DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750–AH32

Defense Federal Acquisition Regulation Supplement; Successor Entities to the Netherlands Antilles (DFARS Case 2011–D029)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to revise the definitions of ''Caribbean Basin country'' and ''designated country'' due to the change in the political status of the islands that comprised the Netherlands Antilles.

DATES: *Effective date:* June 29, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Telephone 703–602–0328.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule amends definitions of ''Caribbean Basin country'' and ''designated country'' at the clauses 252.225–7021, Trade Agreements, and 252.225–45, Balance of Payments Program—Construction Materials Under Trade Agreements.

On October 10, 2010, Curacao and Sint Maarten became autonomous territories of the Kingdom of the Netherlands. Bonaire, Saba, and Sint Eustatius now fall under the direct administration of the Netherlands.

The Netherlands Antilles was designated as a beneficiary country under the Caribbean Basin Initiative (see 19 U.S.C. 2702). According to the initiative, successor political entities remain eligible as beneficiary countries.

Therefore, the definitions have been revised to replace ''Netherlands Antilles'' with the five separate successor entities.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule.

Therefore, an initial regulatory flexibility analysis has not been performed because an initial regulatory flexibility analysis is only required for proposed or interim rules that require publication for public comment (5 U.S.C. 603) and a final regulatory flexibility analysis is only required for final rules that were previously published for public comment, and for which an initial regulatory flexibility analysis was prepared (5 U.S.C. 604).

This final rule does not constitute a significant FAR (or DFARS) revision as defined at FAR 1.501–1 because this rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of the Government. The rule only reflects the political status of the islands that comprised the Netherlands Antilles. This will have no impact on any entities in the United States. Therefore, publication for public comment under 41 U.S.C. 1707 is not required.

IV. Paperwork Reduction Act

This rule will not change the burden of any of the approved information collection requirements for part 225 currently approved by the Office of Management and Budget under OMB Clearance 0704–0229, Defense Federal Acquisition Regulation Supplement Part 225, Foreign Acquisition, and related clauses.

List of Subjects in 48 CFR Part 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

252.212–7001 [Amended]

■ 2. In section 252.212–7001, amend paragraph (b)(12)(i) by removing the clause date ''(NOV 2009)'' and adding in its place ''(JUN 2011)''.

■ 3. In section 252.225–7021, remove the clause date ''(NOV 2009)'' and add in its place ''(JUN 2011)'' and revise paragraph (a)(3)(iv) to read as follows:

252.225–7021 Trade agreements.

* * * * *

(a) * * *

(3) * * *

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

* * * * *

■ 4. In section 252.225–7045, remove the clause date ''(JAN 2009)'' and add in its place ''(JUN 2011)'' and in paragraph (a), revise paragraph (4) of the definition of ''designated country'' to read as follows:

252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.

* * * * *

(a) * * *

Designated country * * *

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

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[FR Doc. 2011–16373 Filed 6–28–11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 173

[Docket No. PHMSA–2010–0353; Notice No. 10–9]

Clarification of the Fireworks Approvals Policy

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Clarification.

SUMMARY: In this document, PHMSA is responding to comments received from its initial Notice No. 10–9 clarifying PHMSA's policy regarding the fireworks approvals program. Furthermore, in this document PHMSA is restating our policy clarification in that we will issue firework classification approvals only to fireworks manufacturers, and accept firework classification applications only from fireworks manufacturers or their designated agents. This policy clarification is intended to enhance safety by ensuring accountability of the manufacture of the device, and reducing the number of duplicate applications and approvals being issued for identical fireworks devices.

DATES: The policy clarification discussed in this document is effective June 29, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Paquet, Director, Approvals and Permits Division, Office of Hazardous Materials Safety, (202) 366–4512, PHMSA, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

With regard to fireworks approvals, the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180), Section 173.56(j)(3) states that ''[t]he manufacturer applies in writing to the Associate Administrator following the applicable requirements in APA Standard 87–1, and is notified in writing by the Associate Administrator that the fireworks have been classed, approved, and assigned an EX number.''

On December 17, 2010, PHMSA published the initial Notice No. 10–9 (75 FR 79085) clarifying its policy, consistent with the HMR, to issue firework classification approvals only to fireworks manufacturers, and accept firework classification applications only from fireworks manufacturers or their designated agents. The Notice also sought comment on that clarification. In today's document, PHMSA is responding to those comments and restating its policy clarification on the fireworks approval program.

The comments received covered various topics, including the economic impact, language barrier issues, jurisdictional issues, implementation time, and the legal issues associated with the Notice itself. Furthermore, commenters also expressed concern on how the policy would affect the EX application volume, the control and distribution of fireworks designs, PHMSA's ability to ensure compliance with and to enforce the clarification, and the relationship with other Federal regulations.

II. Background

The pyrotechnic industry is a global logistics supply chain comprised of mostly foreign fireworks manufacturers and domestic importers, retailers, distributors, and consumers. The transportation of an explosive (fireworks device) requires an EX classification approval issued by PHMSA, commonly referred to as an EX number. The EX number is a unique identifier that indicates the device has been classed and approved for transportation in the U.S., and is specific to a particular device as specified in 49 CFR 173.56(j) and the APA Standard 87–1.

PHMSA understands that it is a common industry practice for fireworks devices produced by one manufacturer to be marketed and sold under different trade names. Further, each retailer, importer or distributor, in addition to the manufacturer, applies for and receives an EX classification approval for the identical firework device. This practice has resulted in PHMSA processing multiple applications and issuing multiple approvals for the same firework device.

For some time, PHMSA has accepted fireworks applications from manufacturers, importers, retailers and distributors, and has issued the classification approvals to those stakeholders in the pyrotechnic industry. This redundant and burdensome process does not promote the safe transportation of explosives (fireworks devices); instead, it impedes the conduct of business for both the fireworks industry and PHMSA.

In this document, PHMSA is responding to comments on its policy clarification to issue fireworks classification approvals only to fireworks manufacturers. PHMSA believes that this policy will enhance safety by ensuring accountability of the manufacture of the device and reducing the number of duplicate applications and approvals being issued for identical fireworks devices. The manufacturer of the device is the only entity that can ensure the approved formulation is the actual formulation used to create the device.

III. List of Commenters, Beyond-the-Scope Comments, and General Comments

PHMSA received 18 comments in response to the initial Notice No. 10–9. Some of the commenters requested that we expedite the issuance of this document to finalize the clarification of the policy. We recognize their concerns and have made every effort to publish this document in an expeditious manner. While a minority of the commenters supported the clarification to the fireworks policy in initial Notice 10–9, a majority of the commenters had reservations about it. The comments, as submitted to the docket for the initial Notice No. 10–9 (Docket No. PHMSA–2010–0353), may be accessed via *http://www.regulations.gov* and were submitted by the following individuals, companies and associations:

(1) Ms. Elizabeth Knauss; PHMSA–2010–0353–0002
(2) Huisky Trading Co., Ltd.; PHMSA–2010–0353–0003
(3) Extreme Pyrotechnics LLC; PHMSA–2010–0353–0004
(4) Rozzi's Famous Fireworks; PHMSA–2010–0353–0005
(5) Dangerous Goods Advisory Council (DGAC); PHMSA–2010–0353–0006
(6) Kellner's Fireworks Inc.; PHMSA–2010–0353–0007
(7) B.J. Alan Company; PHMSA–2010–0353–0008
(8) DG Advisor, LLC; PHMSA–2010–0353–0009
(9) International Fireworks Shippers Alliance (IFSA); PHMSA–2010–0353–0010
(10) Law Office of Douglas Mawhorr; PHMSA–2010–0353–0011
(11) Pyrotechnics Guild International; PHMSA–2010–0353–0012
(12) Institute of Makers of Explosives (IME); PHMSA–2010–0353–0013
(13) National Fireworks Association; PHMSA–2010–0353–0014
(14) Galaxy Fireworks, Inc.; PHMSA–2010–0353–0017
(15) American Pyrotechnics Association (APA); PHMSA–2010–0353–0018
(16) Alliance of Special Effects & Pyrotechnic Operators, Inc. (ASEPO); PHMSA–2010–0353–0019
(17) Fireworks Over America; PHMSA–2010–0353–0021
(18) American Promotional Events Inc.; PHMSA–2010–0353–0023

Beyond-the-Scope Comments

PHMSA received ten comments beyond the scope of this document. One commenter requests PHMSA consider waste management of used or defective fireworks when proposing any amendments to regulations related to

the transport of fireworks. This document does not propose any regulatory amendments; rather, we are clarifying existing policy. While PHMSA agrees environmental impacts should be considered when proposing amendments to regulations, no regulatory changes were proposed in the Notice, and therefore, waste management of fireworks is beyond the scope of this document.

PHMSA received nine comments suggesting alternative approaches aimed at improving the current fireworks approvals process. These alternative approaches ranged from small modifications and improvements to the current system, to the complete elimination of the requirement for EX numbers for consumer fireworks. PHMSA values input from the stakeholders involved in the fireworks approval process; however, the alternative approaches suggested are beyond the scope of this document and will not be addressed here. The scope of this document is limited to PHMSA's issuance of fireworks approvals only to fireworks manufacturers. While we agree that certain alternative approaches to fireworks approvals merit PHMSA's consideration, we urge those commenters who submitted these beyond-the-scope approaches to request a change in the regulations by filing the recommendations as petitions for rulemakings in accordance with 49 CFR 106.95 and 106.100.

General Comments

Implementation Concerns

PHMSA received comments both in support of and in opposition to the policy clarification in the initial Notice No. 10–9. A number of these concerns dealt specifically with how PHMSA's implementation of the clarification would affect the pyrotechnics industry. These comments are discussed in detail below.

Implementation. Commenters suggested that if the clarification presented in the initial Notice No. 10–9 were adopted, there would need to be a substantial implementation time. PHMSA received two comments concerned with the amount of time for implementing the clarification and the effect on industry.

PHMSA understands the concerns the fireworks industry has expressed about the ramifications of implementing this action. In response to these concerns PHMSA has devised an implementation plan that addresses these concerns (see section: IV. Summary of Policy Clarification). As of the date of the publication of this document in the Federal Register, classification approval applications will be issued only to the manufacturer. Fireworks approvals applications submitted on behalf of entities other than the manufacturer to PHMSA prior to the publication date of this document in the **Federal Register** (*i.e.* already accepted by PHMSA) will continue to be reviewed, processed, and if approved, issued to the applicant.

Impact on Fireworks EX Application Volume. Specifically, PHMSA received comments regarding what impact the clarification would have on the actual volume of fireworks EX applications received. PHMSA received comments from seven companies opposing the policy clarification asserting that there will be an increase in the volume of applications that PHMSA will have to process. However, one company supported the policy clarification indicating that it is an ''effort to reduce redundancy and increase process efficiency.''

PHMSA does not agree with the commenters' concerns pertaining to application volume. We believe that this is a safety and data management issue. Furthermore, we do not make policy decisions of this type based on the potential volume of applications. Nonetheless, PHMSA believes that there would not be an appreciable increase to the number of firework applications received. However, if such an increase occurs, it will be temporary and over time application volume will decrease.

One commenter asserted that an EX approval allows multiple manufacturers to use the same EX number. This is incorrect. The use of the same EX number by multiple manufacturers constitutes a violation of the HMR. Only the manufacturer identified in the approval application is authorized to use the assigned EX number. PHMSA does not issue the same EX approval number to more than one holder/manufacturer.

Language Barriers. A majority of fireworks manufacturers are located outside the U.S. where English is not a first language. Several commenters expressed concern that implementing the policy clarification could be complicated by language barriers present between PHMSA officials and foreign fireworks manufacturers. Commenters cited examples of Chinese companies not understanding why an application is rejected and not being able to correct errors when re-applying.

PHMSA does not agree with the commenters' concerns pertaining to a language barrier. All companies based outside of the U.S. are required to have a U.S. designated agent (see § 105.40) to support the company in various issues, including language translation. PHMSA has issued many approvals to foreign companies without any confusion or misunderstanding as a result of language barriers. When language barriers arise, it is the U.S. designated agent's responsibility to resolve any communication problems and technical issues.

Control and Distribution of Fireworks Designs. Three commenters addressed the effect of initial Notice No. 10–9 on the control and distribution of fireworks design types. U.S. fireworks distributors expressed their concern that they will no longer have exclusive control over their firework products if the clarification presented in the initial Notice No. 10–9 were implemented. These commenters oppose the policy clarification based on possible trademark infringement. The commenters who addressed this issue indicated that, if adopted, the policy clarification would deprive them of their ability ''to trademark private label products that are proprietary to U.S. companies.''

PHMSA does not agree with the commenters that the policy clarification would result in trademark infringement. The holder of the EX approval for a firework device bears no relevance to a company's protected trademark. The U.S. Patent and Trademark Office defines a trademark as ''a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others.'' Trademark infringement occurs when a competitor uses a mark that is identical or confusingly similar to the protected trademark. An EX approval number is assigned by the Associate Administrator to an explosive device that has been evaluated under 49 CFR 173.56. Fireworks EX approval applications are reviewed by transportation specialists who evaluate the composition and safety of the firework device. Thus, a protected trademark and an EX approval number are issued separately by different U.S. agencies for distinctly separate purposes, which are mutually exclusive.

Ability to Ensure Compliance/Enforce. Various commenters suggested that the policy clarification in the initial Notice No. 10–9 could prove difficult for PHMSA to enforce. In addition, commenters suggested that the policy clarification could decrease regulatory clarity and make it more difficult for the regulated entities to comply with the HMR.

One commenter opposed the policy clarification expressing concern that by placing the maintenance of the EX

number wholly in the hands of the manufacturer, the U.S. user or seller has no capacity to assure that the numbers are being administered and applied correctly. They state: ''it is the importers and end users who are transporting the products in the U.S., not the manufacturers. The importers and end users are the ones who must demonstrate compliance.''

While firework classification approvals will only be issued to fireworks manufacturers, PHMSA will accept fireworks approval applications from the manufacturer's U.S. designated agent on behalf of the manufacturer, as well as the manufacturer itself. PHMSA disagrees that the burden to follow the requirements of the approval falls solely on the importer or end user once it becomes part of the U.S. transportation system. In fact, at that point it is too late to correct a defect with the firework device or any improper use of an EX number. While it is incumbent upon the manufacturer and the importer to ensure the fireworks device meets the EX approval requirements, it is not PHMSA's intent to regulate the relationship between these two entities. All participants throughout the supply chain will be held accountable for their regulatory responsibility. Furthermore, § 171.2(b) provides that ''each offeror is responsible only for the specific pre-transportation functions that it performs or is required to perform, and each offeror may rely on information provided by another offeror, unless that offeror knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the other offeror is incorrect.''

One commenter opposed the policy clarification because it is unclear how PHMSA will obtain new resources to be able to conduct a ''fitness review'' on each factory in China.

PHMSA currently conducts fitness reviews on foreign entities for many types of approval applications. Our standard procedure, after we determine that an application is complete, is to evaluate the application to determine whether the Applicant is qualified to hold the type of approval for which it has applied, in this case, a fireworks approval. During the review, PHMSA checks the application to determine whether the Applicant followed the requirements of the HMR. While we do not typically conduct an onsite inspection of the Applicant's facilities prior to granting or denying an approval application for fireworks, we may conduct an inspection if necessary to determine the Applicant's fitness. Furthermore, the Associate Administrator may modify, suspend, or terminate an approval in accordance with 49 CFR 107.121 if necessary to avoid a risk of significant harm to persons or property.

One commenter opposed the policy clarification because it is likely to divert PHMSA's scarce resources and PHMSA does not have the means to develop a global investigative capability. The commenter claimed this would allow for ''front'' or ''shell'' companies to exploit the policy clarification.

PHMSA does not agree with the commenter about its global investigative capability. Part of PHMSA's mission is to implement the best course of action to support the safety of the products produced through shared responsibility and focused accountability. PHMSA currently conducts international as well as domestic inspections. If a company is found to be noncompliant with the HMR, PHMSA may impose civil penalties or seek criminal prosecution for knowing, willful, or reckless violations of the HMR.

One commenter opposed the policy clarification because it would potentially complicate the approvals process.

PHMSA does not agree that the policy clarification would complicate the approvals process. Rather, we believe that the policy clarification simplifies the process. By issuing one EX number for each type of firework device, as opposed to issuing multiple EX numbers for the same fireworks device, we will reduce redundancy of approvals for the same device and increase the overall efficiency of the approvals process. Additionally, by ensuring uniform classification of fireworks devices and eliminating application duplicity, we will reduce the potential risks of the shipment of unapproved fireworks, thereby enhancing the safe transport of fireworks devices.

Regulatory Clarity. PHMSA received several comments concerning regulatory clarity. Commenters are concerned about the definition of manufacturer being different between regulatory areas. One commenter suggested that PHMSA would have a different definition of ''manufacturer'' for entities who construct packages than that used to define a fireworks device maker. One commenter states ''PHMSA would be creating inconsistencies where a firework approval obtained through § 173.56(f) could only be held by the person who formulates or produces the firework while no such limit would apply for fireworks approved through the process used for other explosives.''

PHMSA disagrees with the commenters because it is within the agency's discretion to interpret its own regulations and clarify our policies. However, we may in the future consider adding a definition for manufacturer through notice and comment rulemaking.

Economic and Transportation Effects

Several commenters expressed concern about the possible economic ramifications caused by the implementation of the fireworks approval policy clarification. Although most of the comments received addressed economic impacts indirectly, five commenters explicitly addressed the economic impact of the policy clarification.

Economic Impact. PHMSA received several comments claiming that if PHMSA issues approvals only to manufacturers, it will increase costs, discourage competition, and interfere with trade and commerce. Commenters expressed specific concerns that companies could go out of business and proprietary information could be revealed.

PHMSA does not believe the policy clarification pertaining to the fireworks approvals process will affect costs, competition, or interfere with trade and commerce because we are not changing the regulations pertaining to fireworks approvals. Rather, we are clarifying the existing regulations by advising the public that a manufacturer, or its designated U.S. agent, may submit an approvals application. After review and approval, PHMSA will issue an EX number to the manufacturer specified in the approval application. Despite not being the approval holder, importers and end users may still offer and transport fireworks devices under the EX approval issued to the manufacturer.

Commenters also expressed concern that proprietary information may be released to the public. To determine whether records are releasable, PHMSA complies with the Freedom of Information Act (FOIA), 5 U.S.C. section 552, and any other applicable laws. Should PHMSA receive a FOIA request for information marked ''confidential commercial'' or where PHMSA has some other reason to believe that confidential commercial information may be contained in the record, Departmental regulations in 49 CFR § 7.17 require that PHMSA consults with the submitter of the information to provide an opportunity to submit any written objections and specific grounds for non-disclosure before PHMSA determines whether to release the information.

Transportation Safety. Four commenters objected to the initial Notice No. 10–9 on the grounds that no safety benefit would be realized from the policy clarification in the application process. One commenter stated ''because it is required to identify the product manufacturer on all applications, the Agency has access to manufacturer information regardless of whether the approval is issued to an importer, exporter and/or distributor.'' PHMSA disagrees with the commenter's assertion. Issuing EX numbers exclusively to manufacturers will provide greater accountability on the part of the manufacturer.

One commenter stated ''we are not aware of any situations where there was a safety or transportation problem attributable to the fact that the EX approval was obtained by the entity that worked with the factory and was responsible for the fireworks once they arrived in the United States.'' While PHMSA agrees with the commenter about the safety record of fireworks in transportation, we believe that this policy clarification will nonetheless make fireworks device transportation safer. The manufacturer of the device is the only entity that can ensure the formulation that is approved is the actual formulation used to create the device. Furthermore, eliminating redundant applications for the same fireworks device will reduce the potential risk of unapproved fireworks being transported, thereby enhancing the overall safety of the fireworks devices in transport.

Administrative Issues

Several commenters expressed concern over the manner in which PHMSA is clarifying its fireworks approvals policy. Other commenters raised concerns regarding the effect the policy clarification would have on other sections of the HMR. A couple of commenters expressed legal concerns regarding the policy clarification. These comments are discussed in detail below.

Manner in which the Clarification was Presented. Three commenters expressed concern with how we presented our policy clarification. Specifically, these commenters suggested that the policy clarification presented in that Notice may be better addressed in a rulemaking action where comments can be addressed in a more substantive manner. Commenters claimed that PHMSA is indicating a regulatory change through that Notice, and thus, should conduct notice and comment rulemaking.

PHMSA is not required under the Administrative Procedure Act to initiate informal rulemaking to clarify a policy. Section 173.56(j) specifically states that the manufacturer applies in writing and is notified by the Associate Administrator that the fireworks have been classed, approved, and assigned an EX-number. It is the responsibility of the manufacturer to sign the application and certify that the device conforms to the APA Standard 87–1, which PHMSA has incorporated by reference in the HMR. In this document, we are clarifying our policy to issue EX approvals to manufacturers only to coincide with the plain language of § 173.56(j).

Effects on the HMR. While, as cited above, some commenters were concerned that the clarification would result in ambiguity in the regulations pertaining to the definition of different types of manufacturers, (*e.g.,* fiberboard box manufacturers and fireworks manufacturers), commenters also raised concern regarding the potential precedent set by the policy clarification in the initial Notice No. 10–9. Specifically, commenters maintained that the clarification presented in the initial Notice No. 10–9 could affect the definition of ''manufacturer'' in other parts of the HMR. In addition, concern was raised that this could set a precedent for how explosives, other than fireworks, are treated. One commenter, for example, is concerned that this policy may affect requirements for package manufacturers.

PHMSA does not agree with the commenters that this document would affect other provisions of the HMR. In this document we are clarifying our policy with respect to fireworks approvals only.

Legal Issues. PHMSA received a comment opposing the policy clarification based on the doctrine of laches. The commenter indicated that PHMSA's ''neglect to assert a right, the lapse of time associated therewith and resultant disadvantage to another bars the neglecting party from asserting the right.''

PHMSA does not agree with the commenter's application of the doctrine of laches. Laches is the equitable counterpart to the statute of limitations that bars a claim when a delay in bringing the claim is unreasonable and results in prejudice to the opposing party. In general, laches cannot be imputed to the Federal government and is not applicable to an agency's determination to clarify policy.

Another commenter opposed the policy clarification asserting because PHMSA has not thoroughly explained its reasons for changing the policy.

PHMSA agrees that we should provide a reasoned basis for the policy clarification, but disagrees that we have failed to do so. As stated in the initial Notice No. 10–9, we believe issuing fireworks approvals only to manufacturers will enhance safety by ensuring uniform classification of fireworks devices, eliminating application duplicity, and minimizing the potential risks of the shipment of unapproved fireworks.

PHMSA received multiple comments opposing the policy clarification based on our lack of jurisdiction over foreign manufacturers.

PHMSA agrees that we lack jurisdiction over foreign manufacturers who manufacture fireworks, but do not offer them for transportation in commerce. However, the Federal Hazardous Materials Transportation Law (49 U.S.C. 5101, *et. seq.*) provides the authority to regulate the safe transportation of hazardous materials in interstate, intrastate, and foreign commerce. If a foreign manufacturer does not merely manufacture the fireworks, but is also an offeror and offers fireworks for transportation in commerce within the U.S., then our regulations would apply and the foreign manufacturer may be held accountable for violations of the HMR. Furthermore, foreign manufacturers may have an economic incentive to obtain EX approvals given the market in the U.S. for foreign fireworks.

One commenter opposed the policy clarification based on Executive Order No. 13563, Improving Regulation and Regulatory Review, dated January 18, 2011. The commenter indicated that, if adopted the policy clarification would not support the spirit of the Executive Order and would create more burdens on both the regulated industry and government.

PHMSA does not agree that the policy clarification would contradict the spirit of the Executive Order, which addresses an agency's adoption of new regulations and does not restrict the agency's ability to interpret its existing regulations or to make policy clarifications.

IV. Summary of Policy Clarification

Based on the comments received and our responses to those comments, PHMSA will proceed to implement the policy clarification discussed in this document. The implementation strategy is detailed below:

1. All EX numbers issued prior to June 29, 2011 will continue to remain in effect.

2. All pending fireworks approval applications submitted to PHMSA prior to June 29, 2011 will continue to be

reviewed, processed, and if approved, issued to the applicant.

3. All fireworks approval applications submitted to PHMSA after June 29, 2011 will only be accepted from manufacturers *or* their designated agents. Designated agents, as specified in § 105.40, may submit applications on behalf of the manufacturer as long as the agent or the manufacturer signs the application and certifies that the device for which approval is requested conforms to APA Standard 87–1, and that the descriptions and technical information contained in the application are complete and accurate, in accordance with § 173.56(j)(3). PHMSA will review and process each application, and if approved, will issue an EX approval number only to the manufacturer specified in the application.

Issued in Washington, DC, on June 21, 2011 under authority delegated in 49 CFR part 1.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2011–15969 Filed 6–28–11; 8:45 am]

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