all ammonium nitrate.

DATES: *Effective Date:* May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Denise Brown, Enforcement Programs and Services, Office of Regulatory Affairs, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648-7070.

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General has delegated to the Director of ATF responsibility for administering and enforcing title XI, Regulation of Explosives, of the Organized Crime Control Act of 1970 (OCCA), Public Law 91-452, as amended, 18 U.S.C. chapter 40. See 18 U.S.C. 847; 28 CFR 0.130. Congress has declared that the purpose of the OCCA, is to reduce the “hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials.” Public Law 91-452, title XI, sec. 1101. Regulations in 27 CFR part 555 implement title XI.

The regulations at 27 CFR 555.220 set forth a table of separation distances of

ammonium nitrate and blasting agents from explosives or blasting agents (the § 555.220 Table of Distances) followed by six explanatory notes. In this table, the term “separation distance” means the minimum distance that must be maintained between stores of certain materials, such as high explosives, and blasting agents. The third note states that the distances specified in the § 555.220 Table of Distances “apply to ammonium nitrate that passes the insensitivity test prescribed in the definition of ammonium nitrate fertilizer issued by the Fertilizer Institute” in its “Definition and Test Procedures for Ammonium Nitrate Fertilizer.”

The Fertilizer Institute (TFI) is a voluntary, non-profit trade association that currently has more than 160 members. See Membership List, The Fertilizer Institute, <http://www.tfi.org/about-tfi/members> (last visited February 13, 2019). Members include importers, wholesalers, retailers, and others involved in the fertilizer industry. *Id.*

The Agricultural Nitrogen Institute, a predecessor organization of TFI, first developed the “Definition and Test Procedures for Ammonium Nitrate Fertilizer” guidance document. See The Fertilizer Institute, Definition and Test Procedures for Ammonium Nitrate Fertilizer (Aug. 1984), available at <https://www.atf.gov/resource-center/docs/guide/definition-and-test-procedures-ammonium-nitrate-fertilizer/download> (last visited February 13, 2019). In May 1984, TFI assembled a task force of industry and government representatives who were “experts on the physical and chemical characteristics of ammonium nitrate fertilizer” to review and update the document. *Id.* at i. “Based on that review and the technical expertise and experience of the task force members, TFI published” a revised guidance document in August 1984 (the August 1984 guidance). *Id.* The August 1984 guidance defines ammonium nitrate fertilizer as “solid ammonium nitrate containing a minimum of 33.0% nitrogen, having a minimum pH of 4.0 in a 10% aqueous solution, 0.20% maximum carbon, 0.010% maximum elemental sulfur, 0.150% maximum chloride as Cl, or particulated elemental metals sufficient to release 4.60 ml, maximum, of hydrogen from 50.0 gram sample and which will pass the detonation resistance test in Section 2.0 and the burning test in Section 4.0.” *Id.* at 1.

A. The Fertilizer Institute Petition

On March 19, 2002, TFI filed a petition with ATF requesting that ATF

amend the explosives regulations at § 555.220 to remove the reference to the August 1984 guidance. TFI explained that the document is outdated because TFI last published it in 1984, will not review or update it, and cannot ensure that its procedures are still valid. TFI recognized that ATF may require an alternate method of determining the insensitivity of ammonium nitrate fertilizer and suggested that ATF reference certain Department of Transportation (DOT) regulations.

The DOT regulations include several definitions and two hazardous classifications (Class 5.1 and Class 9) for ammonium nitrate based fertilizers based, in part, on the amount of combustible material included in the fertilizer. See 49 CFR 172.101. Class 5.1 ammonium nitrate based fertilizer is defined as a uniform mixture of fertilizer with ammonium nitrate as the main ingredient within the following composition limits: (1) Not less than 90 percent ammonium nitrate with not more than 0.2 percent total combustible, organic material calculated as carbon, and with added matter, if any, that is inorganic and inert when in contact with ammonium nitrate; or (2) less than 90 percent but more than 70 percent ammonium nitrate with other inorganic materials, or more than 80 percent but less than 90 percent ammonium nitrate mixed with calcium carbonate or dolomite or mineral calcium sulphate, and not more than 0.4 percent total combustible, organic material calculated as carbon; or (3) ammonium nitrate based fertilizers containing mixtures of ammonium nitrate and ammonium sulphate with more than 45 percent but less than 70 percent ammonium nitrate, and not more than 0.4 percent total combustible, organic material calculated as carbon such that the sum of the percentage of compositions of ammonium nitrate and ammonium sulphate exceeds 70 percent. See 49 CFR 172.102(c)(1), code/special provision 150.

The 5.1 ammonium nitrate fertilizer classification can only be used for substances that are too insensitive for acceptance into Class 1 (explosive) when tested in accordance with Test Series 2 in the United Nations (UN) Manual of Tests and Criteria, Part 1. See 49 CFR 172.101, 172.102(c)(1) code/special provisions 52 and 150. To determine whether a material falls within Class 5, Division 5.1, DOT requires regulated parties to conduct tests in accordance with international standards in the UN Manual of Tests and Criteria. See 49 CFR 173.127(a).

Class 9 ammonium nitrate based fertilizer is defined as a uniform,

ammonium nitrate based fertilizer mixture containing nitrogen, phosphate, or potash with not more than 70 percent ammonium nitrate and not more than 0.4 percent total combustible, organic material calculated as carbon or with not more than 45 percent ammonium nitrate and unrestricted combustible material. See 49 CFR 172.101, 172.102(c)(1) code/special provision 132.

B. Advance Notice of Proposed Rulemaking

On September 16, 2010, based upon TFI's petition, ATF published in the **Federal Register** an advance notice of proposed rulemaking (ANPRM). 75 FR 56489. ATF requested information from explosives industry members, trade associations, consumers, and all other interested parties to determine whether a replacement reference for the August 1984 guidance is necessary, and, if so, whether there are any alternate methods available to determine the insensitivity of ammonium nitrate fertilizer. ATF solicited comments on 10 specific questions as well as any relevant information on the subject. The comment period for the ANPRM closed on December 15, 2010.

In response to the ANPRM, ATF received three comments. One commenter is the petitioner, one commenter is the Institute of Makers of Explosives (IME), an explosives trade association, and the third commenter is an associate member of the same explosives trade association. All three commenters were in support of removing the reference to the August 1984 guidance and adopting DOT regulations for classifying ammonium nitrate fertilizer in accordance with the UN Manual of Tests and Criteria.

II. Notice of Proposed Rulemaking

On May 29, 2015, ATF published a notice of proposed rulemaking (NPRM) in the **Federal Register** (80 FR 30633) that requested comments on its proposed rule to amend the regulations governing the separation distances of ammonium nitrate and blasting agents from explosives or blasting agents. ATF proposed in the NPRM to remove reference to the August 1984 guidance following the § 555.220 Table of Distances and clarify that all ammonium nitrate is subject to 27 CFR 555.206(c)(2) and the § 555.220 Table of Distances. The comment period for the NPRM closed on August 27, 2015.

The proposed rule did not include the change suggested by one of the commenters on the ANPRM, to replace the current reference to the August 1984 guidance document with a reference to

the UN Test Series 1 and 2 Gap Tests because the recommended test methods do not address all of the hazards encountered during all processes involving dangerous goods. Under common circumstances, such as during handling and storage, certain characteristics of ammonium nitrate can change and make the material more sensitive and susceptible to accidental detonation. Because these changes may occur long after the evaluation of suitability for classification under the UN testing regime occurs (following manufacture and prior to first transportation), the application of such a test, and the assignment of a UN classification for transportation may not accurately reflect the susceptibility of the material to accidental detonation throughout its lifespan. Additionally, ATF is unaware of any commercially-produced ammonium nitrate manufactured for use with, and stored in proximity of, explosives that would not fall under the § 555.220 Table of Distances, using the UN Test Series 1 and 2 Gap Tests under the commenter's suggested amendments. Thus, the Department preferred amending the third note following the § 555.220 Table of Distances to delete the reference to the August 1984 guidance and stating that all ammonium nitrate stored near high explosives and blasting agents is subject to the § 555.220 Table of Distances. These changes would be cost effective for the affected industry and maintain public safety.

III. Analysis of Comments on the NPRM and Department Response

A. Comments Received

ATF received one comment in response to the NPRM. The commenter, IME, also responded with a comment to the 2010 ANPRM. Once again, IME generally supports ATF's proposed changes with one suggested amendment. While IME appreciates ATF's efforts to "minimize costs to industry associated with regulatory compliance, and its actions to update and streamline its rules," IME suggests that by "expanding its rules to regulate 'all A[mmonium] N[itrate],' ATF's Table of Distances will continue to differ materially from its source document, the IME's American Table of Distances (ATD), and the current National Fire Protection Association publication 495, both of which reference UN test procedures for A[mmonium] N[itrate]." IME recommends that, in order to avoid any confusion that the removal of the TFI definition might engender, the word "solid" should be added to note (3) to the table in § 555.220 so it reads as

follows: (3) These distances apply to all *solid* ammonium nitrate with respect to their separation from stores of high explosives and blasting agents

B. Department Response

TFI's 1984 Definition and Test Procedures for Ammonium Nitrate Fertilizer addressed solid ammonium nitrate containing, in part, a minimum of 33 percent nitrogen that passed a detonation and burning test. Since that time, the explosives industry has developed a variety of new ammonium nitrate based products for blasting operations, and continues to develop more efficient and effective explosive products. Therefore, the Department does not believe it is in the best interests of public safety to specify that only solid ammonium nitrate should be subject to 27 CFR 555.206(c)(2) and the § 555.220 Table of Distances. Retaining flexibility to include ammonium nitrate in other forms will ensure that the public is protected from stores of all ammonium nitrate stored in proximity to high explosives and blasting agent storage. Accordingly, the Department is not adopting IME's suggestion to clarify that only solid ammonium nitrate is subject to 27 CFR 555.206(c)(2) and the § 555.220 Table of Distances.

The Department believes that this final rule will not adversely affect the explosives industry because explosives industry members storing ammonium nitrate near stores of high explosives and blasting agents do not use the outdated August 1984 guidance referenced in the existing regulations and already comply with the § 555.220 Table of Distances for all ammonium nitrate. The final rule will remove an outdated reference from the regulations and replace it with clear guidance that the Department believes will have virtually no impact on the explosives industry. All ammonium nitrate will be subject to the § 555.220 Table of Distances when stored within the sympathetic detonation distances of high explosives and blasting agents listed under the table at § 555.220. Ammonium nitrate explosive mixtures that are high explosives pursuant to § 555.202(a), or are defined as a blasting agent pursuant to § 555.11, will be subject both to the table of distances for storage of explosives materials at § 555.218 and to the § 555.220 Table of Distances. The final rule will continue to protect public safety by ensuring that all stores of ammonium nitrate, located within sympathetic detonation distances to high explosives and blasting agents, meet the minimum distances to inhabited buildings, highways, and passenger railways.

IV. Final Rule

This final rule implements, without change, the amendments to the regulations in 27 CFR 555.220 that were specified in the NPRM.

V. Statutory and Executive Order Reviews

A. Executive Orders 12866, 13563 and 13771

Executive Orders 13563, “Improving Regulation and Regulatory Review,” and 12866, “Regulatory Planning and Review,” direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” directs agencies to reduce regulation and control regulatory costs.

The Attorney General has determined that this final rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB). As this rule is not a significant regulatory action, this rule is not a regulatory action subject to the requirements of Executive Order 13771. See OMB Memorandum, “Guidance Implementing Executive Order 13771, titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

As discussed below, this rule would not have any costs to industry because this rule puts into regulation current industry practices; therefore, the explosives industry would not need to incur any hourly or capital burdens in order to comply with these changes.

Section 6 of Executive Order 13563 directs agencies to develop a plan to review existing significant rules that may be “outmoded, ineffective, insufficient, or excessively burdensome,” and to make appropriate changes where warranted. The Department selected and reviewed this rule under the criteria set forth in its Plan for Retrospective Analysis of Existing Rules, and determined that this final rule removes a reference to an outdated guidance document, clarifies the existing regulations, and continues to protect public safety.

B. Executive Order 13132

This final rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, “Federalism,” the Attorney General has determined that this final rule will not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, the Attorney General certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule updates the affected regulations by removing a reference to an outdated guidance document. The changes in this final rule are administrative and do not add any new requirements that would have any impact on the economy because the referenced test in explanatory note three was last published in 1984, is obsolete, and is not used by the explosives industry; and the explosives industry already ensures their stores of ammonium nitrate are stored in accordance with the § 555.220 Table of Distances. Accordingly, this rule does not require any business, regardless of size, to incur any additional costs.

E. Congressional Review Act

This final rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This final rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year, and it will not significantly or uniquely affect small

governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

Disclosure

Copies of the petition, this notice, and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–8740.

Drafting Information

The author of this document is Denise Brown, Enforcement Programs and Services, Office of Regulatory Affairs, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Customs duties and inspection, Explosives, Hazardous substances, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, Warehouses.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 555 is amended as follows:

PART 555—COMMERCE IN EXPLOSIVES

- 1. The authority citation for 27 CFR part 555 continues to read as follows:

Authority: 18 U.S.C. 847.

- 2. In § 555.220, revise note (3) to the table to read as follows:

§ 555.220 Table of separation distances of ammonium nitrate and blasting agents from explosives or blasting agents.

* * * * *

(3) These distances apply to all ammonium nitrate with respect to its separation from stores of high explosives and blasting agents. Ammonium nitrate explosive mixtures that are high explosives pursuant to § 555.202(a) or are defined as a blasting agent pursuant to § 555.11 are subject to the table of distances for storage of explosive materials in § 555.218 and to the table of separation distances of ammonium nitrate and blasting agents

from explosives or blasting agents in this section.

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March 25, 2019.

William P. Barr,

Attorney General.

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 269

[Docket ID: DOD-2016-OS-0045]

RIN 0790-AK40

Civil Monetary Penalty Inflation Adjustment

AGENCY: Under Secretary of Defense (Comptroller), Department of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense is issuing this final rule to adjust each of its statutory civil monetary penalties (CMP) to account for inflation. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), requires the head of each agency to adjust for inflation its CMP levels in effect as of November 2, 2015, under a revised methodology that was effective for 2016 and for each year thereafter.

DATES: This rule is effective April 1, 2019.

FOR FURTHER INFORMATION CONTACT: Brian Banal, 703-571-1652.

SUPPLEMENTARY INFORMATION:

Background Information

The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890 (28 U.S.C. 2461, note), as amended by the Debt Collection Improvement Act of 1996, Public Law 104-134, April 26, 1996, and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), Public Law 114-74, November 2, 2015, required agencies to annually adjust the level of CMPs for inflation to improve their effectiveness and maintain their deterrent effect. The 2015 Act required that not later than July 1, 2016, and not later than January 15 of every year thereafter, the head of each agency must adjust each CMP within its jurisdiction by the inflation adjustment described in the 2015 Act. The inflation

adjustment is determined by increasing the maximum CMP or the range of minimum and maximum CMPs, as applicable, for each CMP by the cost-of-living adjustment, rounded to the nearest multiple of \$1. The cost-of-living adjustment is the percentage (if any) for each CMP by which the Consumer Price Index (CPI) for the month of October preceding the date of the adjustment, exceeds the CPI for the month of October in the previous calendar year.

The initial catch up adjustments for inflation to the Department of Defense's CMPs were published as an interim final rule in the **Federal Register** on May 26, 2016 (81 FR 33389-33391) and became effective on that date. The interim final rule was published as a final rule without change on September 12, 2016 (81 FR 62629-62631), effective that date. The revised methodology for agencies for 2019 and each year thereafter provides for the improvement of the effectiveness of CMPs and to maintain their deterrent effect. The Department of Defense is adjusting the level of all civil monetary penalties under its jurisdiction by the Office of Management and Budget (OMB) directed cost-of-living adjustment multiplier for 2019 of 1.02522 prescribed in OMB Memorandum M-19-04, "Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015," dated December 14, 2018. The Department of Defense's 2019 adjustments for inflation to CMPs apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Defense after the effective date of the new CMP level.

Statement of Authority and Costs and Benefits

Pursuant to 5 U.S.C. 553(b)B, there is good cause to issue this rule without prior public notice or opportunity for public comment because it would be impracticable and unnecessary. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701(b)) requires agencies, effective 2017, to make annual adjustments for inflation to CMPs notwithstanding section 553 of title 5, United States Code. Additionally, the methodology used, effective 2017, for adjusting CMPs for inflation is established in statute, with no discretion provided to agencies regarding the substance of the adjustments for inflation to CMPs. The Department of Defense is charged only with performing ministerial

computations to determine the dollar amount of adjustments for inflation to CMPs.

Further, there are no significant costs associated with the regulatory revisions that would impose any mandates on the Department of Defense, Federal, State or local governments, or the private sector. Accordingly, prior public notice and an opportunity for public comment are not required for this rule. The benefit of this rule is the Department of Defense anticipates that civil monetary penalty collections may increase in the future due to new penalty authorities and other changes in this rule. However, it is difficult to accurately predict the extent of any increase, if any, due to a variety of factors, such as budget and staff resources, the number and quality of civil penalty referrals or leads, and the length of time needed to investigate and resolve a case.

Regulatory Procedures

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a "significant regulatory action," and was not reviewed by the Office of Management and Budget.

Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs"

This final rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

Unfunded Mandates Reform Act (2 U.S.C. Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule the mandates of which require spending in any year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will not mandate any requirements for State, local, or tribal