



# Flash Sound Diversionary Devices: Important updates on storage and purchasing

*By Jim F. Clark and Don Whitson*

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First, agencies must understand the regulations and make preparations to be in compliance. Admittedly, to do so is impractical if not impossible. There are ATF agents currently working on an amendment to the storage regulations, but changes of this magnitude can take a long time.

Secondly, there is an industry-wide change in the requirements to purchase these devices from the major manufacturers that will affect all of law enforcement.

**T**he NTOA offers a section to certify instructors in the use of flash sound diversionary devices as part of our less lethal instructor course. Over the past several years, we have discovered that many agencies do not have a certified instructor or their instructor's certification is expired, and some agencies use hand-me-down instruction to train officers on the use of the devices.

This has led to criminal indictments, unnecessary injuries and increased civil litigation. One area of concern involves the misunderstanding of the storage and transportation regulations for the devices. The regulations are complicated and lengthy. There are numerous accounts of getting conflicting information from ATF on the interpretation of the federal code. It has been generally accepted that law enforcement agencies were exempt from the federal regulations pertaining to storage and transportation of distraction devices, but recent incidents have demonstrated otherwise.

There are two key considerations in this article. First, agencies must understand the regulations and make preparations to be in compliance. Admittedly, to do so is impractical if not impossible. There are ATF agents currently working on an amendment to the storage regulations, but changes of this magnitude can take a long time. Secondly, there is an industry-wide change in

the requirements to purchase these devices from the major manufacturers that will affect all of law enforcement.

### Lawful storage and transportation of flash sound diversionary devices

The Bureau of Alcohol Tobacco Firearms and Explosives (BATFE) classifies flash sound diversionary devices (FSDD) utilized by tactical teams as "destructive devices." This classification, in conjunction with the chemical components of the charge, mandates that the devices be properly stored and transported.

Note: BATFE previously held that devices designed for expelling chemical agents or pyrotechnic signals are not weapons and are exempt from destructive device definition. The United States Department of Transportation (USDOT) classifies flash



powder, a component of the FSDD charge, as a “high explosive.”

## Storage

FSDDs must be stored in compliance with current federal law, as well as state statutes and municipal ordinances. **The trunk of a law enforcement vehicle does not meet the mandated storage requirements.** T27 U.S.C. Subpart 1 Section 55.164 states, “Any person who stores any explosive material in a manner not in conformity with this part shall be fined not more than \$1,000.00 or imprisoned not more than one year, or both.” Note that there is no statutory exception or exemption for law enforcement regarding the storage requirement of diversionary device charges.

explosive material may be stored in a Type 2 Magazine.

Outdoor magazines in which high explosives are stored must be located no closer to inhabited buildings, passenger railways, public highways, or other magazines in which high explosives are stored, than the minimum distances specified in the Table of Distances for the storage of high explosive material in §55.218.

An “urban magazine” is one in which a small amount of explosive material is stored (like FSDDs) and is not subject to the Table of Distances (§55.218). This regulation concerns the net weight of the explosive material, not the total weight of the loaded device itself. No indoor magazine is to be located in a residence or dwelling. The indoor storage of high explosives must not exceed fifty (50) pounds [§55.208 (b) (1)].

These regulations are maintained by the Research and Special Projects Administration (RSPA). HMRs are contained in Title 49 of the Code of Federal Regulations (CFR), Parts 171 through 180.

FSDDs, no matter how many, should be contained in a Type 2 magazine during transportation.

## Distribution

The serial number of each FSDD should be recorded along with the operators’ name. Upon completion of the operation, an inventory should be taken. Federal regulation requires that agencies report how an FSDD was utilized, either operationally or for training purposes. This report should be mailed to the BATFE and a record maintained by the agency.

## State and local regulations

Tactical teams should be aware that some state statutes and municipal ordinances may be even more restrictive than federal law regarding the storage, transportation, possession and deployment of FSDDs. It is strongly recommended that each team confer with their legal advisor, municipal attorney, district attorney and state attorney general to ensure conformity with the law.

## Terminology

*High explosive:* Explosive material which can be caused to detonate by means of a blasting cap when confined (for example: dynamite, flash powders, and bulk salutes).

*Low explosive:* Explosive materials which can be caused to detonate by means of a blasting cap when unconfined (for example: black powder, safety fuses, igniters, igniter cords and “special fireworks” defined as Class B explosives by the U.S. Department of Transportation regulations in 49 CFR Part 173, except for bulk salutes).

## New purchasing requirements

Like other disciplines within the law enforcement community, the uses of flash sound diversionary devices are generally unregulated. Some agencies advocate the deployment of the devices in every high-

As of January 1, 2008, BAE Systems (formerly Armor Holdings, Inc.) requires proof of current instructor certification at the point of sale in order to purchase FSDDs. The other two companies that make up the bulk of the U.S. market share for these devices, ALS Technologies and Combined Tactical Systems, will announce a date in 2008 when they will also require instructor certification from reputable vendors, state POST training and recognized national training associations.

Title 27 U.S.C. Section 55.203 defines what type of magazine is necessary. A “Type 1 Magazine” is a permanent magazine for the storage of high explosives, subject to the limitations prescribed by §55.206 and §55.213. Other classes of explosive materials may also be stored in Type 1 Magazines. This type of magazine is to be bullet-resistant, fire-resistant, weather-resistant, theft-resistant and ventilated.

“Type 2 Magazines” are mobile and portable indoor and outdoor magazines for the storage of high explosives, subject to the limitations as prescribed by §52.206, §55.208(b) and §55.213. Other classes of

## Transportation

Congress gives the U.S. Department of Transportation (USDOT) the authority to “. . . issue regulations for the safe transportation of hazardous materials (inclusive of explosives) in intrastate, interstate and foreign commerce.” This authority was granted in the Hazardous Materials Transportation Act (HMTA), first adopted in 1974 and amended in November 1990, as the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA).

In response to this mandate, the USDOT has created a body of rules called the Hazardous Materials Regulations (HMR).

BAE Systems' new regulations regarding the sale of their diversionary devices are as follows:

1. The purchaser must have a current BAE/Defense Technology instructor certificate (within the past two years), or;
2. The certificate must be issued by the National Tactical Officers Association, or;
3. The certificate must be from a state accredited training agency (and it must be stated on the certificate).

risk environment. Other, more conservative agencies use the devices for specific circumstances only.

The use of the FSDD as a tactical tool is at another crossroads. In case after case, the courts have admonished law enforcement to carefully consider their use. Yet, as a profession we have not done enough to standardize them.

The NTOA Less Lethal Cadre, Legal Section, Board of Directors, subject-matter experts and three leading manufacturers of less-lethal products met at the NTOA's national conference in Milwaukee, Wisconsin in September 2007. The purpose was to discuss current issues regarding the storage and transportation of flash sound diversionary devices (FSDDs).

One important issue that was discussed was the sale of diversionary devices. As of January 1, 2008, BAE Systems (formerly Armor Holdings, Inc.) requires proof of current instructor certification at the point of sale in order to purchase FSDDs. The other two companies that make up the bulk of the U.S. market share for these devices, ALS Technologies and Combined Tactical Systems, will announce a date in 2008 when they will also require instructor certification from reputable vendors, state POST training and recognized national training associations. The manufacturers will make the determination as to which certifications will be accepted.

This is a voluntary compliance measure mutually agreed upon by the manufacturers to minimize civil and criminal liability for the companies, the officers and the departments who handle, store and transport these devices.

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Combined Tactical Systems and ALS Technologies will have similar regulations in 2008. There is tremendous product liability associated with these devices. Regulating their sales to agencies with current certifications seems a prudent policy. Most important is that it is a step to mitigate liability and injury for the end users. All three companies agree that safety through standardization is a high company priority.

In summary, in 2008 every agency using diversionary devices will be required to supply the manufacturer with approved instructor certifications. Contact your manufacturer to be certain the certification is current and accepted. Each manufacturer

will have the final determination. This is a self-regulated policy that works because all the manufacturers met to discuss this issue and cooperate as an industry.

Currently, approved training entities have specific requirements for re-certification:

- BAE Systems/Defense Technology — *every two years*
- Combined Tactical Systems — *every five years*
- ALS Technologies — *every two years*
- NTOA — *no recertification required*
- POST — *varies*

This will undoubtedly require some agencies to adjust by having to get an instructor certification. The positive aspect of this change is that this will be an important component to further shield agencies from liability and reduce injuries.

## Conclusion

The National Tactical Officers Association recognizes that the lawful storage and transportation of FSDDs is somewhat problematic. At present there is not a "law enforcement exception" for storing and transporting distraction devices. The NTOA is working diligently with several different entities at the federal level in an effort to simplify storage and transportation regulations, so that operators may have these devices immediately on hand when responding to a tactical situation. ◀◀

## Source references

- ATF Orange Book (<http://www.atf.treas.gov/explarson/fed-explolaw>)
- Title 27, Code of Federal Regulations, Part 55 – Commerce in Explosives
- 18 United States Code, Chapter 40
- Gun Control Act, 18 U.S.C., Chapter 44
- National Firearms Act, 26 U.S.C., Chapter 53
- American Table of Distances for Storage of Explosives as Revised and Approved by The Institute of Maskers of Explosives – July, 1991

## Acknowledgments

Keith Frakes, Don Kester and Scott B. Wood, Esquire.

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