

July 7, 2003

James P. Ficaretta
Program Manager
Room 5150, Bureau of Alcohol, Tobacco, Firearms and Explosives
P.O. Box 50221
Washington, DC 20091-0221

Re: Commerce in Explosives, Notice of Proposed Rulemaking, Notice No. 968, 68 Federal Register 4406 (January 29, 2003)

Dear Mr. Ficaretta:

The Office of Advocacy is pleased to submit these comments on the Bureau of Alcohol, Tobacco and Firearms' (ATF) proposed rule on Commerce in Explosives. ATF deserves credit for having conducted a review under Section 610 of the Regulatory Flexibility Act of 1980 (RFA) in an effort to remove regulatory barriers that can impede job creation and economic growth. We are proud to play a lead role in following through on the President's commitment to eliminate unnecessary or duplicative regulations that can stymie entrepreneurial success. It is our intention that these comments will help accomplish both the regulatory goal of ATF and the goal of the President's small business plan, to create an environment where businesses can flourish.

The Office of Advocacy (Advocacy) monitors and reports on agencies' compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The purpose of these laws is to bring the voice of small business into the regulatory development process. The requirements of small business impact analysis, small employer outreach and input, and consideration of less burdensome alternatives were enhanced by President Bush's Executive Order 13272. The Executive Order, signed on August 13, 2002, requires agencies to implement policies protecting small entities when writing new rules and regulations. Advocacy is an independent entity within the U.S. Small Business Administration (SBA), so the views expressed in this letter do not necessarily reflect the views of SBA or the Administration.

This letter is in response to a Notice of Proposed Rulemaking published in the *Federal Register* on January 29, 2003. The proposed rule, Commerce in Explosives, solicits comments on proposed changes to 29 CFR Part 55, including changes to requirements for recordkeeping and storage facilities for explosives. Included in the changes are at least three potentially costly revisions to 27 CFR Part 55. These concerns were first brought to the attention of the Office of Advocacy by industry representatives, who are concerned that ATF has underestimated the

economic impact of several provisions of the proposed rule. It is on their behalf and the on behalf of small businesses in the affected industries that Advocacy submits this comment.

First, the change in definition of the term “highway” to include low-volume roads will force manufacturers and users to redeploy storage magazines¹ to meet compliance. Second, the elimination of one column of the table of distances designated “low volume highways” will carry similar consequences. These two proposed provisions lead to the elimination of a class of storage possibilities near roads that are not heavily traveled. This will increase costs to industry members who use the low volume highway as the determining factor when choosing where to position storage facilities. However, given the need for transportation and access coupled with the fact that the low volume highway distance was the least constraining for many industry members, it is likely that many firms followed this standard when positioning storage magazines. Third, changes in physical storage criteria, including new storage unit construction material and new lock specifications, entail significant one-time capital expenditures.

Advocacy is concerned that this proposed rule does not satisfy the certification requirements of the RFA. As stated in section 605(b) of the RFA, the head of an agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The certification must include a statement providing the factual basis for this determination. The proposed rule lacks a discussion of the factual basis supporting the Secretary’s decision to certify the proposed rule. The ATF notice indicates that the rule as proposed “will have a minimal economic impact on the explosives industry,” and that the certification is based on “the lack of response [ATF] received to the RFA analysis set forth in T.D. ATF-293 and comments received on Notice 845.”² Advocacy believes the ATF must be more specific. At a minimum, a certification must include a description of the affected entities, and the reasoning and assumptions underlying the certification.

Advocacy recognizes ATF’s efforts to reach out to the pyrotechnics industry, as described in the preamble to the proposed rule. However, Advocacy believes that ATF does not go far enough in identifying all of the the industries that it proposes to regulate. Industry statistics indicate that the commercial explosives and fireworks industries, both subsets of the North American Industrial Classification System (NAICS) category 325920, explosives manufacturing, are dominated by small firms. Out of only 57 firms manufacturing explosives in the U.S., 45 have fewer than 500 employees, and 20 have fewer than 20 employees. The SBA size standard for

¹Defined as “[a]ny building or structure, other than an explosives manufacturing building, used for storage of explosive materials.” 27 CFR 55.11.

² The notice indicates that ATF amended Part 55 in 1990 (T.D. ATF-293, 55 Fed. Reg. 3717, March 7, 1990), and subsequently published a general notice of a review of the 1990 regulation under Section 610 of the RFA (Notice No. 845, 62 Fed Reg. 1386, January 10, 1997). Section 610 requires a “periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities.” 5 U.S.C. Sec. 610(a). The current notice further indicates that the proposed rule is based on the six responses the agency received to Notice 845, as well as provisions of ATF Ruling 76-18, changes proposed by the agency and changes proposed by the industry. 68 Fed. Reg. 4406.

NAICS 325920 is 750 employees. The Institute of Makers of Explosives (IME), a commercial explosives industry trade group, states that over 70% of its members are small firms.³ Additional industries will also be affected by the rule due to their use and/or storage of explosives, include the mining and quarrying industry, explosives distribution industry, the construction industry and the modeling/rocketry industry. Each of these industries also has small firms that will be faced with potentially costly provisions of the rule.

The elimination of the low volume highway classification for storage magazines could entail sizeable capital expenditures for storage magazine relocation. Depending upon the number of firms required to move storage magazines to reach compliance, the industry's total costs could be many times annual industry revenues. However, even if only a small number of firms have to relocate storage magazines, the impacts *on those firms* could be crippling. The capital costs of destroying and rebuilding facilities could force a capital-constrained small firm out of business. Clearly, this requirement must be considered significant even if it affects only a few firms, and therefore is worthy of consideration by ATF. Likewise, ATF must measure the impacts of changes proposed for storage magazine construction materials and lock specifications. One small firm that commented on the proposed rule, Energetic Systems, Inc., estimated that lock replacement alone would cost as much as \$100,000 for its facilities.⁴ This is a significant capital expenditure for a small firm, and ATF should calculate the unit costs and estimated costs per firm as a percent of revenues.

The Office of Advocacy recommends that ATF perform an analysis of the proposed rule's impact on other small entities to determine if an Initial Regulatory Flexibility Analysis (IRFA) is appropriate. If the analysis reveals a significant economic impact on a substantial number of small entities, then ATF should publish a supplemental notice in the *Federal Register* with an IRFA and solicit public comments. If ATF determines that the proposed rule can be certified by the Secretary as not having a significant economic impact on a substantial number of small entities, then the certification with its factual basis may be published with the final rule.

For further clarification of the certification process, the ATF may wish to refer to the section on certification in Advocacy's recently revised RFA guide, *The Regulatory Flexibility Act: an Implementation Guide for Federal Agencies*. This guide can be found on Advocacy's website, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

³ ATF Notice No. 968, Comment No. 821, Institute of Makers of Explosives, June 13, 2003.

⁴ ATF Notice No. 968, Comment 913, SEC Investment Corp., June 12, 2003.

If you have any questions regarding this letter, please contact Charles Maresca at (202) 205-6978.

Sincerely,

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Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs