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**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**[Docket No. PHMSA-2018-0027; Notice No. 2018-09]**

**Hazardous Materials: Clarification of Process to Reissue Explosives Classification**

**Approvals**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA),  
Department of Transportation (DOT).

**ACTION:** Notice and request for comments.

**SUMMARY:** PHMSA issues this notice to clarify and request comments on the Approvals Program procedures for companies to request a modification to an explosives classification approval to reflect a merger, acquisition, or change in name or legal status.

**DATES:** Interested persons are invited to submit comments on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by Docket No. PHMSA-2018-0027 via any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 1-202-493-2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, Routing Symbol M-30, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* To Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* All submissions must include the agency name and docket number for this notice. Internet users may access comments received by the DOT at:

<http://www.regulations.gov>. Please note that comments received will be posted without change to: <http://www.regulations.gov> including any personal information provided.

*Privacy Act:* In accordance with 5 U.S.C. 553(c), the DOT solicits comments from the public. The DOT posts these comments, without edit, including any personal information the commenter provides, to <http://www.regulations.gov>, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <http://www.dot.gov/privacy>.

**FOR FURTHER INFORMATION CONTACT:**

*Pipeline and Hazardous Materials Safety Administration:* Laura Ulmer, Attorney-Advisor (PHC-10), U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590-0001, Telephone (202) 366-4400.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

As defined in title 49, section 173.56 of the Code of Federal Regulations (CFR), a “new explosive” is an explosive produced by a person who either has not previously produced that explosive, or has previously produced that explosive, but has made a change in the formulation, design, or process so as to alter any of the properties of the explosive. The

Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) require that each new explosive be examined by a DOT-approved explosives test laboratory and assigned a recommended shipping description, division, and compatibility group in accordance with § 173.56(b). This classification must be approved by PHMSA. Applications are submitted and approvals are issued per the requirements in 49 CFR part 107, subpart H. These explosive classification approvals are generally known as “EX” approvals. A “person,” as defined in 49 CFR 171.8, must obtain an approval classifying each new explosive that he or she offers or transports to, from, or within the United States.

In December 2015, PHMSA posted a document titled “EXPLOSIVES CLASSIFICATION (EX) APPROVALS (Company Name Changes, Mergers, Acquisitions, and Changes in Legal Structure)” on its website,

<http://www.phmsa.dot.gov>. This document clarified that: (1) an EX approval is non-transferable in any merger, acquisition, sale of assets, or other business transaction; (2) an EX approval is non-transferrable in bankruptcy proceedings, and thus, a debtor may not use an EX approval as an asset to sell in order to drive up the purchase price; and (3) PHMSA may reissue the EX approvals in certain situations to reflect the new company name, when adequate documentation is submitted. The document also included frequently asked questions on several common merger, acquisition, and legal-status change scenarios and provided instructions on how companies could request a modification of an EX approval to reflect a status change. Companies can also choose to apply for new EX approvals instead of requesting to go through the company name-change process.

The specific scenarios and documentation requirements included in the document led to questions and concerns from the regulated community. Therefore, we are clarifying the

description of the program procedures and documentation required for PHMSA to reissue EX approvals. Specifically, we have revised the guidance to remove the requirement that the applicant declare that the information that it is providing for the certification is correct, under penalty of perjury, after certain members of the regulated community had concerns about swearing under penalty of perjury that documents they did not personally draw up were complete and correct. PHMSA acknowledges those concerns, and believes that the modification of the certification letter contents will alleviate these concerns. The guidance also clarifies that companies which request a modification at least 30 days prior to the merger, acquisition, or legal-status change can continue to use their existing approvals until PHMSA takes final administrative action on the application for modification. PHMSA is seeking comments on:

1. the contents of the certification letter;
2. the description of the timeline for applying and processing a name change;
- and
3. information requested for additional facilities.

## **II. Clarification of Requirements to Reissue Approvals**

Companies always have the option to apply for a new EX approval in anticipation of a merger, acquisition, or other change in corporate structure or form. Alternatively, PHMSA may reissue existing EX approvals when adequate documentation is provided for the types of corporate changes described in this guidance. Provided a request to reissue an EX approval is made at least 30 days prior to the anticipated corporate change, the new entity may continue to use the existing EX approval until PHMSA reaches a final decision on the request. Title 49 CFR part 107, subpart H and § 173.56(b) set out the requirements for applying for an EX approval. Table 1, below, explains what is meant by

various types of requested documents. Table 2, which follows, explains which of these documents are requested for an EX approval to be reissued in different scenarios.

**Table 1: Types of Documentation**

<b>Certification Letter</b>	When applicable, the company requesting the reissued approval will submit a certification letter that: <ul style="list-style-type: none"> <li>A. is signed by a director or officer of the company requesting the reissued approval;</li> <li>B. states that the company is not producing a new explosive and that there has been no change in the formulation, design, or process so as to alter any of the properties of the explosive; and</li> <li>C. states that the requesting company understands that failure to provide accurate and complete information could result in the modification, suspension, or termination of the approval.</li> </ul>
<b>Approvals List</b>	A list of EX approval numbers and product descriptions, and a copy of each EX approval that the company is requesting that PHMSA reissue.
<b>Lab Report</b>	Copies of any laboratory reports or technical drawings in the company's possession relating to the requested EX approvals.
<b>Proof of Change</b>	Legal documentation of the applicable change (e.g., certification of merger, sales agreement, etc.).
<b>Relinquishment Letter</b>	When applicable, the company that initially held the approval should provide a letter that: <ul style="list-style-type: none"> <li>A. is signed by a director or officer of the company holding the initial approval; and</li> <li>B. states that the company holding the initial approval voluntarily relinquishes all the rights to the EX approval numbers listed in the document and that they will no longer manufacture the explosives approved under those respective EX approvals.</li> </ul>

**Table 2: Requested Documentation to Reissue Approvals in Different Scenarios**

Scenario		Documents Requested to Reissue EX approval				
		<i>Cert. Letter</i>	<i>EX# List</i>	<i>Lab Reports</i>	<i>Proof of Change</i>	<i>Relinquishment Letter</i>
<b>Merger</b>	Hazmat Companies A, B, C, and D are merging to create new company X, which is legally distinct from its predecessors. Company X wants to perform activities that require an EX approval.	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes (merger certification)</i>	<i>No</i>
<b>Total Purchase</b>	Company A buys 100% of Company B. Both companies hold EX approvals. Company B will now operate under Company A's name. Company A wants to use Company B's EX approvals.	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes (sales agreement)</i>	<i>No</i>
<b>Partial Purchase (Assets)</b>	Company A buys less than 100% of Company B's assets. Company A wants to use Company B's EX approvals.	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes (sales agreement)</i>	<i>Yes</i>
<b>Subsidiary (Separate Legal Entities)</b>	X Corporation has three subsidiaries that are distinct legal entities: <ul style="list-style-type: none"> <li>• X LLC,</li> <li>• X Inc., and</li> <li>• X LP.</li> </ul> X Corporation wants to use X Inc.'s EX approvals.	<p>N/A. Reissuing of EX numbers is not permitted. Each of the four companies (one parent and three subsidiaries) needs EX approvals for covered activities.</p> <p>Each of these entities is a separate "person" based on the definition PHMSA uses.</p> <p>The term "person" refers to each separate legal entity, such as a corporation, partnership, association, or LLC, or LP. This means that a separately incorporated subsidiary (or LLC or LP) must apply for their own approval if it engages in activities that require an EX approval, even when a parent company already holds an EX approval.</p>				
<b>New Additional, U.S. Facility</b>	Company X adds a new U.S. facility. The principal place of business and manufacturing process do not change.	N/A. No change needed.				

<b>New Primary, U.S. Facility</b>	Company X changes “principal place of business” to new U.S. facility, and therefore must submit an application to amend its EX approval.	<i>No</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>No</i>
<b>Additional Facility Abroad</b>	Company X purchases an additional manufacturing plant location outside of the United States.	N/A. All manufacturing locations outside of the U.S. are required to apply for their own EX approvals.				
<b>New Name, Same Legal Structure</b>	Company X changes its name to “Company Y,” but does not change the legal structure or ownership of the company.	<i>No</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>No</i>
<b>New Name, New Legal Structure</b>	Company X, LLC changes its name to “Company X, Inc.” indicating a change in legal structure. Company X., Inc. wants to use Company X, LLC’s approval.	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>No</i>
<b>Bankruptcy</b>	Debtor holds an EX approval with PHMSA and goes into bankruptcy.	N/A. EX approvals are non-transferrable and cannot be treated as assets in the event of a bankruptcy.				

Signed in Washington, DC, on October 2, 2019.

***William S. Schoonover***

Associate Administrator for Hazardous Materials Safety

Pipeline and Hazardous Materials Safety Administration

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