REEVES & DOLA LLP

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Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives
U.S. Department of Justice
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Subject: Comment for Docket Number ATF 2021R–05

Dear Mr. Lange:

We submit this letter in response to the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Notice of Proposed Rulemaking ("NPRM"), Definition of "Frame or Receiver" and Identification of Firearms (Docket No. ATF 2021R-05), published in the May 21, 2021, *Federal Register*. Reeves & Dola, LLP, is a Washington, DC law firm. We represent licensed firearms manufacturers, importers, dealers, and collectors in regulatory compliance and enforcement matters arising under the Gun Control Act of 1968 ("GCA"), the National Firearms Act of 1934 ("NFA"), and the Arms Export Control Act. We appreciate the opportunity to comment on these proposed revisions to the regulations.

With this NPRM, ATF proposes amending the regulations in Title 27 of the Code of Federal Regulations, parts 447, 478, 479, to provide new definitions for a variety of terms, including "frame or receiver," and "readily," and to amend the marking and recordkeeping requirements to implement these new or amended definitions. For reasons we explain in more detail below, ATF's proposed revisions to the regulations in 27 C.F.R. Parts 478 and 479, including the addition of several new terms, will have widespread negative consequences, intended or not, to the manufacturing industry. The potential negative impact these proposed rules will have on industry far outweigh any benefit that could be gained by "modernizing" the definition of "frame or receiver."

I. Summary

The following is a summary of our comments, which we explain more fully herein.

- **Structure of the definition "frame or receiver."** The basic structure of the proposed multi-part definition of "frame or receiver" is needlessly lengthy and convoluted. It will not fix the confusion or uncertainty that courts have identified with the current definition.

- **The "frame or receiver" definition supplement for split or modular frames or receivers.** The proposed definition opens the ability for ATF to determine that more

than one part is the controlled frame or receiver. This exceeds the scope of the underlying statute and Congressional intent, which is that the controlled frame or receiver be limited to one part, not multiple parts.

- **Nonexclusive list of common weapons with split/multi-piece frame or receiver configuration ATF has already classified that will not be affected by the new definition of "frame or receiver."** The NPRM explains that an important goal of the rule is to not affect existing ATF classifications of firearms that specify a single component as the frame or receiver. This list is comprised of so-called "common weapons" with split/multi-piece frame or receiver configuration for which ATF has already ruled a specific part to be the frame or receiver. However, it provides little to no clarity because it does not require the agency to work within clearly defined parameters.

- **Nonexclusive list of factors ATF may consider in evaluating whether a particular part is a frame or receiver.** The list is offered as part of ATF's assurances that the revised definition of "frame or receiver," although considerably broader than the existing definition, will not impact existing policy in reviewing firearms for classification purposes. But ATF qualifies the list and leaves plenty of room to either consider additional factors not listed, or to not consider all the factors. Even if this is a complete list, which presumably it is not based on the qualifications "*variety of factors*" and "*including,*" ATF provides no indication of how much weight it gives each factor.

- **The effect the proposed definition of "frame or receiver" will have on the current backlog at the Firearms and Ammunition Technology Division.** No reasonable person will be able to determine what component or components of a given firearm constitute a frame or receiver. Consequently, industry will be forced to seek ATF rulings on which component(s) of a firearm meet the definition of firearm frame or receiver. The current backlog of 12 months could potentially double. This is unacceptable and unsustainable.

- **Partially complete, disassembled, or inoperable frame or receiver.** Under supplement (c) for the "frame or receiver" definition, ATF proposes the term 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. The descriptive term "readily" should not be applied to determine whether something is a frame or receiver because it is contrary to the plain language of the GCA. It will also significantly impact the industry in terms of operations and product planning.

- **Proposed new defined term "readily."** The proposed definition would not bring any clarity or predictability to ATF's interpretations of "frame or receiver" or its classifications.

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- **Markings.** ATF's attempt to carve out existing firearms from the new marking requirements creates confusion because of the use of the connector "and" in the reference to "design and configuration." The use of the term "and" in this context indicates that ATF believes these are two separate criteria, both of which must be met for the grandfathering clause to apply.

II. The Stated Reasons for the Rulemaking

A. Update the Definition of "Frame or Receiver"

In 1968, ATF published the first set of regulations to implement the GCA, which Congress passed earlier that year. Included in those regulations was the term "firearm frame or receiver," which ATF defined as "[t]hat part of a firearm that provides housing for the hammer, bolt or breachblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 33 Fed. Reg. 18558 (Dec. 14, 2968). This definition has remained unchanged for more than 50 years, but now, according to ATF, the definition must be immediately updated or there will be serious consequences to public safety. NPRM at 27725.

According to ATF, the definition was originally drafted because single-framed firearms were "far more prevalent for civilian use than split/multi-piece receiver weapons, such as semiautomatic rifles and pistols with detachable magazines." NPRM at 27721. ATF goes on to explain that over the years firearms with split or multi-piece receivers have grown in popularity and now "constitute the majority of firearms in the United States." Id.

The NPRM lays out the history of ATF's approach ("[s]ince it began issuing firearm classifications under the GCA and NFA") to determine which singular part in a split or multi-piece receiver is the controlled firearm for GCA and NFA purposes. NPRM at 27721-27722. According to ATF, its long-held position has been to determine if ***either*** the upper or lower half of the receiver more nearly fits the legal definition of "frame or receiver." NPRM at 27721.

ATF's historical approach of identifying a **single** part of a firearm as the controlled frame or receiver comports with the statutory language of the GCA and legislative intent. Indeed, ATF makes this fact clear in the NPRM. "The intent of Congress, as indicated by the plain language and the statutory scheme of the GCA, is to regulate—as a firearm— the ***frame or receiver*** of a firearm. NPRM at 27722 (citing to 111 Cong. Rec. 5527 (March 22, 1965), wherein Congress explained the reason for replacing the definition of "firearm" in the Federal Firearms Act of 1938, which included "any part or parts of such weapon," and limiting the new law, the GCA, to only the frame or receiver of any such weapon because controlling "any part or parts" was cumbersome and ineffective). See also U.S v. Rowold, 429 F. Supp. 3d 469, 476 (N.D. Ohio 2019) (noting the government argued "the GCA's statutory and regulatory scheme shows intent to regulate a single part of a firearm and that "to require that a receiver house all parts listed in this section would result in an application of the 'firearm frame or receiver' definition which is inconsistent with the GCA.").

Despite the clear and unambiguous language of the statute, ATF claims it must now update the

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regulations to adequately capture modern developments and advancements in firearms technology, particularly with split or multi-part frames or receivers. ATF cites to three federal criminal cases as the impetus for this rulemaking.[1] All three cases involved attempted prosecutions of individuals for unlawful possession of an AR-15 or similar lower receiver. The government was unsuccessful in all three cases because each of the respective courts found that ATF's classification of the AR-15-type rifle (that the lower receiver is the controlled part) did not comport with the regulatory definition of "firearm frame or receiver." The courts also rejected the government's use of sources outside the law to argue the defendants in the respective cases had notice that the conduct was unlawful. See Jimenez at 1041-43.

While admonishing these courts for not deferring to ATF's expertise and its historical classifications of the AR lower as the controlled "frame or receiver," ATF explains that these judicial interpretations mean that the agency must act immediately to revise the regulations.

> These courts' interpretation of ATF's regulations, if broadly followed, could mean that as many as 90 percent of all firearms now in the United States would not have any frame or receiver subject to regulation. Those firearms would include numerous widely available models, such as Glock-type and Sig Sauer P320 pistols, that do not utilize a hammer—a named component—in the firing sequence. Such a narrow interpretation of what constitutes a frame or receiver would allow persons to avoid: (a) obtaining a license to engage in the business of manufacturing or importing upper or lower frames or receivers; (b) identifying upper or lower frames or receivers with a serial number and other traceable markings; (c) maintaining records of upper or lower frames or receivers produced or imported through which they can be traced; and (d) running NICS checks on potential transferees to determine if they are legally prohibited from receiving or possessing firearms when they acquire upper or lower frames or receivers. In turn, this would allow prohibited persons to acquire upper and lower receivers that can quickly be assembled into semiautomatic weapons more easily and without a background check. If no portion of split/multi-piece frames or receivers were subject to any existing regulations, such as marking, recordkeeping, or background checks, law enforcement's ability to trace semiautomatic firearms later used in crime would be severely impeded. This result would thereby undermine the intent of Congress in requiring the frame or receiver of every firearm to be identified and regulated as a firearm.

NPRM at 27722 (internal citations omitted).

[1] See U.S. v. Roh, No. SACR 14–167–JVS, Tentative Minute Order re Post Trial Motions (C.D. Cal. Jul. 27, 2020); U.S v. Rowold, 429 F. Supp. 3d 469 (N.D. Ohio 2019); U.S. v. Jimenez, 191 F. Supp. 3d 1038 (N.D. Cal. 2016).

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B. Proposed Rule Not Intended to Alter Prior Determinations

ATF explains that updating the definition of "frame or receiver" will necessarily broaden the scope of coverage "to account for the majority of technological advances in the industry and ensure that these firearms continue to remain under the regulatory regime as intended by the enactment of the GCA, including accounting for manufacturing of firearms using multiple manufacturers." NPRM at 27738. However, ATF emphasizes throughout the proposed rulemaking that the new definition is not intended to alter any prior classifications and that ATF would continue to consider the same factors when classifying firearms. "Although the new definition would more broadly define the term ''frame or receiver'' than the current definition, it is not intended to alter any prior determinations by ATF of what it considers the frame or receiver of a particular split/modular weapon." NPRM at 27727.

1. ATF Considers A "Variety" of Factors When Classifying Firearms

In arguing that ATF has always classified just one singular part as the controlled firearm, even in cases involving split or multi-piece receivers, ATF provides a list of seven factors it claims it considers in making firearm classification determinations. This list is also contained in the proposed rule under the second supplement, or subparagraph (b) of the "frame or receiver" definition (see NPRM at 27743) but is qualified by the fact that no single factor controls. The list is as follows:

(a) Which component the manufacturer intended to be the frame or receiver;
(b) Which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms;
(c) How the component fits within the overall design of the firearm when assembled;
(d) the design and function of the fire control components to be housed, such as the hammer, bolt or breechblock, and firing mechanism;
(e) Whether the component could permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed, in accordance with regulations;
(f) Whether classifying the particular component is consistent with the legislative intent of the GCA and implementing regulations; and
(g) Whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.

This is a significant list as it appears to provide the public with insight into how ATF determines what part is the controlled firearm in the case of split or modular frames or receivers. It is therefore important we highlight our concerns with this list. First, ATF attempts to lend credence to this list by stating that it has considered these factors "since it began issuing firearm classifications under the GCA and NFA in private letter rulings and for criminal investigations." NPRM at 27721. While that may be the case, ATF has never made this list public, despite the present definitions being in place for more than 50 years, until publishing this proposed rulemaking on May 21, 2021. Neither private letter rulings nor classification reports made in the

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context of criminal investigations are available for public viewing or scrutiny. Indeed, ATF's habit of relying on non-public classification rulings as precedent is long established and has been criticized by the courts. See Roh at 4 ("[i]t is clear that the ATF's classification of articles as firearm does not comply with the rule making process which brought into effect the public definition for firearm found in Section 478.11. The rule making process under Administrative Procedures Act, 5 U.S.C. § 551, requires promulgation of a rule and eventual publication of the rule in the Federal Register. 5 U.S.C. § 552(a).").

Second, this list is the first example in the NPRM of ATF's use of vague and overbroad language. The agency offers this list of factors as part of its assurances that the revised definition, although considerably broader than the existing definition, will not impact existing policy in reviewing firearms for classification purposes. But ATF qualifies this list of factors and leaves plenty of room to either consider additional factors not listed, or to not consider all the factors. Even if this is a complete list, which presumably it is not based on the qualifications "*variety of factors*" and "*including,*" ATF provides no indication of how much weight it gives each factor.

2. The Nonexclusive List of "Common Weapons" with Split/Multi Piece Frame or Receiver Configuration

ATF adamantly explains that "[o]ne important goal of this rule is to ensure that it does not affect existing ATF classifications of firearms that specify a single component as the frame or receiver. Application of the rule, as proposed, would not alter these prior ATF classifications." NPRM at 27728-27729. Ostensibly to provide "clarity," ATF proposes to include in the new definition of "frame or receiver" a ***nonexclusive*** list of ***common weapons*** with split/multi-piece frame or receiver configuration for which ATF has already ruled a specific part to be the frame or receiver. NPRM at 27729. The list is included in one of four "supplements" to the "frame or receiver" definition to further explain the meaning as applied to certain firearm designs. We will expand on our concerns regarding this part of the proposed definition below, but initially we will focus on the nonexclusive list of pre-existing classifications of common weapons with split or multi-piece frames or receivers. ATF organizes this list into nine buckets of "common" designs distinguished by their differences in firing cycle, method of operation, or physical design characteristics. These are, according to ATF:

- Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols;
- Glock-type striker fired semiautomatic pistols;
- Sig Sauer P320-type semiautomatic pistols;
- Certain locking block rail system semiautomatic pistols;
- AR-15-type and Beretta AR-70-type firearms;
- Steyr AUG-type firearms;
- Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP 38, MP 40, and SIG 550-type firearms, and HK-type machineguns and semiautomatic variants;
- Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns

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and semiautomatic variants thereof; and
- Sten, Sterling, and Kel-tec Sub-2000-type firearms.

This is yet another example of ATF putting forth a ***nonexclusive*** list that provides little to no clarity because it does not require the agency to work within clearly defined parameters. ATF repeatedly identifies some manufacturers and models followed by "type," but not for others. For example, the very first bucket is labeled "Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols." We are left to wonder whether this grandfathered category applies only to hammer-fired semiautomatic pistols manufactured by these discrete manufacturers or to all firearms that integrate an operating system that matches ATF's provided definition for these firearms? The answer is unclear in the regulation as currently proposed, and leaves manufacturers and others to guess as to ATF's intent.

In addition, ATF's use of "—type" language to identify certain firearms is inconsistent and confusing. For example, ambiguity prevails in ATF's reference to the "Sig Sauer P320-type semiautomatic pistols" in the third bucket. Is the identification of these firearms as "P320-type" firearms meant only to include P320s or exact replicas thereof? Alternatively, is "-type" meat to convey a broader meaning of any firearm that has the same basic design basis, even if it uses different materials, or has different gross dimensions (such as the SIG P365)? Again, the proposed regulation is insufficiently precise to provide a clear answer, and leaves industry and the public to hypothesize as to what ATF is captured.

Neither does ATF offer any guidance on what constitutes a "common" weapon. ATF does not put forth any explanation of what this term means other than the ***nonexclusive*** list. Once again, we have a list that is vague and raises more questions than it answers.

C. Privately Made Firearms ("Ghost Guns")

ATF also explains that this rulemaking is necessary to catch up to the technological advances that have made it easier for unlicensed individuals to make firearms at home without involving the licensed industry. The privately made firearms ("PMFs") are built using standalone parts kits, 3D printers, or personally owned equipment, without any records or a background check.

ATF cites to an increase in the number of PMFs recovered at crime scenes across the country and internationally as well as "numerous" requests it has received from licensees seeking clarity on how to accept and record PMFs from individuals. NPRM at 27722-27725. Based on rise of PMFs being made without identifying marks, recordkeeping, or background checks, and because more of these firearms are "finding their way" to licensees, ATF asserts rulemaking is necessary "to ensure that PMFs are not unlawfully manufactured for sale to licensees who may wish to acquire them for resale, or accept them as security in pawn for a loan, as this would undermine the important public safety goals of the GCA to reduce violent crime, which includes assisting State and local law enforcement in their efforts to control the traffic of firearms within their borders." NPRM at 27725.
The primary tools to capture such PMFs is the new definition of "readily" and the revised

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marking requirements. Both measures, as we describe below, will adversely impact the licensed industry.

III. The Proposed Rule

A. Frame or Receiver Redefined

In reviewing the proposed rulemaking, one must ask whether the proposed changes provide the clarification ATF seeks, and do they allow the public and industry to operate without having to obtain ATF classifications? Can the public or industry make a good faith self-classification based on what it believes to be an accurate interpretation of these regulations without risking ATF enforcement action if they do not obtain a technology ruling? Unfortunately, the answer to all these questions is NO.

ATF claims the current definition of "firearm frame or receiver" is outdated and does not adequately capture modern firearms technology. In addition, certain courts have ruled that ATF's classification decisions for the AR-type receiver do not to comport with the definition, which causes uncertainty and makes it impossible for the public to know whether a particular part is controlled as a firearm. However, the proposed revisions will not solve these problems. The convoluted structure of the proposed revised definition and boundless factors ATF may consider will effectively require industry to obtain classifications as the only sure way to obtain comfort in what part is the controlled frame or receiver.

The basic structure of the proposed multi-part definition of "frame or receiver" is needlessly lengthy and convoluted. As currently drafted, "frame or receiver" begins with a general definition, containing ***non-exclusive*** examples, followed by a series of supplements. This layout is exceedingly complex and difficult to follow. The lengthy and verbose structure is prone to misinterpretation and increases the potential for compliance issues. Trying to define what is or is not a "frame or receiver" should not require multiple pages of regulatory text.

1. General Definition (*i.e.,* the first part)

The first part of the definition reads as follows:

> *Frame or receiver.* 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:

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> Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails.

We will address this in baby steps. Right off the bat the definition has problems with clarity. It begins with the language: "*Frame or receiver.* A part of a firearm that, when the complete weapon is assembled, is visible from the exterior…." According to ATF's guidance in the preamble, "the new definition makes clear that a "frame or receiver" must be visible to the exterior when the complete weapon is assembled so that licensees can quickly record the identifying markings, and law enforcement officers who recover the weapon can easily see if the identifying markings for tracing purposes." NPRM at 27727. As written, the proposed new definition ("*A part of a firearm that is visible from the exterior*") does not accomplish this because visibility is not a requirement but instead a characteristic for determining what is the frame or receiver. On this point, the current regulations are clearer because they require the serial number, which must be marked on the frame or receiver pursuant to the statute, must be *conspicuously* placed on the frame or receiver (27 C.F.R. § 478.92(a)(1)(i).

The next part reads, "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." ATF does not explain what "other reliable evidence" a person should look to or rely on in making such a determination. Given the fact that ATF issues classification rulings by private, non-public letter, and especially considering the complexity of the proposed revisions to the definition, how is anyone to know whether a given firearm has or has not received an official determination by the Director? Furthermore, does this mean that one must obtain an ATF classification ruling to confirm the markings on a firearm are correctly placed on the controlled part?

The general definition continues to define "fire control component" as "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." NPRM at 27741 (emphasis added). Here again ATF utilizes a nonexclusive list. Are there any other parts ATF could determine to be a fire control component? With split or multi-piece frames or receivers, there is no doubt that ATF may identify more than one part as the controlled firearm. Although ATF attempts to grandfather existing firearm models with split or multi-piece frames or receivers, the list of grandfathered models are listed on yet another ***nonexclusive*** list that has its own problems (see above discussion). This is hugely problematic and threatens to undermine all prior classifications, despite ATF's assurances that this rule will not affect existing classifications.

Within this general definition, or the first part of "frame or receiver," ATF provides a ***nonexclusive*** list of illustrative examples. Why provide a nonexclusive list? Are there other examples that should be included but are not? The confusion and uncertainty are then compounded by the paragraphs (a) – (d), which ATF refers to as supplements to the definition.

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2. The Supplements (*i.e.,* paragraphs (a) – (d))

Without the preamble, the structure of the definition would make no sense. The most confusing part, arguably is the second "supplement," or paragraph (b), titled "*Split or modular frame or receiver*." This supplement is then further divided into subparagraphs (1) – (3). As we first describe above, this section is riddled with problems. Namely, it opens the ability for ATF to determine that more than one part is the controlled frame or receiver. This exceeds the scope of the underlying statute. The GCA defines "firearm" to include "the frame or receiver of any such weapon." As is well established, including in ATF's own preamble to the NPRM, Congress replaced the definition of "firearm" in the Federal Firearms Act of 1938, which included "any part or parts of such weapon", limiting it to only the frame or receiver of any such weapon. The plain language of the statute at 18 U.S.C. 922(i) clearly delineates, with the use of the singular the frame or receiver, that there can only be one controlled frame or receiver.

Ignoring Congress's intent as reflected in the statute, ATF is proposing to expand the definition of "frame or receiver" to possibly capture more than one part. The definition starts off by specifying "a part" in the singular but then expands to envision more than one part in the context of split or modular frames or receivers. The definition leaves it up to ATF to determine whether one or more parts of a weapon is the frame or receiver. Subparagraph (1) appears to be a process ATF may follow when evaluating new firearm designs with more than one part providing the housing or a structure designed to hold or integrate one or more fire control or essential components. This part of the definition states: "[i]n making this determination, the Director will consider the following factors, ***with no single factor being controlling***" followed by a list of seven factors, which we discussed above.

The second subdivision describes frames or receivers of different weapons combined to create a similar weapon. The NPRM states that each retain their respective frame or receiver classifications, provided they retain their original design and configuration.

The third subdivision addresses pre-existing classifications of split or modular frames or receivers and contains a nonexclusive list of nine examples of existing classifications of common designs distinguished by their differences in firing cycle, method of operation, or physical design characteristics. We examine this nonexclusive list above.

There is no doubt this convoluted structure of the proposed "frame or receiver" definition does not fix the confusion or uncertainty that courts have identified with the current definition. Namely, that no reasonable person will be able to determine what component or components of a given firearm constitute a frame or receiver. The proposed definition creates a reality where a reasonable person would be forced to assume that every component of the firearm which meets the proposed definition of firearm frame or receiver is such, *unless* they are aware of a determination to the contrary by ATF. Therefore, consumers must constantly be in doubt as to whether a firearm in their possession has been properly marked in accordance with law, or if they are in possession of an illegal item.

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This will be enormously problematic for both industry and the government. ATF clearly states that its goal is to update the term "frame or receiver" into a living definition. But it is precisely its attempt to capture everything that increases the risk that the definition will be overbroad. As presented, the proposed definition of "frame or receiver" does not stand on its own. Because of the uncertainty and confusion caused by the definition's structure and wording, industry will be forced to seek ATF rulings on which component(s) of a firearm meet the definition of firearm frame or receiver. So how does this new definition improve anything? Clearly, the law does not require industry to obtain classifications from ATF. Indeed, for the regulations to work effectively, the public, including industry, should be able to determine (fair notice) whether the widget in question is a firearm subject to the GCA. See Jimenez at 1041-1043 (remarking on "the utter lack of evidence showing that the public had fair notice of potential criminal liability for possessing only an AR-15 lower receiver."). The proposed new definition offers no improvement on what currently exists, which is lack of clarity in the regulations and ATF's secret and unpredictable classification methods. See Roh ("[t]he Government's theory of conviction rests on proposition that the AFT [*sic*] had 'classified' finished receivers as firearms, notwithstanding the conflict with the definition published by the ATF in its regulations. Examination of Government expert Daniel Hoffman revealed that there is no 'objective classification scheme or system in place.' ATF personnel simply make a determination in response to individual inquiries. … More significant for present purposes is that there is no way for the public to learn the particulars of the classification system. The only way a person can learn of an AFT [*sic*] classification is to make direct contact with the AFT [*sic*].") (internal citations omitted); see also Jimenez at 1043-1044 (finding the government's notice theory "further weakened by an element of randomness in the ATF's enforcement practices."). The courts have criticized ATF for this situation, at least in the criminal context, and this has prompted ATF to propose the new definitions. But ATF would still hold all the cards when it comes to firearm classifications under the proposed scheme.

Currently, the ATF Firearms and Technology Division, the ATF office responsible for evaluating firearms and determining GCA and NFA controls, has an atrocious backlog of requests from industry. The current wait time is close to 12 months. This is unsustainable – to expect (or require) manufacturers to wait such an inordinate amount of time to put new product to market is breathtakingly unreasonable. If the proposed rule goes into effect, that wait time will likely double because of the uncertainty caused by the revised definition. One may argue that obtaining an ATF classification ruling is not required under the law. Fair enough, but if ATF determines through a technology review unbeknownst to the manufacturer that a part is controlled other than what the manufacturer considers the frame or receiver, that manufacturer could face enforcement penalties, including forced recalls.

The result is that the substantial investment industry makes in new product development – millions of dollars per new product in research and development and capital expense - will be expended by industry and then tabled, unable to yield a return for the business, until ATF issues a classification ruling. Assuming sales of a single new model are forestalled for a year this will have a significant economic impact. For example, if we multiply 50,000 units of first year of sales by a $300 sales price yielding a modest 30% margin, the impact is roughly $4.5 million in deferred margin for each product developed and under ATF determination review. And note that

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this example uses relatively modest numbers, so the impact could be much worse.

B. Partially Complete, Disassembled, or Inoperable Frame or Receiver

Under supplement (c) for the "frame or receiver" definition, ATF proposes the term 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. Making the determination as to whether a partially complete, disassembled, or inoperable frame or receiver is "readily" completed is left up to the ATF Director, though a definition of "readily" is proposed to be added to Parts 478 and 479, which we discuss further below.

The term "firearm" is defined in the GCA in relevant part, as "(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." 18 U.S.C. § 921(a)(3) (emphasis added). The descriptive words "may readily be converted to expel a projectile" is used to describe a weapon, not the frame or receiver. Since the term weapon is not defined in the GCA, looking at the plain meaning of the term, a frame or receiver itself is not a weapon. Therefore, the description language of "readily" should not be applied to determine whether something is a frame or receiver.

In fact, ATF has argued in City of Syracuse v. ATF, No. 1:20-cv-06885-GHW, that an unmachined frame or receiver is not "designed to" expel a projectile because "it's purpose is not to expel a projectile. Rather, its purpose is to be incorporated into something else that is designed to expel a projectile. Holding otherwise would mean that every part of a gun is designed to expel a projectile and, therefore, would be deemed a firearm under the GCA." Mem. in support of ATF's Motion for Sum. Judgment at 21 (Jan. 29, 2021). That result is unsupported by the GCA's plain meaning, legislative history, and judicial interpretations in an analogous provision of the GCA.

Now, ATF argues that clarifying the issue of when a piece of metal, plastic or other material becomes a frame or receiver is needed to deter the increased sale or distribution of unlicensed and unregulated partially complete or unassembled frames or receivers sold as part of kits that can be *readily* completed or assembled to a "functional state." NPRM at 27729. "Functional state" is not defined so it is debatable how much clarification this new subcategory of "frame or receiver" would really provide.

Furthermore, such expansion of the definition of "frame or receiver" will significantly impact the operations and product development and planning of firearms manufacturers. Many licensed manufactures buy receiver shells, which are currently not considered to fit within the definition of "firearm." Because these shells arrive at the manufacturer's site without the fire-control holes drilled, this allows the supplier to manufacture and transfer to the licensed manufacturer with relative ease. The licensed manufacturer then completes the steps to make it a finished firearm frame or receiver and applies the required markings.

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Under the proposed rule, these shells may now be classified as firearm frames or receivers prior to their transfer to the FFL-manufacturer and before the fire-control holes are drilled. In such a development, the supplier would have to (i) obtain a federal firearms license, (ii) apply the required markings to the frame or receiver, and (iii) record the transfers in an acquisition and disposition book. These changes will likely drive costs up significantly.

We therefore propose removal of the term "readily" from Supplement (c). The new text would read as follows:

> (c) 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 is clearly identifiable by mechanical properties, material composition, geometry, or function as an unfinished component part of a weapon. 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. ~~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.~~

C. New Definition – "Readily"

The term "readily" is used in the GCA in several contexts, including interstate transportation of firearms at 18 U.S.C. 926A (allowing interstate transport of a firearm if it is unloaded and not *readily* accessible) and importability of firearms generally recognized as particularly suitable for or *readily* adaptable to sporting purposes (18 U.S.C. 925(d)(3)). As seen above, the term is also in the definition of "firearm" and is the key qualifier by which the statute controls not just those weapons that actually or are designed to function as firearms (expel a projectile by the action of an explosive) but also weapons which may be ***readily converted*** into a firearm. The statute, however, does not define "readily."

Currently, ATF's regulations are also silent on the definition of "readily," but because the concept of something being *readily convertible* into a firearm affects partially machined bodies and parts kits, just how ATF interprets "readily" is of critical importance and has been for some time. For example, ATF is often asked whether a partially machined block of metal or plastic is a "blank" or a "firearm." This is important because as soon as a that blank is a "firearm" it is subject to the GCA and that statute's interstate controls over transfer and possession, the qualifications to engage in the business, and marking and recordkeeping requirements. For manufacturers, this could impact supply chains and how business is conducted with vendors. Important operational questions must be considered, such as whether the vendor needs a license

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from ATF to manufacture firearms, or whether a marking variance is needed. For importers, if that blank coming in is in fact a "firearm," the GCA restrictions on firearm imports will apply.

Also impacted by the concept of "readily" and ATF's interpretation is the market for so-called "80% receivers." The term "80% receiver" (and similar language such as "80% finished," "80% complete," and "unfinished receiver") is often used to identify an item some believe is not a controlled "firearm" under the GCA because it is only partially machined. However, none of these phrases are used in the statute or in ATF regulations, and ATF has not endorsed any of these terms. So, how ATF will interpret and apply "readily" will have a significant impact on a market that has exploded in recent years.

ATF proposes to add this new term to "provide guidance" on how "readily" is used to classify firearms. NPRM at 27730.

ATF's reference to guidance here is interesting, and we note also that earlier in the NPRM's preamble, ATF argues its definitions contained in the regulations are mere guidance. Definitions are essential to the law and regulations because, in providing meaning and clarity to words, definitions help identify the scope of the law as they give notice on what items or activity is subject to government control. When Congress delegates to an agency the authority to interpret and enforce a law, and that agency prescribes regulations to implement that law, those regulations, including the definitions, have the force of law.

Nevertheless, according to ATF, its regulatory definitions are guidance. In fact, ATF justifies its historical approach to split and multi-part receivers because "[t]he intent in promulgating these definitions was to ***provide guidance*** as to which portion of a firearm was the frame or receiver for purposes of licensing, serialization, and recordkeeping, thereby ensuring that a necessary component of the weapon could be traced if later involved in a crime." NPRM at 27721. ATF goes on to state that "the current definitions were never intended to be, or understood to be, exhaustive; …." Id.

Regulations are not guidelines and have the force and effect of law. Regulations implement and enforce the requirements of the underlying statute being implemented. Considering industry is held to the standards and requirements outlined in the regulations, or face administrative and/or criminal penalties, the regulations cannot be simply guidelines for the implementing agency (ATF) to interpret as they see fit. Definitions provided in the regulations are just that, a statement of the exact meaning of a word. When and if the changes proposed in this NPRM are finalized, they cannot be viewed as guidance by ATF but required for industry.

The proposed definition of "readily," which would be added to 27 C.F.R. §§ 478.11 and 479.11, offers no real clarification of anything. The following is the proposed definition in its entirety.

> *Readily.* 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:

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> (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.

Given the importance of the word because of its frequent use as a qualifier in both the law and the regulations, this definition offers no guidance, and certainly no certainty to the public in how ATF uses "readily" in classifying firearms.

D. Markings

To implement the new or amended definitions, ATF proposes revisions to the regulations on markings and recordkeeping. As with the identification of a frame or receiver, ATF explains that its intent is not to change the marking requirements for firearms manufactured or imported (in existence) before the rule. In the NPRM's preamble, ATF offers the following explanation:

> The additional information required to be marked on each frame or receiver (*i.e.,* name, city and state, or name and abbreviated serial number) would only apply to new designs or configurations of firearms manufactured or imported after publication of the rule. Licensed manufacturers and importers may continue to identify the additional information on firearms (other than PMFs) of the same ***design and configuration*** as they existed before [effective date of the rule] under the prior content rules, and any rules necessary to ensure such identification will remain effective for that purpose. This provision is intended to reduce production costs incurred by licensees.

NPRM at 27731 (emphasis added).

Unfortunately, the carveout only creates confusion on the matter because of the use of the connector "and" in the reference to "design and configuration." The use of the term "and" in this context indicates that ATF believes these are two separate criteria, both of which must be met for the grandfathering clause to apply (*i.e.*, a change in a model's configuration but not design would render the grandfathering inapplicable, and vice versa). However, neither of these terms is defined within the rule or any other regulation, and therefore the proposed rule leaves manufacturers unsure of when changes to a particular firearm model render it outside of the grandfathering protection.

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In addition, the proposed grandfathering clause is incomplete and creates a legal inconsistency because it does not preserve the current definition of firearm frame or receiver as applied to covered firearms. For example, manufacturers may be confused over what components of an existing firearm model must be marked if such model now has more than one component defined as a frame or receiver because of the proposed change to *that* definition. Although the grandfathering is effective in relieving manufacturer's from the need to locate name, location, model, and caliber markings on the frame(s) or receiver(s), the failure to incorporate the current definition of frame or receiver into the grandfathering clause results in a situation where manufacturers will still be required to place a serial number on any additional component(s) of these extant models which could now be defined as a frame or receiver (absent any prior determination by ATF on what component is the single frame or receiver of that weapon). Although this is clearly not ATF's intent with this grandfathering clause, the current language results in such confusion.

For this grandfathering provision to be effective, ATF must revise the proposed rule to give clarity to the terms "design" and "configuration" so that manufacturers can effectively operate within its bounds. ATF should also ensure that the current definition of firearm frame or receiver is preserved for such purpose to avoid creating a third category of firearms which does not fit neatly within either the old marking requirement scheme or the new.

Conclusion

We appreciate the importance of an agency to ensure its regulations are kept up to date. However, the case at hand illustrates that true and effective modernization is not a once-every-50-years endeavor. In addition, the present rules, if finalized and adopted, will have significant and far-reaching negative impacts on a vital and lawful industry. We therefore urge ATF to carefully consider the comments from the firearms industry, especially those comments that are technical (for example, comments on the proposed grandfathered models and types of firearms) or pertain to operative costs.

We thank ATF for the opportunity to comment on the proposed rulemaking and urge ATF to consider adding fidelity and additional clarity where we have suggested. Clear and concise regulations help both industry and government to maintain compliance. Please do not hesitate to contact the undersigned if ATF has any questions or would like to discuss our comments or proposals made herein.

Respectfully,

/s/

Johanna E. Reeves
Attorney at Law

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