

case may be, to remove the employee from a position requiring the possession of explosive materials. Also, if the employer has listed the employee as a person authorized to accept delivery of explosive materials, the employer must remove the employee from such list and immediately, and in no event later than the second business day after such change, notify distributors of such change.

Section 555.33 also provides for an appeal process for a responsible person or employee to challenge an adverse determination. Such appeals must be submitted to the Director in writing within 45 days of issuance of the determination. In the case of employees and responsible persons who have not submitted fingerprint cards, fingerprints must be submitted in accordance with the instructions in the letter of denial. In the case of both responsible persons and employees, it may be necessary to submit additional information or documents in support of an appeal, such as certified court records. Responsible persons and employees, where appropriate, are encouraged to contact the agency that originated the record containing the information causing the adverse determination. If the records are corrected as a result of contact with an originating agency, ATF will take steps to correct the record with the agency responsible for the record system.

#### *B. Background Checks Conducted in Connection With Applications for License or Permit (Including Renewals)*

The background checks conducted under section 555.33 will also be done in conjunction with the issuance of a license or permit under 18 U.S.C. 843.

There is no requirement that persons holding a license or permit prior to May 24, 2003, submit names of responsible persons and employees for background checks. Such licensees and permittees need not provide this information until their license or permit is renewed on or after May 24, 2003. Moreover, ATF has no authority, prior to May 24, 2003, to conduct background checks that are not associated with a license or permit application, including a renewal application.

#### *C. Reporting Changes in Responsible Persons and Employees Authorized To Possess Explosive Materials*

All persons who have been issued licenses or permits, including renewals, on and after May 24, 2003, must report any change in responsible persons or employees authorized to possess explosive materials. ATF will then conduct a background check on any

new responsible persons or employees in accordance with section 555.33. The report of such changes will ensure that all persons having access to or possession of explosive materials are not prohibited persons likely to misuse explosives for criminal or terrorist purposes. Regulations that implement these provisions of the Act are in §§ 555.33 and 555.57.

### **VII. Prohibited Persons**

#### *A. Definitions*

The Act amended 18 U.S.C. 842(d) and 842(i) to provide additional categories of persons who may not lawfully transport, ship, receive or possess explosive materials. Prior to amendment, persons under indictment for or convicted of a felony, fugitives from justice, unlawful users of or persons addicted to controlled substances, and persons adjudicated as a mental defective or committed to a mental institution were prohibited from transporting, shipping, receiving or possessing explosive materials. The Act added aliens (other than permanent resident aliens and certain other excepted aliens), persons dishonorably discharged from the military, and persons who have renounced their U.S. citizenship to the list of prohibited persons. These provisions of the law became effective on January 24, 2003.

Definitions for the categories of prohibited persons are set forth in section 555.11 and are consistent with the definitions for the categories of persons prohibited from receiving or possessing firearms contained in 27 CFR 478.11. (For background information concerning these definitions see T.D. ATF-391, June 27, 1997; 62 FR 34634.) The definitions in this part and part 478 of this chapter are also consistent with judicial decisions interpreting the statutory categories of prohibited persons. The new definitions in section 555.11 include the three new categories added to the law by the Act as well as definitions for categories that have been in the statute since 1970. These include "committed to a mental institution," "adjudicated as a mental defective," and "unlawful user of or addicted to any controlled substance." It was necessary to define all these terms so that persons applying for explosives licenses or permits on or after the effective date of this interim rule, will know whether responsible persons (such as partners, corporate officers, and directors) are prohibited and therefore cannot be associated with the applicant. It is also necessary to define these terms so that persons who are subject to explosives disabilities are put on notice that they

may not lawfully transport, ship, receive or possess explosives. These persons need to know the criteria ATF will use in determining who is subject to such disabilities so that they may apply for relief from disabilities pursuant to 18 U.S.C. 845(b) if they desire.

Finally, it is also necessary to clearly define the categories of prohibited persons so that a thorough background check can be conducted on applicants for licenses and permits, responsible persons, and persons applying for relief from disabilities. A clear understanding of which persons fall within the different statutory categories is necessary to determine whether a particular person is a prohibited person under the law. Background checks will also be conducted on employees authorized to possess explosive materials by an employer applying for, or renewing, a license or permit that will be issued on and after May 24, 2003. Because it generally takes 90 days to process such applications, it is anticipated that many applications for the new limited permit will be submitted in February and March of 2003. Thus, background checks on employees may begin in February 2003, necessitating clear definitions for the guidance of those persons conducting the background checks. Clear definitions will also assist employees and responsible persons who appear to fall within a category of prohibited persons in preparing an appeal to a prohibited person determination they believe is erroneous or to file an application for relief from disabilities if they desire.

An amendment has been made to section 555.45(a) requiring submission of ATF Form 5400.28, Responsible Person Questionnaire, for all applications for a license or permit postmarked on or after the effective date of this interim rule. The purpose of the questionnaire is to obtain a certification from each responsible person stating that he or she is not prohibited from receiving or possessing explosive materials under the new prohibited persons provisions of the law, *i.e.*, non-excepted aliens, persons dishonorably discharged from the military, and renunciates.

As stated previously in relation to licensing criteria, in determining whether a particular person is in possession of explosives, ATF is guided by case law under the Gun Control Act of 1968 (GCA), 18 U.S.C. Chapter 44. Possession may be actual or constructive, but in all instances no violation of section 842(i) is committed unless the person "knowingly" possesses the explosives.