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NRA-ILA

COMMENTS OF THE NATIONAL RIFLE ASSOCIATION ON ATF'S PROPOSED RULE 2021R-05

August 18, 2021

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Via electronic submission to regulations.gov

Re: ATF's Notice of Proposed Rulemaking Docket Number ATF 2021R-05

What is a firearm? That is the core question that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") claims to answer with ATF 2021R-05 (the "proposed rule"). Unfortunately for ATF, Congress provided the current statutory definition of "firearm" over 50 years ago. UNITED STATES STATUTES AT LARGE, PL 90-618, October 22, 1968, 82 Stat. 1213. And that definition was derived from a term that was first codified over 80 years ago. UNITED STATES STATUTES AT LARGE, 75 Cong. Ch. 850, June 30, 1938, 52 Stat. 1250.

Needless to say, the American people, and especially the American firearms industry, have relied on these definitions.

The National Rifle Association of America (“NRA”) is a 501(c)(4) nonprofit corporation organized under the laws of New York with its principal place of business in Fairfax, Virginia. The nearly five million members of the NRA would be substantially harmed by the proposed rule if adopted as presently drafted.

For decades, the firearm industry, NRA members, and other American gun owners have dealt with (mostly) consistent rules regarding the core questions in federal firearms law. With the proposed rule, ATF abandons this consistency and upsets decades of reliance on existing rules.

The long history of the existing definitions also proves that there has not been an issue with their clarity. In the case of these statutory definitions, which have remained consistent for the better part of a century, it is very obvious that “Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

In fact, it is hard to imagine a case where Congress has spoken with greater clarity on a statute with this longevity and where an administrative agency nonetheless refuses to “give effect to the unambiguously expressed intent of Congress.” *Id.* at 843.

To support the necessity for this complete rewriting of federal firearms law, ATF cites a few cases where the existing regulatory definition of “frame or receiver” was held not to apply to particular firearm designs. 86 Fed. Reg. 27,720, 27,722 (May 21, 2021). While these cases, if taken to their logical conclusion, could pose problems with prosecutions involving certain firearm designs, they hardly justify the complete rewriting of numerous definitions and regulatory requirements that ATF seeks in the proposed rule.

After all, “[r]egardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” *Food & Drug Admin. v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (citing *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

The proposed rule’s numerous definitions, the new marking requirement, and the agency’s attempt to extend its jurisdiction to homemade firearms are all “inconsistent with the administrative structure that Congress has enacted into law” *Id.* In short, ATF’s proposed rule clearly violates the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 706(2)(A)-(C); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Discussion

I. Proposed Definitions

The proposed rule seeks to amend or add definitions for “complete muffler or silencer device,” “complete weapon,” “gunsmith,” “firearm,” “frame or receiver,” “firearm muffler or silencer frame or receiver,” “split or modular frame or receiver,” “partially complete, disassembled, or inoperable frame or receiver,” “destroyed frame or receiver,” “importer’s or manufacturer’s serial number,” “privately made firearm,” and “readily.”

a) Definitions of “Complete Muffler or Silencer Device” and “Complete Weapon”

ATF proposes to add new definitions of “complete muffler or silencer device” to mean “a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable” and “complete weapon” to mean “[a] firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to

function as designed whether or not assembled or operable.” 86 Fed. Reg. at 27. To the extent that these definitions could give federal firearm licensees a clearer idea of when marking of a silencer is required, NRA has no objections to these definitions. However, they are not necessary, and may potentially create more confusion.

For example, a “firearm” would legally be a “firearm” whether or not it is a “complete weapon” under this proposed definition. Some gun owners and industry members may be confused by this proposed definition and not understand that it only serves to trigger the timing of the marking requirement.

To avoid this confusion, ATF could simply use the existing statutory terms “firearm” and “firearm muffler or firearm silencer” and clarify the timing for marking in 27 C.F.R. § 478.92 and other applicable regulations.¹

b) The Definition of “Gunsmith”

The proposed rule would amend the definition of “engaged in the business” as it applies to a “gunsmith.” The current regulatory definition of “gunsmith” is

A person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such a term shall not include a person who makes occasional repairs of firearms or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms

27 C.F.R. § 478.11.

The proposed rule would amend this definition to

A person who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or

¹ These objections also apply to ATF’s proposal to add these terms to § 479.11.

customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms

86 Fed. Reg. at 27,741.

The new definition contains two major changes to existing law. First, the definition acknowledges the role that gunsmiths may play in ATF's proposed *ultra vires* marking regime discussed in detail in the marking section of these comments. The second change attempts to resurrect a past attempt at distinguishing gunsmiths from manufacturers that was voided by a federal court.

Shortly after passage of the Firearm Owner's Protection Act, Pub. L. No. 99-308, ATF proposed a large number of new regulations. One of these regulations sought to define the term "manufacture." The United States District Court for the District of South Carolina ruled that ATF's proposed definition of "manufacture" was arbitrary and capricious because it would have effectively nullified the Gun Control Act's ("GCA") allowance for those licensed as dealers to engage in certain gunsmithing activities. *Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 478 n.2 (4th Cir. 1990).

With this proposed definition, ATF again attempts to curtail the activities that gunsmiths with a "dealer" license could perform. By limiting gunsmithing activities to "a service performed on existing firearms not for sale or distribution by a licensee," ATF's proposal would require many gunsmiths to apply for and receive a license as a manufacturer and overturn longstanding agency policy.

Existing ATF policy allows gunsmiths to engage in certain manufacturing activities for licensed manufacturers. *See* ATF Ruling 2010-10. The proposed rule would completely eliminate this allowance. ATF only references this reversal in a single footnote. 86 Fed. Reg. at 27,731 n.64. While NRA noticed this footnote, this may not alert all interested parties that ATF is even changing its policy. *See MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136, 1141-43 (D.C. Cir. 1995). (*Holding* that “[A]n agency may not turn the provision of notice into a bureaucratic game of hide and seek.” (Internal citations omitted). “Although this court has not unequivocally held that notice is inadequate solely because it is to be found only in a footnote, such placement has been a significant factor in our prior cases holding notice inadequate.” (Internal citations omitted)).

“A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it.” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). While ATF’s change may not be an entirely “*sub silentio*” change that is clearly prohibited by the APA, it hardly seems clear that ATF is “display[ing] awareness that it *is* changing position.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

There are four things that an agency must do when changing a policy under the APA: (1) the agency must display “awareness that it is changing [its] position”; (2) “the new policy is permissible under the statute”; (3) the agency “believes” the new policy is better; and (4) the agency provides “good reasons” for the new policy. *Id.* at 515-16.

ATF completely fails to offer any explanation, let alone a reasoned one, for why it is departing from this policy other than the conclusory claim that it is needed to “eliminate . . .

confusion among regulated industry members and the public as to who needs a license to manufacture firearms.” 86 Fed. Reg. at 27,731 n.64. The proposed rule also offers no explanation of how the new definition is consistent with the statute.

And, the change is not a small one. Overturning ATF Ruling 2010-10 would require many gunsmiths to obtain manufacturing licenses. As a consequence, these gunsmiths would also have additional marking obligations that could lead to firearms being marked by a number of manufactures. Having firearms marked by multiple manufacturers would only serve to add confusion to the existing manufacturing process, not reduce it.

For these reasons, ATF should not finalize its proposed definition of “gunsmith.”

c) The Definition of “Firearm”

ATF proposes changing the definition of “firearm” to:

Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. The term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which each part defined as a frame or receiver of such weapon is destroyed.

86 Fed. Reg. at 27,741.

The statutory definition provides that

The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(3).

While administrative agencies may be given some discretion when applying the statutes they are charged with enforcing,² “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43 (internal page numbers omitted).

The same rule applies when Congress has provided a statutory definition for a particular term. “Such an explicit reference to a statutory definition demonstrates a Congressional intent to forestall interpretation of the term by an administrative agency and acts as a limitation on the agency’s authority.” *Royce v. Hahn*, 151 F.3d 116, 123 (3d Cir. 1998).

Because the proposed definition of “firearm” goes beyond the clear statutory definition of the same term provided by Congress, ATF should not finalize a rule with this definition.

d) The Definition of “Frame or Receiver”

The proposed rule takes a multi-pronged approach to the definition of “frame or receiver.” While current law uses a single definition, ATF proposes differing definitions based on various types of “firearms.” That alone is not the most serious problem with the proposed definition, but ATF’s conclusion that a firearm can have more than one “frame or receiver” is contrary to the statute and inconsistent with half a century of agency practice.

Under the current definition, “firearm frame or receiver” means “[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.” 27 C.F.R. § 478.11.

² The rule of lenity, rather than agency deference, should apply in this case because these definitions form the basis for criminal statutes. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 462 (6th Cir.), reh’g en banc granted, opinion vacated, 2 F.4th 576 (6th Cir. 2021).

As noted in the proposed rule, in recent years, ATF has struggled to sustain application of this definition to certain firearm designs. *See, e.g., United States v. Rowold*, 429 F. Supp. 3d 469 (N.D. Ohio 2019). Rather than make modest changes to account for the issues identified in these cases, ATF has chosen to completely discard the existing regulatory framework.

ATF proposes a base “frame or receiver” definition of:

A part of a firearm that, when the complete weapon is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure. Any such part identified with a serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be a frame or receiver. For purposes of this definition, the term “fire control component” means a component necessary for the firearm to initiate, complete, or continue the firing sequence, including any of the following: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails.

86 Fed. Reg. at 27,742.

There are three main issues with this proposed definition. First, it would include parts that do not bear any reasonable resemblance to a firearm’s frame or receiver under the common industry understanding of the term. Under the proposed definition, a bolt carrier or slide might be considered a “frame or receiver” because they both can be “visible from the exterior” and “provide[] housing” for the “firing pin.”

Second, the serial number presumption is contrary to existing industry practice. Many manufacturers choose to mark multiple parts with the serial number for internal control purposes. This practice generally allows manufacturers to match multiple parts of the same firearm using the same serial number. Given this practice, the mere appearance of a serial number on a part is not necessarily indicative that part is a “frame or receiver.”

Third, the definition presumes that multiple parts of a single firearm can be a “frame or receiver.” This change frustrates Congress’s exact purpose in adding the term “frame or receiver” to the definition of “firearm.” As ATF notes in this very proposed rule, prior to the enactment of the current definition of “firearm,” multiple parts of a firearm could be considered a “firearm,” so Congress created the *singular* frame or receiver term to avoid this issue:

During debate on the GCA and related bills introduced to address firearms trafficking, Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that “[t]he present definition of this term includes ‘any part or parts’ of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words ‘frame or receiver’ for the words ‘any part or parts.’”

86 Fed. Reg. at 27,720 (citing 111 Cong. Rec. 5527 (March 22, 1965)).

While it is odd that ATF cites legislative history that undermines its own new proposed definition, resorting to legislative history is unnecessary in this case because the statute clearly refers to a singular part. The definition of firearm includes “*the* frame or receiver of any such weapon” 18 U.S.C. § 921(a)(3) (emphasis added).

When Congress wanted to create a definition that included multiple parts of a “firearm,” it knew how to do so. The definition of “firearm silencer” or “firearm muffler” applies to “any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.” 18 U.S.C. § 921(a)(24). If Congress had intended multiple parts of other firearms to be “firearms,” it could easily have enacted a similar provision.

The Supreme Court recently examined another federal statute with a singular article before a defined term that the government also found inconvenient. In *Niz-Chavez v. Garland*, the Court evaluated whether an immigration statute’s requirement to send “a notice” with certain

information was met when the government sent the defendant multiple notices, each containing a piece of the required information. 141 S. Ct. 1474, 1480 (2021). The Court applied the plain text of the statute to hold that the government must send a single notice. *Id.* at 1486.

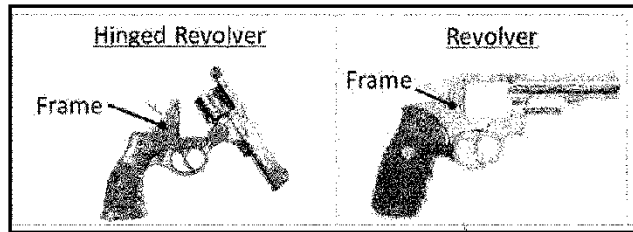
In holding that the singular usage in the statute controlled, the Court also rejected the government's attempt to use the Dictionary Act³ as a way to pluralize the otherwise singular text of the term. *Id.* at 1482. "The Dictionary Act does not transform every use of the singular 'a' into the plural 'several.'" *Id.*

To confirm its analysis that "a notice" referred to a single document, the Court looked at a nearby code section that referred to "the notice." "Here again we encounter an article coupled with a singular noun ("the Notice"), a combination that once more seems to suggest a discrete document." *Id.* at 1483. Just as "the notice" referred to a single document, "the frame or receiver" refers to a single part of a firearm.

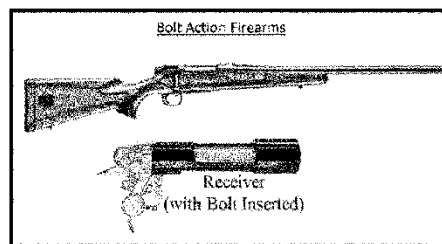
As part of the base definition, ATF also provides some examples of firearm frames or receivers:

³ This act provides that "words importing the singular include and apply to several persons, parties, or things," unless statutory context indicates otherwise. 1 U.S.C. § 1.

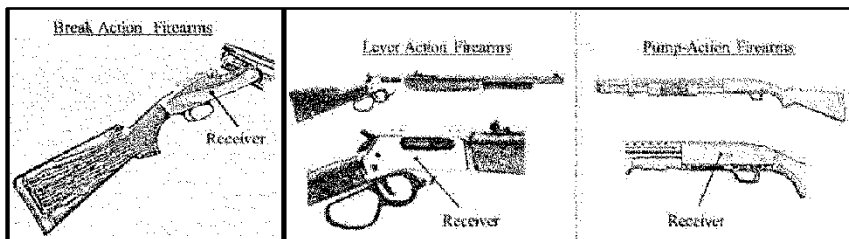
Example 1 – Hinged or single framed revolver: The frame or receiver is the part of the revolver that provides a structure designed to hold the trigger, hammer, and cylinder.



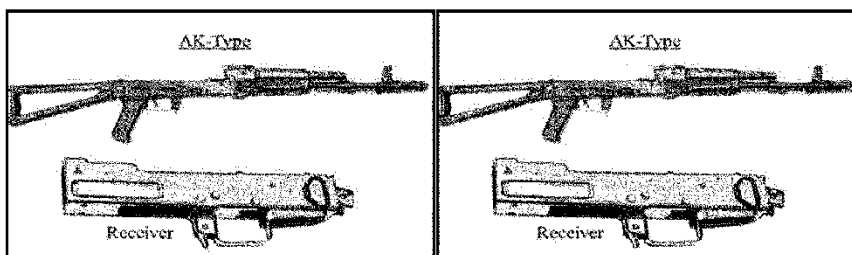
Example 2 – Bolt action rifle: The frame or receiver is the part of the rifle that provides a structure designed to hold the bolt, firing pin, and trigger mechanism.



Example 3 – Break action, lever action, or pump action rifle or shotgun: The frame or receiver is the part of the rifle or shotgun that provides housing for the bolt and firing pin, or a structure designed to integrate the breechblock.



Example 4 - Semiautomatic firearm or machinegun with a single receiver housing all fire control components: The frame or receiver is the part of the firearm that provides housing for the hammer, bolt, trigger mechanism, and firing pin (e.g., AK-type firearms).



Providing definite examples is a much improved way to deal with the “frame or receiver” issue, but there are several problems with the examples given. It isn’t clear how the examples interact with the serialization presumption. For example, many revolvers or bolt-action rifles may have an additional serial number on their barrels. For these firearms, may the manufacturer treat the identified part as a singular “frame or receiver” or does the serialization presumption control?

The example for AK-type firearms is not consistent with many existing AK-type firearms already lawfully possessed. While many of these firearms are marked on the identified “single receiver,” many of these type of firearms have been imported with the serial number only marked on the front trunnion. Since it is unlikely that ATF is intending to identify an unmarked part of thousands of firearms as the “frame or receiver,” this example should be reevaluated.

1. The Definition of Firearm Muffler or Silencer Frame or Receiver

ATF proposes adding a new definition for “firearm muffler or silencer frame or receiver”:

The term “frame or receiver” shall mean, in the case of a firearm muffler or firearm silencer, a part of the firearm that, when the complete device is assembled, is visible from the exterior and provides housing or a structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device, including any of the following: Baffles, baffling material, or expansion chamber.

86 Fed. Reg. at 27,743.

This definition could be a positive improvement on current law. As ATF notes, under existing law there isn’t a clear “frame or receiver” for firearm silencers. It isn’t clear from the definition if ATF intends for only a singular part to be the “frame or receiver” for firearm silencers, but there is some indication that this definition may also apply to multiple parts. In the

Background section of the proposed rule, ATF states “[t]hese new definitions would clarify for manufacturers and makers of complete muffler or silencer devices that they need only mark each part (or specific part(s) previously determined by the Director) of the device defined as a ‘frame or receiver’ under this rule.” 86 Fed. Reg. at 27,728. There is no reason in the case of firearm silencers to consider multiple parts the “frame or receiver.”

Because firearm silencer parts are already legally firearms, the “frame or receiver” is only relevant for marking purposes. Since ATF need not worry about the prosecution issues that have arisen with other firearms, it should clarify in any final rule that firearm silencers only need to be marked on a single piece that is the “frame or receiver.”

2. The Definition of Split or Modular Frame or Receiver

The definition of “split or modular frame or receiver” provides in part:

In the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential internal components (e.g., a split frame with upper assembly and lower assembly as in many semiautomatic rifles, upper slide assembly and lower grip module as in many semiautomatic handguns, or multiple silencer modular pieces), the Director may determine whether a specific part or parts of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification.

86 Fed. Reg. at 27,743.

ATF then provides an unweighted list of facts that the Director may consider in determining if a “split or modular frame or receiver” firearm has a single part that may be considered the “frame or receiver.” As discussed *supra* in more detail, Congress has made clear that a firearm has only a single frame or receiver, so ATF may not substitute its own judgment in place of the clearly expressed intent of Congress.

The issues with these factors are compounded by another section of the proposed rule on “voluntary classifications.” That section provides that “[t]he Director *may* issue a determination to a person whether an item is a firearm or armor piercing ammunition as defined in this part upon receipt of a written request or form prescribed by the Director.” 86 Fed. Reg. at 27,748 (emphasis added).

A system where manufacturers would be burdened by increased and unworkable marking requirements where the only option is to appeal to an administrative agency for clarity, but where that agency specifically disclaims any responsibility to provide a response is the very definition of “arbitrary and capricious.”

Following the list of factors is another set of examples of firearms, this time they are “split or modular frame or receiver” firearms that have already had a specific part identified as the “frame or receiver.” However, the list is entirely too short, and could result in very inequitable consequences for the firearm industry. ATF should make every effort to classify all existing firearm designs if it intends to move forward with a rulemaking of this magnitude. That is the only way to ensure that any final rule is fair to all.

The examples list also needs to clarify what counts as a “type” of firearm. For example, is the FN SCAR an FN FNC-type firearm? Or, is the SCAR a different design requiring its own classification? A slightly different example is those firearms that are mechanically different, but use AR-15 compatible receivers. There are a number of bolt-action upper receivers produced that are compatible with AR-pattern lower receivers. May these firearms rely on the designation in the proposed rule for AR-pattern firearms?

There is also an error in the examples given. ATF claims that the “frame or receiver” for Beretta AR-70-type firearms is the lower receiver. Under existing law, the upper receiver of the AR-70 has been treated as the “frame or receiver.” ATF has approved Form 6s for AR-70 and AR-70/90 parts kits that include the lower receiver, which would have been unlawful under ATF’s interpretation of 18 U.S.C. § 925(d)(3) if the lower receiver was the “frame or receiver.”

If ATF moves forward with a final rule, then it should abandon the *ultra vires* multiple “frame or receiver” approach, and attempt to classify the “frame or receiver” of all known firearm designs.

3. The Definition of Partially Complete, Disassembled, or Inoperable Frame or Receiver

The proposed rule would add an entirely new definition of “partially complete, disassembled, or inoperable frame or receiver”:

The term “frame or receiver” shall include, in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state. In determining whether a partially complete, disassembled, or inoperable frame or receiver may readily be assembled, completed, converted, or restored to a functional state, the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials. For purposes of this definition, the term “partially complete,” as it modifies “frame or receiver,” means a forging, casting, printing, extrusion, machined body or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.

86 Fed. Reg. at 27,746.

This definition is not consistent with the statutory definition of “firearm.” The relevant portion of that definition defines firearm as “any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive

[and] the frame or receiver of any such weapon” 18 U.S.C. § 921(a)(3). With this definition Congress made clear that a “frame or receiver” is not itself a “weapon.” Otherwise, the second clause would read “the *weapon* of any such weapon.”

Since a “frame or receiver” is not a weapon, then the “readily converted” clause does not apply. If Congress had intended for those items that may be readily converted into frames or receivers to also be considered frames or receivers, then using the same language of the first clause in the second clause would have been a simple way to accomplish that intent.

This problem is compounded by the expansive definition ATF proposes for the term “readily.” Taken together, these two terms could result in steel or aluminum billets, castings, or forgings, or even simple glass reinforced nylon raw materials, being considered a “firearm.”

ATF is correct that a “weapon” that “may readily be converted to expel a projectile by the action of an explosive” is legally a firearm, but a forging, casting, or other raw material that “may readily be converted” into a “frame or receiver” is, as far as the GCA is concerned, nothing.

Because it is clearly outside of the intent of Congress, ATF should not move forward with any attempt to expand the definition of “frame or receiver” to items that have not yet reached a “critical stage of manufacture” where they are “sufficiently complete to function as a frame or receiver.”

4. The Definition of Destroyed Frame or Receiver

NRA does not object to ATF attempting to define the point at which a frame or receiver is no longer a frame or receiver because it has been sufficient destroyed or altered. However, ATF should avoid the same issues with this definition as with the definition of “partially

complete, disassembled, or inoperable frame or receiver,” discussed *supra*, and the definition of “readily,” discussed *infra*.

e) The Definition of Importer’s or Manufacturer’s Serial Number

ATF proposes defining “importer’s or manufacturer’s serial number” to mean:

The identification number, licensee name, licensee city or state, or license number placed by a licensee on a firearm frame or receiver in accordance with this part. The term shall include any such identification on a privately made firearm, or an ATF issued serial number. When used in this part, the term “serial number” shall mean the “importer's or manufacturer's serial number.”

86 Fed. Reg. at 27,746.

By defining “serial number” to include substantially more identifying information, ATF would require additional information to be marked only on the frame or receiver of a firearm. Under existing law, this additional information may appear on the barrel or slide of the firearm. This definition also incorporates ATF’s new serialization requirement for “privately made firearm[s],” which is discussed in more detail in the next section.

f) The Definition of Privately Made Firearm

ATF proposes to define an entirely new category of firearm previously not subject to federal regulations governing their manufacture as:

A firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings placed by a licensed manufacturer at the time the firearm was produced. The term shall not include a firearm identified and registered in the National Firearms Registration and Transfer Record pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date).

86 Fed. Reg. at 27,746-47.

Congress has gone to great lengths to clarify that only those involved in commercial manufacturing are subject to the controls of the GCA. Only those who are “engaged in the business” of manufacturing must be licensed to manufacture firearms. 18 U.S.C. § 922(a)(1)(A). This limitation exists for good reason. The federal government does not have a police power and must exercise only those limited powers granted to it by the Constitution. *See United States v. Lopez*, 514 U.S. 549, 566 (1995).

ATF’s attempt to enter into regulation of privately made firearms that have no substantial impact on interstate commerce is not only beyond its statutory authority, but also potentially beyond the realm of regulation that even Congress may authorize.

For these reasons, ATF should not finalize any rule that attempts to regulate privately manufactured firearms.

g) The Definition of Readily

The proposed rule offers a multifactor test for the definition of “readily” that is so vague and amorphous that it would give ATF the authority to determine that any piece of raw material of sufficient size is a firearm under federal law. That definition would read:

A process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process. Factors relevant in making this determination, with no single one controlling, include the following:

- (a) Time, i.e., how long it takes to finish the process;
- (b) Ease, i.e., how difficult it is to do so;
- (c) Expertise, i.e., what knowledge and skills are required;
- (d) Equipment, i.e., what tools are required;
- (e) Availability, i.e., whether additional parts are required, and how easily they can be obtained;
- (f) Expense, i.e., how much it costs;

(g) Scope, i.e., the extent to which the subject of the process must be changed to finish it; and

(h) Feasibility, i.e., whether the process would damage or destroy the subject of the process, or cause it to malfunction.

86 Fed. Reg. at 27,747.

This is not ATF's first attempt to use an unworkable standard against a regulated entity. In *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, a rocketry association challenged ATF's classification of a material as an "explosive" because it the reaction of the material was "*much faster* than the reaction achieved by what is more commonly associated with burning" 437 F.3d 75, 79-80 (D.C. Cir. 2006).⁴

The court found that ATF had not given the association a workable standard to operate under:

Obviously, there is such a wide potential for disparity among the substances potentially classified as explosives that the vague description "much faster" conveys no information at all.

ATFE's relational definition suffers from a further methodological flaw: it designates no points of comparison. In order to say that one item burns "much faster" than another, one would need to know the speed at which each item burns. But ATFE has never pointed to evidence establishing the data points necessary to make a comparison. For one thing, ATFE has not stated the burn velocity of APCP in the form relevant to this regulation.

Id. at 82.

Like the vague standard used by ATF in *Tripoli Rocketry*, it is hard to see how ATF could employ the proposed definition of "readily" in a way that would give gun owners and firearm manufacturers sufficient notice of when an item legally becomes a "firearm."

⁴ Notably, Attorney General Garland, then serving as a circuit judge, joined this opinion.

The various factors articulated in the proposed definition of “readily” give no guidance as to how any of those factors will weigh in determining if a given item is a firearm. ATF further compounds this problem by claiming that “no single [factor is] controlling.”

The proposed definition simply fails to conform to the APA’s requirement that agency action not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706(2)(C). Because the definition would impact criminal statutes, it is also unconstitutionally vague. “The doctrine of vagueness provides that a conviction is invalid under the Due Process Clause ‘if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *Rubin v. Garvin*, 544 F.3d 461, 467 (2d Cir. 2008).

II. The Marking Requirements

In addition to the new definitions, the proposed rule would make several changes to firearm marking requirements. Some of these changes would officially recognize longstanding ATF practices, but others represent a serious departure from current law or an entirely new requirement that has no basis in statute.

As discussed *supra* (I)(e), the proposed rule would require all markings to be placed upon the frame or receiver of a firearm. While other industry commenters are likely in a better position to explain the costs associated with this change, it is fair to say that many members of the industry have invested in marking tooling that would be very costly to replace to conform to the new marking requirement.

ATF claims that this change is necessary to support the tracing of firearms, but gives little data to explain how traces are failing under the current system due to existing marking requirements. An “[a]gency action based on speculation rather than evidence is arbitrary and capricious.” *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 50-51 (D.D.C. 2019) (quoting *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014)).

The most significant marking change in the proposed rule is a new requirement that licensees mark privately made firearms. That requirement reads:

Privately made firearms. Unless previously identified by another licensee in accordance with this section, and except as provided in paragraph (a)(4)(vi) of this section, licensees must legibly and conspicuously identify each privately made firearm within seven days following the date of receipt or other acquisition (including from a personal collection), or before the date of disposition (including to a personal collection), whichever is sooner. PMFs must be identified by placing on each part (or specific part(s) previously determined by the Director) of a weapon defined as a frame or receiver, the same serial number, but must not duplicate any serial number(s) placed by the licensee on any other firearm. The serial number(s) must begin with the licensee's abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, e.g., “12345678-[number]”. The serial number(s) must be placed in a manner otherwise in accordance with this section, including the requirements that the serial number(s) be at the minimum size and depth, and not susceptible of being readily obliterated, altered, or removed.

86 Fed. Reg. 27,747.

This proposed requirement would for the first time require those licensed as dealers to mark firearms and require those licensed as manufacturers or importers to mark firearms that they did not manufacture or import. These requirements are in direct contravention of the statute that governs marking of firearms not regulated by the National Firearms Act.

That statute provides that “[l]icensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such

manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.” 18 U.S.C. § 923(i). Notably, this requirement does not apply to licensed dealers.

Had Congress wanted licensed dealers to mark firearms, it would have been easy to include them in § 923(i). The same section of code mentions the term “dealer” eighteen times, and Congress was fully aware of the existence of unmarked firearms when creating the current marking requirement. Prior the enactment of the GCA, many firearms were produced without a serial number. To deal with those unmarked firearms, Congress could have created the exact dealer marking requirement that ATF now proposes, but it did not.

Congress also expressly provided that those licensed as importers and manufacturers were only responsible for marking firearms “imported or manufactured by such importer or manufacturer.” *Id.* Here again, Congress could have made manufactures or importers responsible for marking other firearms, but, again, it did not.

ATF should not finalize the proposed marking requirement because it is “in excess of statutory jurisdiction, authority, or limitations” 5 U.S.C.A. § 706(2)(C).

III. Retroactivity

The proposed rule is inconsistent on its treatment of existing firearms. The new marking requirement provides that:

Firearms designed and configured before [EFFECTIVE DATE OF THE FINAL RULE]. Licensed manufacturers and licensed importers may continue to identify firearms (other than PMFs) of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1)(i) and (ii) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose.

86 Fed. Reg. at 27,748.

But, in the Background section discussion of “split or modular frame or receiver” ATF claims:

However, if there is a present or future split or modular design for a firearm that is not comparable to an existing classification, then the definition of “frame or receiver” would advise that more than one part is the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF, as described above.

86 Fed. Reg. at 27,729.

Can a manufacturer of a “present . . . split or modular design” continue to mark only the part that they presently mark under currently law, or would the proposed rule require that they treat “more than one part [as] the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF”?

Even a manufacturer of a firearm that may have a clear classification under the proposed rule would have unclear guidance regarding future marking of current designs. The marking allowance only applies to “firearms . . . of the same design and configuration,” but no guidance is given on what these terms mean. If a manufacturer has to find a new parts supplier for a given part, is that still “the same design or configuration?” If a manufacturer makes a small change to a firearm, is that still “the same design or configuration”? Without answers to these questions, the marking allowance for existing firearms isn’t particularly useful to the firearm industry.

If ATF moves forward with a final rule it should give clear guidance regarding retroactivity and the application of the proposed rule to existing firearms.

IV. Reliance

The Supreme Court recently made clear that an agency action may be “arbitrary and capricious” because it fails to account for the reliance interests of those affected by the action. *See Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914-15 (2020).

The proposed rule upsets the better part of a century of federal firearms law. Manufacturers, importers, dealers, NRA members, and other firearm owners have all relied on these rules when exercising their fundamental right to manufacture, import, and own Constitutionally-protected arms. The proposed rule fails to address these interests entirely.

ATF is “required to assess whether there [are] reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns. *Id.* at 1915. Because ATF has completely failed to address these interests in the proposed rule, it is “arbitrary and capricious.”

Conclusion

Large portions of the proposed rule are in violation of the APA, unconstitutionally vague, or simply unworkable for the firearms industry. For these reasons, ATF should abandon this clearly unlawful proposed rule. ATF has identified a real problem with its current definition of “frame or receiver,” but the proposed rule is not the solution for that problem.

Signed,



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