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Notice of Proposed Rulemaking Definition of "Frame or Receiver" and Identification of Firearms

Docket No. ATF 2021R-05

AG Order No. 5051-2021

86 FR 27720

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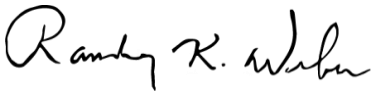
I. Introduction

On May 21, 2021, ATF published a "Notice of Proposed Rulemaking" ("NPRM") in the Federal Register, entitled "Definition of 'Frame or Receiver' and Identification of Firearms," 2021R–05, 86 Fed. Reg. 27720 ("NPRM"). ATF has sought public comment on its proposal by August 19, 2021. I, Thomas Massie, am submitting these comments as a Member of the U.S. House of Representatives and am joined in these comments by several of my colleagues:

Rep. Thomas Massie (KY-4)

Rep. Ralph Norman (SC-5)

Rep. Randy Weber (TX-14)



Rep. Jeff Duncan (SC-3)

Rep. Scott Perry (PA-10)

Rep. Lauren Boebert (CO-3)

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Rep. Marjorie Taylor Greene (GA-17)

Rep. Ben Cline (VA-6)

Rep. Matt Rosendale (MT-at large)

Rep. Diana Harshbarger (TN-1)

Rep. Doug LaMalfa (CA-1)

Rep. Bob Good (VA-5)

In the NPRM, the Department of Justice ("DOJ") proposes to amend Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regulations and definitions dealing with the statutory definition of "firearm," and "the frame or receiver" of such a weapon. Allegedly, ATF proposes these amendments to "clarify the meaning" of certain terms and to "provide definitions" of terms

that had not previously been defined either in the United States Code or in regulations promulgated by the agency.

On the contrary, the NPRM is omnibus gun control legislation clothed as a regulation to implement the existing statute. The NPRM should be withdrawn immediately, as it is outside the authority of bureaucrats to enact new criminal laws or to amend statutes passed by Congress in order to regulate items that heretofore have been unregulated. The DOJ is free to make its recommendations to Congress in the normal course of business, but only Congress, as the elected representatives of "the people," has the authority to change existing statutes or to enact new criminal laws.

II. The NPRM is Improper Omnibus Gun Control Legislation.

The NPRM seeks to make numerous amendments to three different parts of the Code of Federal Regulations: 27 CFR Parts 447, 478, and 479, which cover numerous aspects of the firearms community and industry. Due to the massive scope of the NPRM, this comment will focus on only a few of the most objectionable proposed changes.

a. The NPRM Disregards Congress's Words as to How to Treat Firearms/Frames/Receivers.

The NPRM can only be viewed as an attempt to usurp the legislative power of Congress. Congress speaks with one voice when it passes legislation. It is easy to discern that "voice," because one can read it in the statutes Congress passes. The intent or purpose of Congress is thus

to be found primarily – if not exclusively – in the text of its enactments.[1] If sources such as legislative history have any role to play in statutory interpretation, it is to confirm the meaning of the text – not to be used as evidence that Congress meant something different from what it said.

When, for instance, Congress amends legislation to remove or replace words or phrases, there are considered reasons for those actions. As noted in the NPRM, prior to the Gun Control Act ("GCA"), the Federal Firearm Act ("FFA") defined "firearm" as "any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, *or any part or parts of such weapon*."[2] 52 Stat. 1250 (June 30, 1938) (emphasis added). In 1965, Senator Thomas J. Dodd[3] of Connecticut proposed changing this definition to remove the language "any part or parts" and, in its place, substitute the words "the frame or receiver." As ATF acknowledges, this suggestion by Senator Dodd was because "[i]t has been impractical to treat each small part of a firearm as if it were a weapon." On April 29, 1968, Senator Dodd similarly explained:

> "Also excluded from the present definition of the term 'firearm' is 'any part or parts' of a firearm. Experience in the administration of the Federal Firearms Act has indicated that it is impractical to treat each small part as if it were a firearm."[4]

Thus, the Omnibus Crime Control and Safe Streets Act of 1968 repealed the FFA, replacing it with the Gun Control Act and adopting the new proposed definition of "firearm" to include "the frame

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[1] A statute's "purpose … cannot be used to contradict text or supplement it … the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires." A. Scalia and B. Garner, Reading Law, Thomson/West (2012), pp. 56-57.

[2] https://www.loc.gov/law/help/statutes-at-large/75th-congress/session-3/c75s3ch850.pdf.

[3] https://www.congress.gov/89/crecb/1965/03/22/GPO-CRECB-1965-pt4-10.pdf (pages 5524, 5527).

[4] https://www.congress.gov/bound-congressional-record/1968/04/29/senate-section?s=3&r=278 (page 10859). April 29, 1968, 90th Congress, 2nd Session, Vol. 114, Part 9 — Bound Edition.

or receiver" of such weapon, and with the words "any part or parts" *deleted from the statute*. Public Law 90-351, section 907, 82 Stat. 197 (1968).

Currently, ATF regulations define "firearm" *in line with the statut*e as:

> "[a]ny weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics." *See* 27 CFR § 478.11.

The same regulation further defines "firearm frame or receiver" as:

> "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."

Among other things, the NPRM now proposes to add "weapons parts kit" to the definition of "firearm." NPRM at 27741. The NPRM further proposes to rewrite "frame or receiver" to include:

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

breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails." [*Id.* (emphasis added).]

Then, apparently not content with the additional language it proposes, ATF proceeds to include photographs of various "nonexclusive examples" of what constitutes a "frame or receiver" with respect to several popular firearms. NPRM at 27742-27746. Next, ATF proposes a sub-definition for a "[p]artially complete, disassembled, or inoperable frame or receiver."

Together, the intent behind these changes in the NPRM is to make the statutory phrase "frame or receiver" encompass what has been termed in the industry an "80%" frame or receiver, and what ATF previously for decades determined to be an "unfinished" frame or receiver – *i.e.*, *not a firearm*. Tellingly, this new proposed definition discusses a "component *part* of a complete weapon," the word Congress specifically removed from the statute. NPRM at 27747.

The NPRM acknowledges, but then repudiates, the fact that Congress changed the definition of "firearm," and "replaced the term 'part or parts' in the FFA definition of 'firearm' with 'frame or receiver[.]'" NPRM at 27722. In other words, Congress already made the policy decision against utilizing a definition of "firearm" which includes "any part or parts" of a firearm, because it is "'impractical to treat each small part of a firearm as if it were a weapon.'" *Id.* at 27720. Yet now, ATF proposes to treat various component parts of a firearm as if each of them was a weapon in itself, and to regulate many component parts of a gun as firearms under the GCA. On the contrary, "Congress wrote the statute it wrote — meaning, a statute going so far and no further." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 794 (2014) (citation and punctuation omitted). ATF's blatant re-addition of deleted words into a statute – words that Congress has expressly and unambiguously removed – is entirely improper.

b. The NPRM Disavows Its Own Rewritten Rule.

The new rewritten definition of "frame or receiver," at a minimum, would include not only the "lower receiver," but also the "upper receiver" of highly popular modern sporting rifles such as the AR-15. Under the NPRM's new test, an AR-15 *upper receiver* certainly would be a "firearm," because the upper receiver of the AR-15 is visible from the exterior; it provides housing and structure and is designed to hold one or more fire control components (which is itself defined further in the rewritten regulation); and, for the sake of argument, is capable of bearing a manufacturer's serial number.

Of course, ATF has never considered the AR-15 upper receiver to be a firearm. Rather, since the rifle's creation, the agency has opined that only the *lower receiver* is considered the "frame or receiver" for this platform. NPRM at 27745. Confusingly, although proposing to promulgate a new definition of "firearm" that clearly would encompass the AR-15 upper receiver, ATF then immediately repudiates such an application and states that the AR-15 will continue to be classified and marked as it currently is – *i.e.*, inconsistently with the regulation that the agency just proposed.

The same can be said for the popular Glock-style handgun. ATF says that only "the lower portion of the pistol, or grip, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails" is the "frame or receiver" of a Glock type handgun. NPRM at 27744. However, the slide of such a handgun meets the new proposed definition of "frame or receiver" that the agency proposes. Again, ATF states that the proposed new regulation it claims is so necessary is in fact not necessary at all when applied to existing firearms.

c. The NPRM Muddies the Water Regarding Privately Made Firearms.

Throughout the history of this country, privately made firearms have been perfectly legal to manufacture, own, and even transfer. There is no federal law prohibiting any of these activities (other than by those who are prohibited persons, or by those who might become "engaged in the business" without a license). In fact, the Bureau of Alcohol, Tobacco, Firearms and Explosives announces on its website that "a license is not required to make a firearm solely for personal use."[5] Yet the agency now complains in the NPRM that privately made firearms are "*difficult … to trace*" when "involved in crime," and that privately made firearms make it *difficult "to identify*" crime guns and "*difficult to prove*" and "*difficult* to prosecute" federal crimes.[6] NPRM at 27725 (emphasis added). Of course, alleged *difficulties* in enforcing a statute do not empower bureaucrats to legislate, and do not authorize bureaucratic infringements of law-abiding citizens' historic right to make the arms they keep and bear – even if ATF believes that further regulation may make its job easier to perform.[7] No doubt, equipping every firearm in America with a GPS tracking device monitored by ATF would result in less "difficult[y]" for the agency, but that would not make such a demand lawful or constitutional.

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[5] *See* https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use.

[6] In Footnote 19 of the NPRM, ATF refers to a number of DOJ press releases about individuals manufacturing and selling "ghost guns," among other things. *See* https://www.federalregister.gov/d/2021-10058/p-49. The first linked press release states "Kissimmee Man Sentenced to Five Years In Prison For Manufacturing Over 200 'Ghost Guns' Without A License," D.O.J. Office of Public Affairs (June 12, 2018), https://www.justice.gov/usao-mdfl/pr/kissimmee-man-sentenced-five-years-prison-manufacturing-over-200-ghost-guns-without. Thus, it is obvious that there are already laws on the books addressing such conduct, otherwise there would have been no such federal prosecutions.

[7] If *difficulty* for law enforcement in enforcing the laws was the test as to whether agencies have *carte blanche* to ignore basic fundamental freedoms, then the Bill of Rights would be rendered meaningless overnight. No doubt, the Fourth Amendment's warrant requirement makes it more "*difficult*" for law enforcement to intercept drug shipments, and the Fifth Amendment makes it more "*difficult*" to question suspects who have a right to remain silent. Yet the inconveniences posed by the Bill of Rights to ATF are not negotiable.

Because there is no statute prohibiting the manufacture or possession (or even sale) of privately made firearms, there similarly is no statute requiring privately made firearms to be marked with serial numbers. Yet ATF proposes to require Federal Firearms Licensees to "mark" privately made firearms which may come into their possession during the normal course of business.

> "Requiring Federal firearms licensees to mark in this manner on each part defined as a frame or receiver would *make it possible* for ATF to trace the firearm if the manufacturer's or importer's name, city, or state is marked on the slide or barrel, and the original components are later separated." NPRM at 27731 (emphasis added).

Once again, however, the fact that the proposed rule would make it easier or "possible" for ATF to solve crimes does not mean that the agency has authority to require marking of privately made firearms, which Congress has never required.

III. The NPRM Exceeds the Agency's Authority.

It is black letter law that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (citing *United States v. Hudson*, 11 U.S. 32, 7 Cranch 32, 34, 3 L. Ed. 259 (1812)). Yet the NPRM purports to rewrite a statute with criminal penalties. For instance, if someone mistakenly transfers a heretofore unregulated firearm "part" such as a barrel, which just happened to have been serialized by the manufacturer (something which is not required by any statute), then ATF might take the position after implementation of the proposed rule that such person has transferred a "firearm" in violation of the law. This is because many firearm parts such as a barrel, which no one could honestly consider to be a "firearm," nevertheless may come with a serial number from the factory,

and the proposed rule purports to consider this barrel a "firearm": "[a]ny 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." NPRM at 27741.[8]

ATF has no authority to make this regulatory change. Rather, "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

IV. The NPRM Attempts to Evade the Prohibition on a National Gun Registry

18 USC § 926(a)(3) makes clear that "[n]o[] system of registration of firearms, firearms owners, or firearms transactions or dispositions [shall] be established," including by using "records required to be maintained under this chapter…." First, notwithstanding this prohibition, the NPRM would require numerous additional non-firearm parts to be serialized and recorded, requiring background checks and dealer paperwork, and making gun owners provide identification to the government for exercising an enumerated right. Second, ATF seeks to require privately manufactured firearms to be serialized and registered in dealers' books, vastly increasing the amount and burden of paperwork which already exists on FFLs in order to comply with the latest ATF dictates.

But then, ATF "proposes to amend 27 CFR 478.129 to remove language stating that FFL dealers and collectors need only keep A&D Records and ATF Forms 4473 for up to 20 years…."

[8] It is not the place of the agency to manufacture crimes out of thin air to trap the unsuspecting and otherwise law-abiding citizen.

PR at 27735. Instead, ATF proposes to require FFLs "to retain all records" *forever*, "until business or licensed activity is discontinued…." *Id.* Not even the IRS requires that a business retains all records *forever*. And, of course, "[w]here discontinuance of the business is absolute, the records shall be delivered within 30 days following the business discontinuance to the ATF Out-of-Business [OOB] Records Center." 27 CFR 478.127; 18 USC Section 923(g)(4). Finally, as recently reported, ATF's OOB Records Center has recently begun using high-speed scanners to digitize and OCR all "out of business" records obtained by the agency.

This digitizing of documents from the "out of business" records creates a searchable registry of firearms purchased by citizens of the United States, which is flatly prohibited by 18 USC § 926(a)(3). But under the NPRM, the combination of ATF's proposals gives the agency the ability to create an even larger prohibited National Gun Registry: first, by declaring numerous non-firearm gun parts to be firearms which must then be serialized and transferred by dealers on a Form 4473 after a background check; second, by requiring homemade firearms to be serialized and registered whenever they come into the hands of an FFL; and third, by requiring dealers to keep all of these records in perpetuity, or else transfer them to ATF for scanning and digitization into the agency's centralized database.

V. Conclusion

Contrary to ATF's claims that the NPRM will "clarify" various aspects of federal gun laws, in reality the proposed rule would inject ambiguity after ambiguity into an otherwise unambiguous definition of "firearm," which has existed unmolested since its enactment over half a century ago. These changes will cause significant problems not only for the law-abiding public and the courts in trying to apply the agency's intent instead of a statute, but also for the firearms industry.

> "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 461-62 (2002) (citation omitted).

By purporting to change the statute that Congress enacted, and by purporting to create entirely new federal crimes, the NPRM violates this principle and should be withdrawn in its entirety.