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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 555

[Docket No. ATF 2002R-226P; AG Order No. 3530-2015]

RIN 1140-AA27

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

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

ACTION: Notice of proposed rulemaking.

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proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations to remove the reference to an outdated guidance document in an explanatory note following the table of separation distances of ammonium nitrate and blasting agents from explosives or blasting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

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Commenters should be aware that the electronic Federal

Docket Management system will not accept comments after midnight Eastern Standard Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number (ATF 2002R-226P), by any of the following methods—

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* (202) 648–9741.
- *Mail:* Denise Brown, Room 6N–602, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE, Washington, DC, 20226; *ATTN: ATF 2002R-226P.*

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to the Federal eRulemaking portal, <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

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) 648–7105.

SUPPLEMENTARY INFORMATION:

I. Background

Title XI of the Organized Crime Control Act of 1970, Public Law 91-452, added chapter 40 (“Importation, Manufacture, Distribution and Storage of Explosive Materials”) to title 18 of the United States Code (U.S.C.). One purpose of title XI is to reduce the “hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials.” Public Law 91-452, sec. 1101, 84 Stat. 922, 952 (1970).

The Attorney General is responsible for implementing title XI. *See* 18 U.S.C. 847. The Attorney General has delegated that responsibility to the Director of the ATF subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 CFR 0.130. 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 175 members. *See* Membership List, The Fertilizer Institute, <http://www.tfi.org/about/membership-list> (last visited August 19, 2014). Members include importers, wholesalers, retailers, and others involved in the fertilizer industry. *Id.* Many of TFI’s members handle and store ammonium nitrate fertilizer and may be affected by the regulations at § 555.220.

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/files/publications/download/hist/definition-and-test-procedures-for-ammonium-nitrate.pdf>. 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.* “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 on the amount of combustible material included in the fertilizer. *See* 49 CFR 172.101. Class 5.1 ammonium nitrate fertilizer is defined as a uniform mixture 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) more than 70 percent but less than 90 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 172.101, 172.102(c)(1) code/special provisions 52, 150. Class 9 ammonium nitrate 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. 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 United Nations (UN) Manual of Tests and Criteria. *See* 49 CFR 173.127(a).

B. Advance Notice of Proposed Rulemaking

Based upon TFI's petition, ATF published in the **Federal Register** on September 16, 2010, an advance notice of proposed rulemaking (Notice No. ATF 26A, 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 Notice No. ATF 26A closed on December 15, 2010.

II. Analysis of Comments

A. Comments Received

ATF received three comments in response to the advanced notice of proposed rulemaking. Two of the commenters are explosive and fertilizer trade associations, and one commenter is an associate member of an explosive and fertilizer trade association. All of the commenters support 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.

The first commenter, the Institute of Makers of Explosives (IME), believes that ATF should amend note three following the § 555.220 Table of Distances to be consistent with the source document, Appendix A of IME Safety Library Publication 2,¹ and Table 9.4.2.2(b) of the National Fire Protection Association's (NFPA) NFPA 495: Explosive

¹ Institute of Makers of Explosives, *Safety Library Publication 2: The American Table of Distances 16-17* (1991), available at http://www.ime.org/ecommerce/products.php?category_id=13.

Materials Code.² IME noted that these two internationally recognized standards referenced the August 1984 guidance and replaced it with the following: “The distances in the Table apply to ammonium nitrate and ammonium nitrate based materials that show a ‘negative’ (-) result in the UN Test Series 2 Gap Test and show a ‘positive’ (+) result in the UN Test Series 1 Gap Test. Ammonium nitrate and ammonium nitrate based materials that are DOT hazard Class 1 sensitive shall be stored at separation distances determined by the American Table of Distances.” IME noted that DOT test procedures are “suitable and internationally recognized at the United Nations” and believes that ATF should harmonize its standards with those of DOT.

The petitioner, TFI, submitted the second comment. Like IME, TFI noted that IME removed references to the August 1984 guidance from its Safety Library Publication 2, the American Table of Distances, and that the NFPA adopted the same test as IME in NFPA 495. TFI also commented that ATF references NFPA and IME in its Table of Distances. TFI, therefore, supports IME’s position concerning the use of the UN Test Series 1 and 2 Gap Tests.

The third commenter, an IME member company, fully supports IME’s comments.

B. Department Response

The Department does not agree that it should replace the current reference to the August 1984 guidance document with a reference to the UN Test Series 1 and 2 Gap Tests. The Department acknowledges that the United Nations has developed criteria, test methods, and procedures that are generally sufficient for competent authorities to use for the classification of dangerous goods during transport. *See* U. N. Econ. & Soc. Council,

² National Fire Protection Association, *NFPA 495: Explosive Materials Code 31* (2010), available at <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=495>.

Recommendations on the Transport of Dangerous Goods: Manual of Tests and Criteria

U.N. Doc. ST/SG/AC.10/11/Rev.5 (2009), available at

[http://www.unece.org/fileadmin/DAM/trans/danger/publi/manual/Rev5/English/ST-SG-](http://www.unece.org/fileadmin/DAM/trans/danger/publi/manual/Rev5/English/ST-SG-AC10-11-Rev5-EN.pdf)

[AC10-11-Rev5-EN.pdf](http://www.unece.org/fileadmin/DAM/trans/danger/publi/manual/Rev5/English/ST-SG-AC10-11-Rev5-EN.pdf). However, these recommended test methods do not address all the hazards encountered during processes involving dangerous goods, such as storage.

Existing literature indicates that fertilizer and technical grade ammonium nitrate prill can detonate under certain circumstances and that various factors—such as particle size, prill density, degree of confinement, temperature, and moisture content—can affect the detonability of ammonium nitrate prill.³ Those factors may develop during transport, handling, and storage, after the UN test criteria have been applied.

In addition, ATF is unaware of any commercially-produced ammonium nitrate manufactured for use with, and stored in the 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 commenters' proposed amendments. Because the UN tests would lead to all ammonium nitrate being subject to the § 555.220 Table of Distances, the costs of imposing the extra step of those tests would outweigh any benefits.

The Department thus proposes amending the third note following the § 555.220 Table of Distances to delete the reference to the August 1984 guidance and to state that all

³ Ronald J. A. Kersten et al., *Detonation Characteristics of Ammonium Nitrate Products* (2006) (unpublished manuscript) (on file with ATF); Allan King & Alan Bauer, *A Critical Review of the EEC Detonability Test* (1977) (unpublished manuscript) (on file with ATF); Brian Melof et al., Dep't of Energy, Sandia Nat'l Labs., SAND2008-2078, *Detonability Study Of Fertilizer Grade Ammonium Nitrate* (2009); Henri-Noël Presles et al., *Experimental Study of the Detonation of Technical Grade Ammonium Nitrate*, 337 *Comptes Rendus Mécanique* 755 (2009); Albert C. van der Steen et al., *Detonation Velocities of the Non-Ideal Explosive Ammonium Nitrate*, 15 *Propellants, Explosives, Pyrotechnics* 58 (1990); Robert W. Van Dolah et al., U.S. Dep't of the Interior, Bureau of Mines, Report of Investigation 6903, *Further Studies on Sympathetic Detonation* (1966); Robert W. Van Dolah et al., U.S. Dep't of the Interior, Bureau of Mines, Report of Investigation 6746, *Sympathetic Detonation of Ammonium Nitrate and Ammonium Nitrate Fuel Oil* (1966); C. H. Winning, *Detonation Characteristics of Prilled Ammonium Nitrate*, 1 *Fire Tech.* 23 (1965).

ammonium nitrate stored near high explosives and blasting agents is subject to the § 555.220 Table of Distances. The Department believes this proposal will not negatively affect the explosives industry because most ammonium nitrate currently located near stores of high explosives and blasting agents are already subject to the § 555.220 Table of Distances. Moreover, it is ATF's understanding that entities who store ammonium nitrate located near high explosives and blasting agents do not use the outdated August 1984 guidance referenced in the existing regulations and instead comply with the § 555.220 Table of Distances for all ammonium nitrate. This proposed removal of the reference to the outdated test does not address ammonium nitrate blends containing fuels. Generally, ammonium nitrate blends are subject to ATF's criteria for high explosives in § 555.202(a) or blasting agent in § 555.11. Ammonium nitrate blends that meet the criteria are ammonium nitrate explosive mixtures and designated as such in ATF's List of Explosive Materials, which is published annually pursuant to 27 CFR 555.23.

This proposed amendment will provide industry members with clear guidance on the application of these regulations governing the storage of explosive materials. Section 555.206(c)(2) states that all ammonium nitrate is subject to the separation distances requirements in § 555.220. The revision of the reference to the outdated August 1984 guidance in note three following the § 555.220 Table of Distances will make clear the application of the Table of Distances in relationship to all ammonium nitrate. 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. 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 explosive materials in § 555.218 and to the § 555.220 Table of Distances. In

this way, the proposed amendment will continue to protect public safety by ensuring that all stores of ammonium nitrate located within the sympathetic detonation distances to high explosives or blasting agents meet minimum distances to inhabited buildings, highways, and passenger railways.

III. Proposed Amendments to 27 CFR Part 555

This proposed rule would amend the regulations of ATF governing the separation of distances of ammonium nitrate and blasting agents from explosives or blasting agents. The proposed rule would revise note three following the Table of Distances in 27 CFR 555.220 by removing the reference to the August 1984 guidance. The proposed rule would clarify that all ammonium nitrate is subject to 27 CFR 555.206(c)(2) and 555.220.

IV. Statutory and Executive Order Reviews

A. Executive Orders 12866 and 13563

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation and in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1, General Principles of Regulation, and section 6, Retrospective Analyses of Existing Rules.

Both Executive Orders 12866 and 13563 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, distributive 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. The Department has

assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

This proposed rule will not have an annual effect on the economy of \$100 million or more, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities. Similarly, it does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Accordingly, this proposed rule is not a "significant regulatory action" as defined in Executive Order 12866.

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 proposed rule removes a reference to an outdated guidance document, clarifies the existing regulations, and continues to protect public safety. ATF welcomes public comment on its analysis of the proposed rule's likely effects.

B. Executive Order 13132

This proposed 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 proposed rule will not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This proposed 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

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. The Attorney General has reviewed this rule and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule updates the affected regulations by removing a reference to an outdated guidance document. The changes proposed in this rule are administrative and do not add any new requirements that would have any impact on the economy because: 1) the referenced test in explanatory note three was last published in 1984, is obsolete, and is not used by the explosives industry; and 2) the explosives industry already ensures their stores of ammonium nitrate are stored in accordance with the § 555.220 Table of Distances.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This proposed 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 proposed 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 proposed rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

V. Public Participation

A. Comments Sought

ATF is requesting additional comments on this proposed rule from all interested persons. ATF is also specifically requesting comments on the clarity of this proposed rule and how it may be made easier to understand.

All comments must reference this document docket number (ATF 2002R-226P), be legible, and include the commenter's name and mailing address. ATF will treat all comments as originals and it will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

Comments, whether submitted electronically or in paper format, will be made available for public viewing at ATF, and on the Internet as part of the eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their name or other personal identifying information posted on the Internet should submit their comments by mail or facsimile, along with a separate cover sheet that contains their personal identifying information. Both the cover sheet and comment must reference this docket number. Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comment that contains material that is confidential under law (e.g., trade secrets, processes, etc.). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked “confidential” at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Comments may be submitted in any of three ways:

• *Mail*: Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in a minimum 12 point size of type (.17 inches), include the commenter's mailing address, be signed, and may be of any length.

• *Fax*: Submit comments by fax to (202) 648-9741. Faxed comments must:

(1) Be legible and appear in a minimum 12 point size of type (.17 inches);

(2) Be on 8 1/2" x 11" paper;

(3) Contain a legible, written signature; and

(4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

• *Federal eRulemaking Portal*: To submit comments to ATF via the Federal eRulemaking portal, visit <http://www.regulations.gov>, and follow the instructions for submitting comments.

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) 648-7080.

Drafting Information

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

List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and

recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 555 is proposed to be 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 paragraph (3) in the notes following 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 their 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 § 555.220.

* * * * *

Dated: May 21, 2015.

Loretta E. Lynch
Attorney General

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