NSSF
The Firearm Industry Trade Association

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August 18, 2021

Via Federal eRulemaking Portal

The Honorable Marvin Richardson
Acting Director
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Ave, N.E.
Washington, DC 20226

Re: Notice of Proposed Rulemaking
Definition of "Frame or Receiver" and Identification of Firearms
Docket No. ATF 2021R-05
RIN 1140-AA54

Dear Acting Director Richardson:

On behalf of the National Shooting Sports Foundation ("NSSF"), the trade association for America's firearm, ammunition, hunting and shooting sports industry, and our over 9,000 members, we offer the following public comments on the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) proposed rule on Definition of "Frame or Receiver" and Identification of Firearms: Federal Register Number 2021-10058, published on May 21, 2021 (the "Proposed Rule").

With a membership comprised of thousands of manufacturers, distributors, retailers, shooting ranges, sportsmen's organizations, and publishers across the country, the NSSF advocates on behalf of the Industry and its related businesses (the "Industry") while also working to prevent illegal or unauthorized access of firearms, encouraging the enjoyment of recreational shooting and hunting, and helping citizens to better understand the Industry's constitutionally protected products and services. With this mission in mind, we strongly oppose the Proposed Rule and ATF's attempt to redefine "frame or receiver."

First, NSSF adopts and incorporates by reference the public comments submitted by the Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI") regarding the Proposed Rule. In addition, we offer the following additional comments.

Multiple Sales Reports and One Gun A Month Laws

If a firearm has multiple frames or receivers, each with a different serial number, then each is a "firearm" unto itself. Does this mean that when one such handgun is sold by a licensed retailer, it will be required to have the consumer fill out more than one ATF Form 4473? Do they list the several serial numbers on a single Form 4473? Is the retailer required to file a multiple sales report for each such handgun sold? Similarly, will retailers in Texas, New Mexico, Arizona, and California be required to file multiple sales reports for rifles under the existing ATF demand letter program if the rifle has a split receiver, e.g., modern sporting rifle like the AR-15 style rifle?

Some states, e.g., Virginia, restrict the constitutional right of individuals to purchase more than one handgun a month. If a handgun has more than one "frame or receiver" with different serial numbers, the Proposed Rule could amount to a ban on the sale of handguns in those states or require that a retailer sell only part of the weapon in each month. The Proposed Rule provides retailers no guidance or instruction on these issues.

Privately Made Firearms and Marking

"Privately Made Firearms" (PMFs) are and have been legal and not regulated under federal law. Accordingly, there is no legal requirement that they have any markings including a serial number. They are predominantly a hobbyist option and require more time, tooling, and dedication to craftsmanship than most criminals are willing to invest. According to the 2016 Bureau of Justice Statistics survey "Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates," we know that criminals very seldom acquire firearms from legal means. It is of great concern to the Industry that official counts of PMFs recovered from crime scenes are in fact commercially made firearms with obliterated serial numbers. NSSF has been unsuccessful in its attempt to acquire a report quoted by the Department of Justice (DOJ) and in the media about the purported 23,000 unserialized firearms recovered by law enforcement from 2016 to 2020.[1] Nevertheless, that some number of PMFs may have been recovered at crime scenes does not change the fact that Congress has not chosen to regulate these items.

The Proposed Rule puts unnecessary and cumbersome obligations on the part of licensed retailers by requiring that they serialize the private property (PMFs) of their customers. However, there is no statutory basis in the GCA to require licensees, other than manufacturers and importers, to mark firearms.[2] This portion of the Proposed Rule exceeds ATF's statutory authority. Moreover, consumers are very likely to refuse to bring PMFs to licensed retailers (gunsmiths) because they may not wish to have their PMF marked. This would mean PMFs in need of repair, so they are safe to use, will not be fixed. Because they are not manufacturers or importers, licensed retailers (gunsmiths) lack the necessary specialized tools, technology, and knowledge to mark PMFs in accordance with ATF's marking regulations.[3,4]

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[1] https://www.justice.gov/opa/pr/justice-department-proposes-new-regulation-update-firearm-definitions
[2] 18 USC § 923(i).
[3] 27 CFR 478.92(a) and 479(102(a).
[4] The proposed rule states PMFs may be made by non-licensed individuals for their personal use but cannot be sold. This is incorrect. Nothing in the GCA prohibits an unlicensed individual from selling a PMF provided the person is not "engaged in the business" as a manufacturer (18 USC 921(21)(a)) and they otherwise comply with applicable federal and state law, e.g., do not sell to an out-of-state resident or to someone they know is a prohibited.

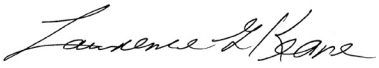
The Proposed Rule aims to address the perceived "ghost gun" issue described above by capturing more firearms in the traceable pool of firearms. This would likely not address violent crime or unauthorized access to firearms in a meaningful way, however, because it is well known that criminals will obliterate serial numbers, a crime on its own, to thwart law enforcement efforts of tracing. Additionally, a PMF is not subject to the same critical level of quality control and testing as commercially manufactured firearms. If private citizens were to mail their PMF to a firearm manufacturer for custom cerakote work, then the marking by the manufacturer would be required according to the Proposed Rule. The manufacturer does not know if the firearm they are receiving was built to acceptable specification and with the correct collaborative parts. Their job is simply to strip it down and paint it. If, for instance, a catastrophic failure was to occur with that now aesthetically customized PMF, then the manufacturer could be open to liability. The potential for financial and reputational risk induced by marking a PMF by a manufacturer that interacted with the firearm due to happenstance is unacceptably high. This is a risk that is inevitable with the Proposed Rule.

Conclusion

The Industry is heavily regulated and has a long history of collaborating effectively with ATF. It is an industry that is widely known to follow the rule of law and sell a product which enjoys explicit Constitutional protection. The Proposed Rule is so damaging to Industry and the Second Amendment that support for it cannot be mustered. The Industry provides firearms and ammunition to the military, law enforcement, and law-abiding citizens. Additionally, it ensures access to shooting ranges for safety training. Both protections highlight the Industry's criticality of contributing to our Nation's security, public safety, and economic well-being. If the Proposed Rule is implemented, it will create significant regulatory challenges, increase costs, impede production, and drive increased risk and undue burden for manufacturers, distributors, and federal firearm retailers conducting day to day business.

We urge ATF in the strongest possible terms to withdraw this Proposed Rule and start again. We suggest engaging with the Industry in a constructive dialogue to address ATF's stated concerns and issues to arrive at an end product that is consistent with ATF's lawful authority as determined by Congress, not sow confusion for consumers exercising their Second Amendment and needlessly complicate compliance for the Industry at major cost.

Sincerely,



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On behalf of the Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI"), the technical standard setting organization for America's firearm, ammunition, component, and propellant industry, (the "Industry"), we offer the following comments below in response to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) proposed rule on the Definition of "Frame or Receiver" and Identification of Firearms: Federal Register Number 2021-10058, 86 F.R. 27720 published on May 21, 2021 (the "Proposed Rule").

The Proposed Rule Aims to Broadly Redefine Frame and Receiver.

The Proposed Rule states that the new definition more broadly describes "frame or receiver" to be "any housing or holding structure for a hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails."

The Proposed Rule clarifies that the housing or holding structure must be visible from the outside of the firearm when fully assembled to aid law enforcement in their efforts to conduct trace requests on firearms that end up at crime scenes. This proposed definition is vague and unworkable in reality. Most modern firearms have many components that could be considered "necessary for the firearm to initiate, complete, or continue the firing sequence." Each of these parts would be considered a

"fire control component." Any part that "provides housing or a structure designed to hold or integrate one or more" of them could, in turn, be considered a "frame or receiver." Each "frame or receiver" would constitute a separate "firearm" under Section 921(a)(3)(B). It is conceivable that a single weapon would have two, three or more "firearms."

Currently, manufacturers and importers cannot duplicate a serial number. At the same time, the law does not permit multiple serial numbers on a firearm. Are manufacturers and importers to now mark multiple parts of a single weapon with different serial numbers or are they to mark the separate components of a single weapon with the same serial number? Either way, it creates significant confusion in the marketplace and appears to be contrary to the Gun Control Act of 1698[1] (GCA) and longstanding ATF interpretation, policy, and regulations.

Furthermore, the Proposed Rule stipulates that any forging or casting that is at a "critical state of manufacture" is to be considered a firearm and regulated as such. The supplemental statement provided in the Proposed Rule on this matter is as follows: "this 'critical stage of manufacture' is when the article becomes sufficiently complete to function as a frame or receiver, or may readily be completed, assembled, converted, or restored to accept the parts it is intended to house or hold," citing ATF Letter to Private Counsel #907010 (Mar. 20, 2015).[2]

What Constitutes the Same or Different "Design and Configuration"?

ATF states that "one important goal" is to "ensure that it does not affect existing ATF classifications of firearms that specify a single component as the frame or receiver." The "application" of the Proposed Rule "would not alter these prior ATF classifications" and provides a "nonexclusive list of common weapons with applicable split/multi-piece frame or receiver configuration for which ATF has previously determined to a specific part to be the frame or receiver."[3] The list refers to "-type," e.g., Colt 1911-type…. hammer fired, striker fired semiautomatic pistols, AR-15-type, and Beretta AR-70-type firearms, etc. First, since the list is nonexclusive there are other firearm designs and configurations not listed that fall into this category, but it is not known from the Proposed Rule what they are, and classifications provided by ATF to individual manufactures is not publicly available. Second, the proposal indicates that the present or future split or modular design for a firearm that is "not comparable" to an existing classification would not be covered by a prior classification. ATF does not explain or define what constitutes a "comparable" design. Similarly, ATF speaks of the same "configuration" but does not make clear what constitutes a different or the same configuration. For example, will ATF apply the same overly broad test utilized in California for what constitutes a "new model" handgun under California's "Not Unsafe Handgun" law?[4] It is also worth noting the ATF's "application" of the rule is subject to change by ATF at any time.

Classifications, FATD and Delays

[1] 82 Stat. 1213-2; 18 U.S.C. § 921, et. seq.
[2] It is inappropriate for ATF to rely upon private letter rulings and correspondence that are not made publicly available by ATF to all members of the industry.
[3] Proposed Rule 86 FR 27720 at pg 27728 and 27729
[4] Cal. Pen. Code § 31910.

While ATF encourages manufacturers to submit samples to ATF for classification or to seek marking variances, nothing in the Gun Control Act requires a manufacturer or importer to submit a sample to ATF Firearms and Ammunition Technology Division (FATD). Nothing in the Proposed Rule requires ATF to provide a manufacturer or importer with a response, let alone a timely one. And, ATF has made classifications, e.g., a so-called "80% receiver" is not a "frame or receiver" which ATF now effectively rescinds. As ATF is aware, the wait time for a classification now is exceedingly long, approaching a year. This Proposed Rule can be expected to exponentially increase ATF FATD's workload thereby greatly increasing the already lengthy wait times as manufacturers and importers will submit samples out of concern that they may be mistaken as to whether something is a comparable or different design and/or configuration of a "grandfathered" firearm. This is especially true given the Department of Justice's recent announcement of a "zero tolerance" policy against the Industry.

Product Development Disincentive

The Proposed Rule could have the unintended consequence of creating a disincentive for manufacturers to develop new, safer, and more reliable firearms because of the heavy regulatory burden and compliance cost they will incur by bringing to market a design not "grandfathered in" by the proposal. They can simply continue to make existing designs at much less cost.

Consequences to Industry and Contradicting the Gun Control Act of 1968

Rewriting the definitions as described above and altering the operating norm for the Industry that has been in place for over fifty years creates numerous problems and challenges. Applying the proposed definition changes would result in an incredible increase in touchpoints and recordkeeping obstacles for Federal Firearm Licensees (FFLs) especially manufacturers and importers. These touchpoints add risk for error which in turn could precipitate into revocation of an FFL's license. The GCA requires that a firearm have "*a* serial number engraved or cast on *the* receiver or frame of *the* weapon" (emphasis supplied)[5].

The GCA only regulates "*the* frame or receiver or receiver of any such weapon."[6] Congress purposefully used the singular in enacting the GCA when it repealed the Federal Firearms Act of 1938 (FFA) which regulated "any part or parts of" a weapon. ATF acknowledges the FFA "regulated all firearm parts."[7] The GCA simply does not authorize ATF to promulgate regulations requiring the placement of multiple serial numbers or a single serial number on multiple parts. ATF will exceed its statutory authority if this proposal is published as a final rule.

The singular phrasing in the GCA provides evidence that Congress never intended for firearms to have multiple receivers and thus only one serial number marking for the regulated firearm. This redefinition complicates manufacturing and the overall business of firearm commerce for the Industry.

[5] 18 U.S.C. § 923(i).
[6] 18 U.S.C. § 921(a)(3)(A)-(B).
[7] Proposed Rule 86 FR 27720 at pg 27720

ATF states that rulemaking is necessary because of just three "erroneous district court decisions"[8] We agree these decisions were incorrect, yet ATF did not fully litigate these cases. The Proposed Rule is severe overreaction by ATF. Moreover, ATF has been aware of the existence of "split receivers" since before it promulgated 27 CFR 478.11 and 479.11. The AR-15 Colt Sporter came on the commercial market in approximately 1963.[9] Congress was also therefore aware of split receivers at the time it enacted the GCA using the singular "*the* frame or receiver." ATF could simply have provided a rule amending the existing regulation to specify that the lower receiver is the "frame or receiver" which has been the universal understanding of the Industry for many decades. Further, the Proposed Rule allows existing designs and configuration "types" to continue to be marked as they have been for decades, raising question about the need for this new rule in the first place.

The Proposed Rule raises a concern with the potential for significant consequence regarding the manufacturing and ownership of firearms. The matter in question relates to recording the transfer of firearms between Industry and the consumer. Currently, a simple semiautomatic handgun has one frame and recording the manufacture and transfer is straightforward and unambiguous. The retail purchase of a single finished receiver has required a background check since 1994. The Proposed Rule has made clear that a future semiautomatic pistol design would have two receivers but failed to explain how that pistol is recorded and transferred. What ATF is proposing would create the potential requirement of recording the transfer of a single pistol as two firearms by regulating the slide and frame as two different frames of the same pistol. Under the Proposed Rule, when selling a single handgun, the FFL would seemingly be required to report the sale of multiple handguns, a legal obligation already in effect, that will create an overwhelming amount of multiple handguns sales notifications to the ATF.

Compounding this is the issue of duplicating serial numbers. It is currently illegal for different firearms to be assigned the same serial number. If the slide of a pistol is in fact a regulated firearm, and the frame of said pistol is also a firearm, they would not be able to share the same serial number. Currently, some manufacturers assign and machine the same serial number on a frame, slide, and barrel for a multitude of reasons such as foreign manufacturing or exporting regulations. These firearms are not currently in conflict with the duplicating serial number requirement in the United States because only the frame of the pistol is considered the regulated firearm. Adding the serial number to other parts, in this case, has no regulatory implication domestically. The Proposed Rule would change this completely and potentially prevent the importation of historic brands, creating a ban. Requiring multiple parts of single firearm, especially a so-called "split receiver" will result in confusion for law enforcement and ATF tracing efforts. Criminals could simply acquire two copies of the same model and interchange or swap parts, sending law enforcement on a wild goose chase.

Requiring multiple parts to be marked and timely recorded as an acquisition for a single firearm will create logistical problems and significant costs for manufacturers to serialize, timely record and then match different parts with the same serial number during the manufacturing and assembly processes. It will also significantly increase scrap costs if one marked part is rejected during the manufacturing process for any reason, e.g., quality control, the other corresponding marked part that was not rejected now also has to be scrapped. Duplicative recordkeeping entries will need to be made in a

[8] Proposed Rule 86 FR 27720 at pg 27727

[9] See also, 86 F.R. at 27721, n. 9 citing to ATF Internal Revenue Service Memoranda #21208, dated. Similarly, the Colt 1911 pistol has existed since the late 1890s, long before the Gun Control Act, without any issue about which part constituted the frame, until now.

manufacturer's Acquisition and Disposition (A&D) record. A&D software is not designed to permit the duplication of a serial number. This Proposed Rule will require wholesale, and costly, reprograming in order to comply with the proposal.

How is a manufacturer to handle a warranty repair of a "split receiver" firearm if one of the marked parts must be replaced to make the firearm safe to use? A manufacturer cannot reuse the serial number nor return the firearm with unmarked component(s) ATF now considers to be a "frame or receiver." A manufacturer presumably can't provide a replacement part that is marked with a different serial number. If a manufacturer can, then it would appear to defeat the purpose of the Proposed Rule and raise questions about whether the manufacturer has marked the same firearm with multiple serial numbers in violation of 18 USC 923(i). In the case of a "split receiver" the gun is incapable of expelling a projectile unless both parts, e.g., the lower receiver that has been considered the "frame or receiver" for decades, and the upper are both present and assembled. Marking both parts does not increase or advance traceability of the firearm should it be recovered by law enforcement.

The Proposed Rule requires the serial number of an internal or "drop in" chassis frame or receiver, like the P-320-type, to be unobstructed and visible to the naked eye.[10,11] It is already challenging to mark such a frame or receiver due to limited space and have it be visible. It is unclear whether or how a manufacturer can safely place a lengthy abbreviated licensee number followed by a hyphen and the actual serial number in a "window" of a polymer frame pistol, so it is visible. This issue is even more acute with a smaller pistol suitable for concealed carry.

Issues Regarding "Serial Numbers"

The Proposed Rule expands the meaning of a serial number as follows: "*Importer's or manufacturer's serial number*. 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." Previously, all markings other than the serial number could be on the barrel or pistol slide. Under the proposed regulation, only the model, caliber, or gauge, and (where applicable) the name and country of a foreign manufacturer may be marked on the barrel or slide.

The Proposed Rule is confusing and inconsistent as to what information must be marked on the "frame(s) or receiver(s)." It is unclear what actually constitutes the "serial number." The proposal redefines the term "serial number" to include additional information not previously encompassed by that

[10] PR 86 FR 27720 Footnote 52 - Markings must also be clearly visible from the exterior because they may be needed to prove that a criminal defendant had knowledge that the serial number was obliterated or altered. See, e.g., Lewis v. United States, No. 3:12–0522, 2012 WL 5198090, at *4 (M.D. Tenn. Oct. 19, 2012) (serial number obliterated on the ''visible exterior'' of a revolver); State v. Shirley, No. 107449, 2019 WL 2156402 (Ct. App. Ohio May 16, 2019) (same); cf. United States v. Sands, 948 F.3d 709, 719 (6th Cir. 2020) (serial number is not altered or obliterated so long as it is ''visible to the naked eye''); United States v. St. Hilaire, 960 F.3d 61, 66 (2d Cir. 2020) ("This 'naked eye test' best comports with the ordinary meaning of 'altered'; it is readily applied in the field and in the courtroom; it facilitates identification of a particular weapon; it makes more efficient the larger project of removing stolen guns from circulation; it operates against mutilation that impedes identification as well as mutilation that frustrates it; and it discourages the use of untraceable weapons without penalizing accidental damage or half-hearted efforts.'').

[11] Proposed Rule 86 FR 27720 at pg 27721 and 27722

term. The Proposed Rule expands the meaning of a serial number as follows: "*Importer's or manufacturer's serial number*. 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 "identification number" seems to be referring to what Industry understands to be the serial number, although "identification number" is not a defined term. Additionally, it is used in other instances of the Proposed Rule where that seems to be the intent. The term "serial number" is interchangeably used throughout the Proposed Rule in different sections to mean both the "identification number" and the newly defined term.

Primarily, a literal reading of the Proposed Rule's definition of "importer's or manufacturer's serial number" (and, therefore, "serial number" when used anywhere in Part 478) suggests that each item listed in that definition is, individually, a "serial number." That cannot possibly be ATF's intent.

Previously, all markings other than the serial number could be on the barrel or pistol slide. Under the proposed regulation, only the model, caliber, or gauge, and (where applicable) the name and country of a foreign manufacturer may be marked on the barrel or slide. This raises significant challenges. First, there could be multiple parts that ATF would now classify as a "frame or receiver" (any housing or structure that holds a fire control component) that must be marked. However, depending on the part, there may not be sufficient surface space to mark all the required information in the manner ATF could require.

"This proposed rule would not change the existing requirements for size and depth of markings in 27 CFR 478.92(a)(1) and 479.102(a) . . .."[12]. Now, the print size limitation only pertains to serial numbers, not the additional required information of the manufacturer's or importer's name, city, and state. See 27 CFR § 478.92(a)(1)(i) ("the serial number must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch") and (ii) ("this information [model, caliber or gauge, name, city and state, country of manufacture (if applicable)] must be to a minimum depth of .003 inch"). The Proposed Rule states in part: "The engraving, casting, or stamping (impressing) of the serial number and additional information must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch."[13] ; § 478.92(a)(1)(iv).) The statement in the proposal is inaccurate and no reason is given for the change. Requiring that information to have a print size no smaller than 1/16 inch will make it more difficult or impossible to comply.

In the case of a weapon with multiple "frame(s) or receiver(s)" would disassembly, e.g., routine cleaning, or replacement, e.g., repair, of a part that ATF would classify as a "frame or receiver" constitute the "remove[al]" of the manufacturer or importer serial number in violation of 18 USC 922(k)?

Issues Regarding Recordkeeping of Firearms

Next Business Day

The Proposed Rule provides that "each licensed manufacturer shall record the name of the manufacturer(s), importer(s) (if any) and/or privately made firearm (if privately made in the United

[12] Proposed Rule 86 FR 27720 at pg 27732
[13] Proposed Rule 86 FR 27720 at pg 27747

States), type, model, caliber or gauge, and serial number(s) of *each firearm manufactured* or otherwise acquired (*including a frame or receiver* to be disposed of separately), the date of such manufacture or other acquisition . . .. The information required by this paragraph shall be recorded not later than the close of the *next business day* following the date of such manufacture or other acquisition."[14] ; proposed § 478.123(a) (emphasis added.) No reason is given for changing current § 478.123(a), which provides: "The information required by this paragraph shall be recorded not later than the seventh day following the date such manufacture or other acquisition was made." This is also inconsistent with the proposed § 478.92(a)(1)(v), which would provide: "Licensed manufacturers must identify a complete weapon or complete muffler or silencer device no later than seven days following the date of completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner."[15] How can a record of the serial number and other information on a manufactured firearm be made by the next business day if it need not be identified for seven days from the completion of its manufacture?

The "Commercial Record" Exception Will Never Apply

The Proposed Rule at § 478.123(a) would provide that records of firearms manufactured "shall be recorded not later than the close of the next business day following the date of such manufacture or other acquisition, except that, when a *commercial record* is held by the licensed manufacturer separately from other commercial documents and readily available for inspection, containing all acquisition information required for the record, the period for making the required entry into the record may be delayed not to exceed the seventh day following the date of receipt."[16] (emphasis supplied.)

A "commercial record" is a record of a transaction between a transferor and a transferee. Internal manufacturer records are not "commercial record[s]." Therefore, the "commercial record" exemption from the next-day recording requirement allowing seven days to record would never apply. The Proposed Rule provides that manufacturers shall record the applicable A&D information for each firearm manufactured or otherwise acquired not later than the close of the next business day following the date of such manufacture or other acquisition. Further, the Proposed Rule states that licensees must generally identify firearms with the required markings no later than seven days following the date of completion of the active manufacturing process or prior to disposition, whichever is sooner.

It appears ATF expects manufacturers to acquire firearms in their records that are not marked with any identifying information (presumably with an "NSN" serial number). Based on the Proposed Rule, a firearm (*e.g.,* a fully machined, unserialized frame or receiver) could be "manufactured or acquired" prior to the time period in which the required markings must be applied. If that is the case, the sheer volume of additional "NSN" serial numbers in a licensee's inventory will be substantially increased and cause significant issues reconciling inventory. Unserialized parts being scrapped would then have to be tracked through the manufacturing process and disposed of as scrap in the manufacturer's A&D records if they are destroyed prior to serialization, without a way to identify which frame or receiver corresponds to each recorded "NSN" entry in the manufacturer's records. This will result in recordkeeping errors and additional theft/loss reports as tracking of unserialized parts will be exceedingly difficult, if not impossible.

[14] Proposed Rule 86 FR 27720 at pg 27749
[15] Proposed Rule 86 FR 27720 at pg 27747
[16] Proposed Rule 86 FR 27720 at pg 27749

ATF Ruling 2012-1 provides that a manufacturer has seven days following the date of the completion of a firearm (or frame or receiver to be shipped or disposed of separately) to both mark *and* record the identifying information in its records. This change is unnecessary and will result in unwarranted complication. The current regulation should be retained.

Multiple Sales Reports and One Gun A Month Laws

If a firearm has multiple frames or receivers, each with a different serial number, then each is a "firearm" unto itself. Does this mean that when one such handgun is sold by a licensed retailer, it will be required to have the consumer fill out more than one ATF Form 4473? Do they list the several serial numbers on a single Form 4473? Is the retailer required to file a multiple sales report for each such handgun sold? Similarly, will retailers in Texas, New Mexico, Arizona, and California be required to file multiple sales reports for rifles under the existing ATF demand letter program if the rifle has a split receiver, e.g., modern sporting rifle like the AR-15 style rifle?

Some states, e.g., Virginia, restrict the constitutional right of individuals to purchase more than one handgun a month. If a handgun has more than one "frame or receiver" with different serial numbers, the Proposed Rule could amount to a ban on the sale of handguns in those states or require that a retailer sell only part of the weapon in each month. The Proposed Rule provides retailers no guidance or instruction on these issues.

"Readily Be Completed, Assembled Converted, or Restored"

The GCA 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."[17]

Clearly, the phrase "may readily be converted" only applies to a "weapon;" it does not apply to "the frame or receiver". The Proposed Rule is based on an incorrect reading of the GCA. Moreover, "*the* frame or receiver" refers to the housing as a unit, not separate pieces of a frame or receiver.

Partially Complete Frame or Receiver – "Critical Stage of Manufacturing"

As stated above, the GCA regulates "the frame or receiver" of a weapon. It does not regulate a "partially complete" frame or receiver, which by definition and logic is not a "frame or receiver" until it is complete.[18]

Nevertheless, as to what constitutes a "partially complete" frame or receiver, the Proposed Rule fails to make clear at what point between a "primordial state"[19] an object reaches a "critical stage of manufacturing" such that it becomes a "frame or receiver." The relevant "factors" ATF lists, throughout

[17] 18. U.S.C. § 921(a)(3) (emphasis supplied).
[18] *Id*.
[19] Proposed Rule 86 FR 27720 at pg 27729

the proposal, that it will consider are themselves inherently subjective. In fact, the Proposed Rule fails to define what constitutes a "primordial state." Adding more confusion, the proposal says that a "partially complete" frame or receiver includes an item that can be a "forging, casting, printing, extrusion, machined body, or similar article" that is "clearly identifiable as an unfinished component part..."[20] Is a forging in a "primordial state" or is it a "partially complete" frame or receiver? At what point in the machining process does the item cross the "critical line" and reach a "critical stage of manufacture[ing]"[21] When is it "sufficiently complete to function as a frame or receiver?"

It is unclear when the state of a frame or receiver is "readily completed" under the Proposed Rule because it does not provide clear and objective guidance for manufacturers. Several major manufacturers communicated that the process of creating a standard semiautomatic handgun, under this Proposed Rule, could result in as many as seven or more stages of a pistol's receiver construction that are called into question. Each stage could require serialization and recordkeeping at every iteration. Changing the standard of requiring serialization of only finished working firearm frames to any "readily completed" precursor creates confusion on the part of both manufacturers and their suppliers. This will essentially create firearms out of basic raw stampings and hunks of metal that have no working properties of a defined frame or receiver. This presumption is made from a lack of guidance because the Proposed Rule does not clearly define "readily completed."

This conclusion is fueled by the purposely broad and vague definition changes suggested by ATF and has no basis in reality or historic regulation of firearms. ATF defines a "receiver" as "that 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. A receiver blank does not yet "provide housing for the hammer, bolt, or breechblock, and firing mechanism," and is thus not a "receiver" within this definition. Therefore, any receiver that is in an unfinished stage and cannot provide housing for these named parts in concert to expel a projectile by force of an explosion is not a frame or receiver.

"Readily convertible" is included in the GCA but with limited scope and implication. The Proposed Rule includes case text from *United States v. Mullins*: "'visually made a determination' that the gun could be converted to expel a projectile, without any specialized knowledge, in less than an hour, and in minutes by an expert". (*Id.* at 43, 62)" *U.S. v. Mullins*, 446 F.3d 750, 756 (8th Cir. 2006). This raises a significant number of questions and serves as an example of the many issues the Proposed Rule embodies. ATF recently made contrary statements from what is set forth in the Proposed Rule concerning how it applies the law to determine when something is "readily convertible" and constitutes a "frame or receiver" and regulated as such. *See* ATF's Motion to Dismiss (attached as separate document) filed in *State of California, et al v Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), et al.*, United States District Court, Northern District of California, San Francisco Division Case No. 3:20-cv-06761-EMC ("ATF Motion to Dismiss). ATF said:

> "Plaintiffs' challenges to ATF's classifications also seek to undercut the process under which, for decades, ATF has reviewed numerous items to determine if they should be classified as "firearms" under the GCA, bringing to bear the agency's technical, scientific, mechanical, and legal expertise. Receivers for the AR-15, the most common rifle in America, have a space within them called the

[20] *Id.*
[21] *Id.*

fire-control cavity, which accommodates the firing components. The longstanding position of ATF is that, where a block of metal (or other material) that may someday be manufactured into a receiver bears no markings that delineate where the fire-control cavity is to be formed and has not yet been even partially formed, that item is not yet a receiver and may not 'readily be converted to expel a projectile.'"

This is significant because ATF's representation in court less than a year before the Proposed Rule is at odds with ATF's new position in the Proposed Rule. The ATF's view has been that a casting or block of metal that cannot house a fire control group and thus not "readily convertible" to expel a projectile by force of an explosion, is not a frame or receiver. This takes into consideration that no dimpling or guide can be present on the block in order to guide someone on the machining required. The implication being that manufacturers can continue business as historically performed while also proving "80% receivers" or blocks of plastic or metal are not firearm frames and should not be regulated as such.

Privately Made Firearms and Marking

"Privately Made Firearms" (PMFs) are and have been legal and not regulated under federal law. Accordingly, there is no legal requirement that they have any markings including a serial number. They are predominantly a hobbyist option and require more time, tooling, and dedication to craftsmanship than most criminals are willing to invest. According to the 2016 Bureau of Justice Statistics survey "Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates," we know that criminals very seldom acquire firearms from legal means. It is of great concern to the Industry that official counts of PMFs recovered from crime scenes are in fact commercially made firearms with obliterated serial numbers. NSSF has been unsuccessful in its attempt to acquire a report quoted by the Department of Justice (DOJ) and in the media about the purported 23,000 unserialized firearms recovered by law enforcement from 2016 to 2020[22]. Nevertheless, that some number of PMFs may have been recovered at crime scenes does not change the fact that Congress has not chosen to regulate these items.

The Proposed Rule puts unnecessary and cumbersome obligations on the part of licensed retailers by requiring that they serialize the private property (PMFs) of their customers. However, there is no statutory basis in the GCA to require licensees, other than manufacturers and importers, to mark firearms.[23] This portion of the Proposed Rule exceeds ATF's statutory authority. Moreover, consumers are very likely to refuse to bring PMFs to licensed retailers (gunsmiths) because they may not wish to have their PMF marked. This would mean PMFs in need of repair, so they are safe to use, will not be fixed. Because they are not manufacturers or importers, licensed retailers (gunsmiths) lack the necessary specialized tools, technology, and knowledge to mark PMFs in accordance with ATF's marking regulations.[24,25]

The Proposed Rule aims to address the perceived "ghost gun" issue described above by capturing more firearms in the traceable pool of firearms. This would likely not address violent crime or

[22] https://www.justice.gov/opa/pr/justice-department-proposes-new-regulation-update-firearm-definitions
[23] 18 USC § 923(i).
[24] 27 CFR 478.92(a) and 479(102(a).
[25] The proposed rule states PMFs may be made by non-licensed individuals for their personal use but cannot be sold. This is incorrect. Nothing in the GCA prohibits an unlicensed individual from selling a PMF provided the person is not "engaged in the business" as a manufacturer (18 USC 921(21)(a)) and they otherwise comply with applicable federal and state law, e.g., do not sell to an out-of-state resident or to someone they know is a prohibited.

unauthorized access to firearms in a meaningful way, however, because it is well known that criminals will obliterate serial numbers, a crime on its own, to thwart law enforcement efforts of tracing. Additionally, a PMF is not subject to the same critical level of quality control and testing as commercially manufactured firearms. If private citizens were to mail their PMF to a firearm manufacturer for custom cerakote work, then the marking by the manufacturer would be required according to the Proposed Rule. The manufacturer does not know if the firearm they are receiving was built to acceptable specification and with the correct collaborative parts. Their job is simply to strip it down and paint it. If, for instance, a catastrophic failure was to occur with that now aesthetically customized PMF, then the manufacturer could be open to liability. The potential for financial and reputational risk induced by marking a PMF by a manufacturer that interacted with the firearm due to happenstance is unacceptably high. This is a risk that is inevitable with the Proposed Rule.

"Weapon Kits"

The Proposed Rule would regulate "weapon parts kits" that include various unregulated parts including an incomplete, unfinished item colloquially referred to, even at times by ATF, as an "80% receiver" as a "firearm." [26] More recently, these unfinished items have been referred to as "ghost guns" by antigun organizations who urge ATF to exceed its statutory authority and regulate non-frames or receivers. ATF has provided manufacturers of "80% receivers" with classifications that the part is not a "frame or receiver" See e.g., ATF Motion to Dismiss, *supra*.

ATF acknowledges individuals have the right to make a firearm for personal use ("privately made firearm"). Purchasing a kit to make a PMF is one way that law-abiding Americans exercise their Second Amendment rights.

ATF's position appears to be that a "weapon parts kit" containing unregulated parts including a so-called "80% receiver" is a "firearm." If the kit contained a forging in a "primordial state," is it still a "firearm" because the kit parts taken together arguably "is designed to… expel a projectile by the action of an explosive," even if it is "not readily convertible" for that purposed? Where along the spectrum between "primordial" and "critical stage of manufacturing" can the part that would ultimately become (but is not yet) a "frame or receiver" be without ATF classifying it as a "weapon parts kit"? See discussion above on *Partially Complete Frame or Receiver*. Under ATF's interpretation, it would appear to be irrelevant whether the part that could become the "frame or receiver" "*may readily be converted* to expel a projectile" as long as it is "designed to expel a projectile by action of an explosive."[27]

The Proposed Rule describes "weapon parts kits" as containing "most or all components." If a kit does not contain all of the necessary components to expel a projectile by the action of an explosive, is it still "designed to" or "readily convertible to" do so? Is it a firearm? What components must be present in a kit to constitute a "firearm"? The Proposed Rule does not say.

[26] Contrary to ATF's claim (87 F.R. 27726, n. 42), it has at times used the term "80% receiver" in ATF publications.
[27] 18 U.S.C. § 921(a)(3) ("is designed to ***or*** may readily be converted to expel a projectile by the action of an explosive) (emphasis supplied.)

The discussion further demonstrates that "may be readily converted to expel a projectile" only applies to "weapon" and does not apply to "frame or receiver."[28] It is our understanding of the Proposed Rule that it does not alter prior classifications given to certain manufacturers that their item is not a "frame or receiver" and those remain unregulated and may be sold, so long as it is not part of a "weapon parts kit."

Challenges to Law Enforcement Firearm Tracing

The National Tracing Center (NTC) conducts all firearm trace requests for domestic and international law enforcement agencies. ATF's own factsheet provides impressive statistics and milestones reached by the NTC to combat criminal activity. [29] If this Proposed Rule is implemented, it is of grave concern for the Industry that firearm tracing efforts would become increasingly more difficult and waste critical law enforcement time. As briefly discussed above, if the Proposed Rule were to become law, criminals will likely mix and match serialized receivers or obliterate serial numbers in an effort to obfuscate the origin of the firearm used; thus, increasing time and effort needed for each and every trace request.

Cost to Implement and Comply Is an Unfunded Mandate

ATF's estimate of the cost to the Industry to comply is not sufficiently explained. To the extent it does attempt to justify its estimates, the estimates are divorced from the commercial reality of the marketplace. The Proposed Rule will require nothing short of a complete reworking of the manufacturing processes and systems, compliance, and recordkeeping software programs systems to timely and accurately account for, mark multiple parts now considered to be a "frame or receiver" and recording acquisitions and dispositions of each part. We are confident the cost to comply with the Proposed Rule for Industry, the public, and the government will easily exceed $177 million and amounts to an unfunded mandate.[30]

Conclusion

The Proposed Rule seeks to regulate weapon kits, "80% frames," and a nebulous assortment of gun parts as if they were each a finished firearm. The text of the Gun Control Act is plain and unambiguous. The Bureau has the authority to regulate "***a weapon*** ... which may readily be converted to expel a projectile by the action of an explosive." None of the dozens of parts to which the Rule potentially applies can, by any stretch of the imagination, be considered a weapon. By unlawfully treating each of these parts as a firearm, the Rule will reduce the ability of the nation's professional gunsmiths and law-abiding gun owners to obtain the parts that they need to keep the nation's legal firearms in safe and working order. But even a completed frame or receiver is not a weapon, only a part of a weapon. Under no reading of the statute, therefore, may an *incomplete* frame or receiver be regulated as if it were a complete weapon. Indeed, even a *completed* frame or receiver would not itself be a complete weapon.

[28] 18. U.S.C. § 921(a)(3) (emphasis supplied).
[29] https://www.atf.gov/resource-center/docs/undefined/ntc-fact-sheet-june-2020/download
[30] Unfunded Mandate Reform Act of 1995, Pub. Law 104–4

The Proposed Rule is impractical, unfeasible, and exceedingly costly. It is a solution in search of a problem. It is an overreaction to just three wrongly decided trial court cases. To the extent ATF believes firearm design developments warrant modifications to the regulations, they should be done in a tailored manner focused on those new designs, instead of a wholesale upsetting of half a century of well-understood, established policy, regulation, and conforming business practices. It should be done with input from stakeholders especially with the heavily regulated nature of the firearm and ammunition industry. Unfortunately, that is not what happened with this Proposed Rule. A single, brief call with Industry members hardly constitutes a meaningful engagement.

The Proposed Rule is vague, ambiguous, confusing, "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law."[31] The Proposed Rule is contrary to clear and express provisions of the GCA. ATF will be exceeding its statutory authority. Accordingly, the Proposed Rule at a minimum violates the GCA and Administrative Procedures Act of 1946.[32]

The Industry is heavily regulated and has a long history of collaborating effectively with ATF. It is an industry that is widely known to follow the rule of law and sell a product which enjoys explicit Constitutional protection. The Proposed Rule is so damaging to Industry and the Second Amendment that support for it cannot be mustered. The Industry provides firearms and ammunition to the military, law enforcement, and law-abiding citizens. Additionally, it ensures access to shooting ranges for safety training. Both protections highlight the Industry's criticality of contributing to our Nation's security, public safety, and economic well-being. If the Proposed Rule is implemented, it will create significant regulatory challenges, increase costs, impede production, and drive increased risk and undue burden for manufacturers, distributors, and federal firearm retailers conducting day to day business.

We urge ATF in the strongest possible terms to withdraw this Proposed Rule and start again. We suggest engaging with the Industry in a constructive dialogue to address ATF's stated concerns and issues to arrive at an end product that is consistent with ATF's lawful authority as determined by Congress, not sow confusion for consumers exercising their Second Amendment and needlessly complicate compliance for the Industry at major cost.

Sincerely,

Lawrence G. Keane
Secretary and General Counsel

[31] 5 U.S.C. § 706(2)(A),(C)
[32] *Id*