AMY K. VAN ZANT (STATE BAR NO. 197426)
avanzant@orrick.com
RIC T. FUKUSHIMA (STATE BAR NO. 272747)
rfukushima@orrick.com
SHAYAN SAID (STATE BAR NO. 331978)
ssaid@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025-1015
Telephone: +1 650 614 7400
Facsimile: +1 650 614 7401

Attorneys for Plaintiffs
Francisco Gudino Cardenas and Troy McFadyen, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

GHOST GUNNER FIREARMS CASES

Included actions:

30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost Gunner, Inc. dba GhostGunner.net, et al.*

CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner, Inc., dba GhostGunner.net, et al.*

JCCP No. 5167

Superior Court of California
County of Orange
Case No. 30-2019-01111797-CU-PO-CJC

Superior Court of California
County of San Bernardino
Case No. CIV-DS-1935422

DECLARATION OF AMY K. VAN ZANT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT POLYMER80, INC.'S UNIQUE DEMURRER ON PLCAA GROUNDS

Date: May 6, 2022
Time: 9:00 a.m.
Dept.: CX 104
Judge: Hon. William D. Claster

I, Amy K. Van Zant, declare as follows:

1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP ("Orrick") and counsel of record for plaintiffs Francisco Gudino Cardenas and Troy McFadyen, et al. ("Plaintiffs") in this case. I respectfully submit this declaration in support of Plaintiffs' Opposition to Defendant Polymer80, Inc.'s ("Polymer80") Demurrer on PLCAA grounds. I have personal knowledge of the matters set forth herein and, if called upon, I could and would competently testify thereto.

2. A true and correct copy of *Englund v. World Pawn Exch.*, No. 16CV00598, 2017 Ore. Cir. LEXIS 3 (Or. Cir. Ct. June 30, 2017) is attached hereto as **Exhibit 1** and incorporated by reference herein.

3. A true and correct copy of Order: Motion for Summary Judgment, Fox v. L&J Supply, LLC, No. 2014-24619 (Pa. Ct. Com. Pl. Nov. 26, 2018) is attached hereto as **Exhibit 2** and incorporated by reference herein.

4. A true and correct copy of Decision by the Court, *Coxie v. Academy, Ltd.*, No. 2018-CP-42-04297 (S.C. Ct. Com. Pl. July 29, 2019) is attached hereto as **Exhibit 3** and incorporated by reference herein.

5. A true and correct copy of *Chiapperini v. Gander Mountain Co., Inc.*, 13 N.Y.S.3d 777 (N.Y. Sup. Ct. 2014) is attached hereto as **Exhibit 4** and incorporated by reference herein.

6. A true and correct copy of ATF Rule 82-8, 27 C.F.R. § 179.11 (1998) is attached hereto as **Exhibit 5** and incorporated by reference herein.

7. A true and correct copy of ATF, *Definition of Frame or Receiver and Identification of Firearms*, 86 Fed. Reg. 27720 (May 21, 2021) is attached hereto as **Exhibit 6** and incorporated by reference herein.

8. A true and correct copy of *Corporan v. Wal-Mart Stores East, LP*, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307 (D. Kan. July 18, 2016) is attached hereto as **Exhibit 7** and incorporated by reference herein.

9. A true and correct copy of 151 Cong. Rec. S9061, S9099 (July 27, 2005) (Sen. Craig) is attached hereto as **Exhibit 8** and incorporated by reference herein.

10. A true and correct copy of S. 1805, 108th Cong. (2003) is attached hereto as **Exhibit 9** and incorporated by reference herein.

11. A true and correct copy of S. 397, 109th Cong. (2005) is attached hereto as **Exhibit 10** and incorporated by reference herein.

12. A true and correct copy of *Gustafson v. Springfield, Inc.*, 207 WDA 2019 (Pa. Super. Ct. Sep. 28, 2020) *opinion withdrawn subject to en banc reargument at* 2020 Pa. Super. LEXIS 957 (Dec. 3, 2020) is attached hereto as **Exhibit 11** and incorporated by reference herein.

13. A true and correct copy of the Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 230 (2001) is attached hereto as **Exhibit 12** and incorporated by reference herein.

14. A true and correct copy of Order of October 23, 2006, *City of Gary v. Smith & Wesson Corp.*, No. 45D05-0005-CT-00243, 4 (Ind. Super. Ct. Oct. 23, 2006) is attached hereto as **Exhibit 13** and incorporated by reference herein.

15. A true and correct copy of Motion Hearing Transcript, *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014) is attached hereto as **Exhibit 14** and incorporated by reference herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 9, 2022 in Sunnyvale, California.

/s/ Amy K. Van Zant
Amy K. Van Zant

EXHIBIT 1

Vivian Englund v. World Pawn Exch.

Circuit Court of Oregon, Multnomah County, Fourth Judicial District

June 30, 2017, Decided; June 30, 2017, Filed

Case No. 16CV00598

Reporter

2017 Ore. Cir. LEXIS 3 *

VIVIAN ENGLUND, a Washington resident, and Personal Representative for the Estate of Kirsten Englund, Plaintiff, v. WORLD PAWN EXCHANGE, LLC, an Oregon for-profit corporation, J&G II, INC d/b/a J&G SALES, LTD., an Arizona for-profit corporation, RICHARD JAMES SINATRA, an Oregon resident, Defendants.

Core Terms

firearms, negligent entrustment, predicate, negligence per se, allegations, purchaser, seller, straw, defendants', transferred, credit card, definite, murder, gun, knowingly, supplied, proximate cause, ultimate fact, manufacturer, ammunition, weapons, aiding and abetting, motion to dismiss, public nuisance, foreseeable, electronic, possessed, violating, belonged, customer

Judges: [*1] Michael A. Greenlick, Circuit Court Judge.

Opinion by: Michael A. Greenlick

Opinion

OPINION REGARDING DEFENDANTS' *RULE 21* MOTIONS AGAINST PLAINTIFF'S FIRST AMENDED COMPLAINT

This matter[1] came before the Court on March 23, 2017,[2] for hearing on defendants' *rule 21* motions against plaintiff's first amended complaint (FAC), arguing to dismiss pursuant to *ORCP 21(A)(8)* plaintiff's claims of negligence, negligence *per se*, gross negligence, negligent entrustment, and public nuisance against World Pawn Exchange, LLC (World Pawn), J&G II, Inc. (J&G), and Richard James Sinatra (Sinatra) (collectively, "defendants"). Alternatively, defendants move to strike under *ORCP 21(E)* and World Pawn and Sinatra move to make more definite and certain under *ORCP 21(D)*. Jonathan Lowy, Alla Lefkowitz, Thomas D'Amore, and Ray Sarola appeared for plaintiff. Jeffrey Eden and Leora Coleman-Fire appeared for World Pawn and Sinatra. Jeffrey Malsch appeared for J&G.

As explained below, the Court, after considering the arguments of counsel, the pleadings, and the submissions, denies defendants' motions to dismiss plaintiff's claims of negligence, negligence *per se*, gross negligence, negligent entrustment, and public nuisance

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[1] As the defendants' arguments cover similar subject matter, the Court addresses them together as opposed to independently.

[2] On November 16, 2016, the Court heard argument on J&G's motion to dismiss, among other issues, and therefore relies upon such prior argument in this opinion.

because the predicate exception set forth in *15 USC § 7903(5)(A)(iii)* applies and plaintiff **[*2]** has sufficiently alleged ultimate facts to support each those claims. In addition, the Court denies defendants' motions to strike. Finally, the Court grants in part and denies in part World Pawn and Sinatra's motion to make more definite and certain. Specifically, the Court grants that motion insofar as it pertains to the allegations regarding the nature and the amount of economic damages set forth in paragraphs 135 through 138 of the FAC. Plaintiff is given leave to make more definite and certain those allegations only.[3]

I. Factual Background

In determining the sufficiency of plaintiff's FAC in response to a motion to dismiss pursuant to *ORCP 21 A(8)*, the Court accepts as true all well-pleaded allegations and gives plaintiff, as the nonmoving party, the benefit of all favorable inferences that may be drawn from those allegations. *Scovill By and Through Hubbard v. City of Astoria, 324 Or 159, 161 (1996)* (citing *Stringer v. Car Data Sys., Inc., 314 Or 576, 584 (1992)*. "All pleadings shall be liberally construed with a view of substantial justice between the parties." *ORCP 12 A*.

The following is a summary of the factual allegations contained in plaintiff's FAC. World Pawn is a retailer of firearms in the State of Oregon. FAC ¶ 30. World Pawn also operates as a middleman for online firearms dealers. *Id.* J&G specializes in the interstate **[*3]** selling of ammunition and firearms through the Internet, including into the State of Oregon. *Id.* ¶ 31. Before December 12, 2011, Jeffrey Boyce and his mother, Diane Boyce, entered World Pawn's retail store on multiple occasions, sometimes perusing firearms and asking World Pawn staff questions about firearms. *Id.* ¶ 32. World Pawn staff answered their questions. *Id.*

At all relevant times, Jeffrey Boyce had a felony conviction for unlawful use of a weapon and was thus ineligible to personally own or operate a firearm. *Id.* ¶¶ 35, 38. In addition, Jeffrey Boyce suffered from mental health and drug abuse issues. *Id.* ¶ 38. Those were the reasons why Jeffrey Boyce ultimately did not acquire the firearms personally and, instead, had Diane Boyce acquire the firearms as a straw purchaser on his behalf. *Id.*

On December 12, 2011, Diane Boyce acquired an AK-47 assault rifle from World Pawn on behalf of her son, Jeffrey Boyce. *Id.* ¶ 33. That firearm was ordered via the Internet by and for Jeffrey Boyce from a nonparty firearms dealer in Minnesota. *Id.*

On January 21, 2012, Diane Boyce acquired another firearm, a Makarov 9mm semi-automatic pistol, from World Pawn on behalf of Jeffrey Boyce. *Id.* ¶ 36. **[*4]** Jeffrey Boyce ordered the Makarov over the Internet through J&G, which transferred the Makarov to World Pawn, which in turn transferred the Makarov to Diane Boyce on behalf of Jeffrey Boyce. *Id.* ¶ 36. Four days earlier, on January 17, 2012, Jeffrey Boyce communicated electronically with J&G, directing J&G to transfer the Makarov to World Pawn. *Id.* ¶ 54. Jeffrey Boyce used an email address he shared with his mother and paid for the firearm with his mother's credit card. *Id.*

On February 27, 2012, Diane Boyce acquired another firearm, a Rock Island semi-automatic pistol, from World Pawn on behalf of Jeffrey Boyce. *Id.* ¶ 37. Jeffrey Boyce ordered the Rock Island over the Internet through J&G, which transferred the Rock Island to World Pawn, which in turn transferred the Rock Island to Diane Boyce on behalf of Jeffrey Boyce. *Id.* ¶ 37. Beforehand, on February 21, 2012, Jeffrey Boyce used his personal

[3] Any motions not specifically discussed in this opinion are denied without further discussion.

email address, jeffreyboyce@gmail.com, to communicate electronically with J&G, stating, "PLEASE SEND[] TRACKING NUMBER TO JEFFREY BOYCE...." *Id.* ¶ 55. The following day, February 22, 2012, Jeffrey Boyce sent the following electronic message to J&G:

> GOOD EVENING,
>
> I PURCHASED A Rock Island Armory **[*5]** 1011a1 [] Tactical 45ACP WITH 2 ADDITIONAL MAGAZINES. WHEN FILLING OUT THE FORMS AND GIVING *MY CREDIT CARD* # I DID NOT NOTICE A SPOT TO PUT THE INFORMATION FOR TH[E] FFL HOLDER I WANT TO TRANSFER THE GUN TO WHEN I GO TO PICK IT UP? MY NAME IS JEFFERY BOYCE. I PURCHASED MY M1011A1 FROM J&G SALES AND I WANT THE FIREARM TRANSFERRED TO [WORLD PAWN].
> THEIR FFL LICENSE IS ON FILE. MY TELEPHONE # IS (541) 267-2392. PLEASE NOTIFY ME WHEN THIS TRANSFER IS COMPLETE. I HAVE SPENT QUITE A BIT OF MONEY AND WOULD LIKE TO USE MY 1911 AS SOON AS POSSIBLE.
> YOURS TRULY,
> MR. JEFFREY G. BOYCE

Id. ¶ 57 (emphasis added).

J&G used the same customer number, OR02017, for the Makaraov and the Rock Island transactions, despite J&G's records indicating that the Makarov was "sold to Diane Boyce" and the Rock Island was "sold to Jeffrey Boyce." *Id.* ¶ 56. Notwithstanding Jeffrey Boyce's written statement that he gave "my credit card," the Makarov and Rock Island were purchased with a credit card that belonged to Diane Boyce. *Id.* ¶ 58. J&G possessed records demonstrating that Diane Boyce was the credit card holder. *Id.* J&G failed to undertake a retrospective assessment of past transactions to identify the discrepancy **[*6]** between Jeffrey Boyce's written statement that he used his credit card and the indisputable fact that the credit card belonged to Diane Boyce. *Id.* ¶ 59. Similarly, J&G failed to identify that the same customer number, OR02017, was previously used to purchase firearms. *Id.*

J&G shipped the Rock Island to World Pawn on February 23, 2012, the day after Jeffrey Boyce sent J&G the foregoing electronic message. *Id.* ¶ 61. Accompanying the Rock Island was an invoice reading, "SOLD TO: JEFFREY BOYCE FOR TRANSFER." *Id.* ¶ 62. The invoice included the last four digits of the credit card associated with payment of the Rock Island, which belonged to Diane Boyce. *Id.* ¶ 63. Despite receiving an invoice that indicated the Rock Island was sold to Jeffrey Boyce and that the credit card belonged to Diane Boyce, World Pawn transferred the firearm to Diane Boyce. *Id.* ¶ 64.

Jeffrey Boyce created a customer account with J&G and used it to order the Makarov and Rock Island pistols. *Id.* ¶ 52. To create the customer account, Jeffrey Boyce had to provide his name, date of birth, email address, residence, and select a password. *Id.* J&G had access to Jeffrey Boyce's customer account. *Id.* For all three firearms, Jeffrey **[*7]** Boyce exclusively communicated with the online dealers, including J&G, as well as with World Pawn to arrange purchase and transfer of the firearms. *Id.* ¶ 51.

All three weapons were paid for by Jeffrey Boyce, were types of guns not typically used for hunting, and were all transferred to Diane Boyce roughly within a three month period. *Id.* ¶¶ 50, 39. Diane Boyce signed a Form 4473 for all three firearms, thereby falsifying a response by indicating that she was the actual transferee and buyer of each firearm. *Id.* ¶ 47. J&G had general knowledge that its firearms were being sold to straw purchasers and that its firearms were being used in crimes at

alarming rates. *Id.* ¶¶ 40, 41. Despite knowledge of frequent straw purchases, J&G did nothing to prevent such unlawful purchases from continuing. *Id* ¶ 40. World Pawn falsified its 4473 Form by indicating that Diane Boyce was the purchaser of the Rock Island even though World Pawn knew that J&G's invoice stated that Jeffrey Boyce was the actual purchaser. *Id.* ¶ 165. Additionally, World Pawn knew, and had reason to believe, that Diane Boyce was acting as a straw purchaser for her son, Jeffrey Boyce, and World Pawn failed to undertake any reasonable **[*8]** inquiry or steps to prevent the unlawful straw purchase of the Rock Island. *Id.* ¶¶ 64, 60, 66, 67. Because World Pawn knew that Diane Boyce was a straw purchaser of the Rock Island, World Pawn should have retrospectively determined that the Makarov and AK-47, both guns previously transferred to Diane Boyce, were likewise straw purchases. *Id.* ¶ 66. Indeed, World Pawn would have realized that Diane Boyce had previously acted as a straw purchaser for the AK-47 and Makarov if World Pawn had undertaken a reasonable records review.[4] *Id.*

As a result of neither J&G nor World Pawn employing reasonable care to undertake a record review or to inquire about whether straw purchases had been afoot, Jeffrey Boyce, a convicted felon suffering from mental illness and drug addiction, was ultimately able to possess all three firearms and engage in an extended criminal episode occurring in both Oregon and California. *Id.* ¶¶ 67, 35, 38, 85, 86. On April 28, 2013, Jeffrey Boyce drove a pickup truck out to the Oregon coast and fired his Makarov six times at a stranger, Kirsten Englund, taking her life. *Id.* ¶¶ 67, 89. Jeffrey Boyce proceeded to douse Kirsten Englund in gasoline and set her on fire *Id.* ¶ 85. **[*9]**

The following day, April 29, 2013, Jeffrey Boyce employed the Rock Island in Sonoma County, California to coerce a stranger to drive him to a church. *Id.* ¶ 86. Upon arrival at the church, Jeffrey Boyce drove off in the stranger's car. *Id.* Afterwards, Jeffrey Boyce brandished the Rock Island again to coerce a different person in Marin County, California to give him their car. *Id.* ¶ 87. Shortly thereafter, law enforcement officers arrested Jeffrey Boyce while he was attempting to break into a nearby home. *Id.* ¶ 88. At the time of arrest, Jeffrey Boyce was carrying the Rock Island and the AK-47. *Id.* ¶ 88. Jeffrey Boyce told law enforcement that he murdered Kirsten Englund with the Makarov. *Id.* ¶ 89. Oregon State Police located six spent casings at the scene of the homicide, later confirming they were fired by the Makarov. *Id.* ¶ 89. The officers also found a heretofore unmentioned Ruger .22 caliber semi-automatic rifle inside Jeffrey Boyce's pickup truck, which according to Alcohol, Tobacco, and Firearms records was acquired by Diane Boyce in 2008. *Id.* ¶ 90. Also found inside the pickup truck was ammunition, methadone, valium prescribed to Diane Boyce, and marijuana. *Id.* Jeffrey Boyce thereafter **[*10]** committed suicide while in custody. *Id.*

II. Defendants' Motions to Dismiss Plaintiff's Claims Because the Predicate Exception, Negligent Entrustment Exception, and Negligence *Per Se* Exception Are Inapplicable Are Denied.

The Protection of Lawful Commerce in Arms Act (PLCAA), *15 USC § 7901 et seq.*, prohibits any "qualified civil liability action," which is defined as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a

[4] The Court recognizes that J&G was not a party to the original AK-47 sale.

qualified product by the person or a third party." *Id.* § 7903(5)(A). A "qualified product" means any firearm or ammunition, or component part thereof, that has been shipped or transported in interstate or foreign commerce. *Id.* § 7903(4). A "seller" means, among other things, a person or entity engaged in the business of selling firearms or ammunition. *See Id.* § 7903(6). The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product. *Id.* § 7903(9). In short, Congress granted **[*11]** immunity generally to manufacturers and sellers of firearms and ammunition for injuries or harm caused by use of firearms sold by them.

However, Congress carved out six exceptions to that immunity, rendering specific conduct outside the scope of a qualified civil liability action, thereby exposing to liability certain manufacturers and sellers of qualified products in limited circumstances. Here, plaintiff argues that the predicate exception, negligent entrustment exception, and negligence *per se* exception apply to this case.

A. Predicate Exception

The first question presented is whether plaintiff sufficiently alleges a claim governed by the predicate exception under 15 USC § 7903(5)(A)(iii).

The predicate exception brings a case outside the scope of a qualified civil liability action and, thus, allows that case to proceed to trial. Initially, the Court notes that the predicate exception's broad language provides that an entire "action" survives—including all alleged claims—if a seller of a qualified product knowingly violated and/or aided and abetted the violation of a statute applicable to the sale or marketing of the qualified product, and that violation was the proximate cause of the harm for which relief **[*12]** is sought. 15 USC § 7903(5)(A)(iii). In support of that conclusion, subsections (5)(A)(iii)(I) and (5)(A)(iii)(II) employ "any case" not "any claim," suggesting that Congress intended for all otherwise justiciable claims to go forward in cases that trigger application of the predicate exception. *See id.* Accordingly, the Court construes section 7903(5)(A)(iii) as providing that all claims—*e.g.*, negligence, public nuisance, negligent entrustment, negligent *per se*—overcome the immunity protections afforded by section 7902. *See e.g.*, Williams v. Beemiller, Inc., 100 AD3d 143, 151 (NY App Div 4th Dep't 2012), *amended by* 103 AD3d 1191 (NY App Div 4th Dep't 2013) (concluding that a separate analysis of the plaintiff's negligent entrustment and negligence *per se* exceptions is unnecessary after determining that the predicate exception applies); Smith & Wesson Corp. v. City of Gary, 875 NE2d 422, 434-45 (Ind Ct App 2007) (allowing a negligence claim to proceed without a claim-by-claim analysis after concluding that violation of a statutory public nuisance law triggered application of the predicate exception); *but see Woods v. Steadman's Hardware, Inc.*, No CV 12-33-H-CCL, 2013 WL 709110 (D Mont Feb. 26, 2013) (discussing approvingly the lower court's dismissal of some claims after determining that other claims survived because they satisfied the predicate exception). Conversely, where the negligent entrustment exception of section 7903(5)(A)(ii) applies, it does not automatically open the gate to all claims. Rather, looking at the plain statutory **[*13]** language, the negligent entrustment provision solely authorizes "an action brought against a seller *for* negligent entrustment or negligence *per se*." *See id.* (emphasis added).

The statutory language of the predicate exception reads:

> (iii) an action in which a manufacturer or seller of a qualified product *knowingly* violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a *proximate*

> *cause* of the harm for which relief is sought, including—
>
> (I) any case in which the manufacturer or seller *knowingly* made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or *aided, abetted*, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller *aided, abetted*, or conspired with any other person to sell or otherwise dispose of a qualified product, *knowing, or having reasonable cause to believe*, that the actual buyer of the qualified product was prohibited from **[*14]** possessing or receiving a firearm or ammunition under subsection (g) or (n) of *section 922* of title 18;

Id. *§ 7903(5)(A)(iii)* (emphasis added). Plaintiff expressly alleges that defendants knowingly violated and/or aided and abetted Diane Boyce and Jeffrey Boyce in violating state and federal statutes applicable to the sale or marketing of firearms, and that such violation was a proximate cause of the harm for which relief is sought in this case. *See* FAC ¶¶ 82, 83, 84 (alleging violations of *ORS §§ 166.416*, *166.418* as well as *18 USC §§ 922(a)(1)(A)*, *922(a)(6)*, *922(d)*, *922(g)*, *922(m)*, *924(a)(1)*, *924(a)(2)*, *924(a)(3)*).

After considering the applicable law, accepting as true plaintiff's factual allegations, giving plaintiff the benefit of all reasonable inferences therefrom, and based upon the totality of circumstances, including the nature and pattern of firearm purchases, the invoice and electronic messages that expressly identified Jeffrey Boyce as the purchaser, the shared online account associated with Diane Boyce's credit card, Jeffrey Boyce's personal email address correspondence, among other things, the Court is satisfied that plaintiff has alleged sufficient ultimate facts to support a knowing violation and/or aiding and abetting theory against J&G and Word Pawn. *See* *ORS §§ 166.416*, *166.418*; *18 USC §§ 922(a)(1)(A)*, *922(a)(6)*, *922(d)*, *922(m)*. Put differently, a reasonable person could **[*15]** find that both World Pawn and J&G knowingly violated and/or aided and abetted Diane Boyce and Jeffrey Boyce in violating a statute applicable to the sale or marketing of firearms. The inquiry, however, does not end there.

The predicate exception also requires that the violation of federal or state statute constitute a proximate cause of the harm for which relief is sought, *i.e.*, a proximate cause of the damages stemming from Jeffrey Boyce's murder of Kirsten Englund. No party disputes that Jeffrey Boyce shot and killed Kirsten Englund using the Makarov. Additionally, plaintiff implicitly argues that Jeffrey Boyce possessed the Rock Island at the time of the murder and that such possession emboldened Jeffrey Boyce, thereby facilitating his ultimate murder of Kirsten Englund. FAC 67, 80, 85. Indeed, case law supports the legal theory that possession of a weapon may be "in furtherance" of a crime when such possession emboldens a defendant in the commission of a crime. *See* *US v. Thongsy, 577 F3d 1036, 1041-42 (2009)* (holding that a rational jury could find that possession of a firearm was "in furtherance" of a drug crime). While *Thongsy* involved a drug crime, and this case involves a murder, the Court concludes that it is appropriate **[*16]** to extend the *Thongsy* rationale to nondrug scenarios. *See id.* Plaintiff has alleged that Jeffrey Boyce was armed with both the Makarov and Rock Island at the time of the murder. FAC ¶¶ 67, 80, 85. A reasonable jury could infer that possessing the Rock Island at the time of the murder emboldened Jeffrey Boyce and was, therefore, possessed in

furtherance of the Jeffrey's Boyce's killing of Kirsten Englund.

Defendants' also raise arguments that Jeffrey Boyce's actions were not foreseeable. The Oregon Supreme Court, in *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1 (1987), explained that foreseeability "depends on whether [defendants' conduct] created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Id. at 17*. The Court concludes that a foreseeable outcome arising from a seller of firearms violating gun safety laws that were designed to keep firearms out of the hands of dangerous people is that innocent people would be harmed or worse murdered. The Court notes that the question of foreseeability is a fact-intensive inquiry rightfully belonging to a jury. *See Thongsy, 577 F3d at 1041*.

In sum, based upon the foregoing, the Court concludes that application of the predicate exception is appropriate **[*17]** in this case because plaintiff has alleged sufficient ultimate facts upon which a reasonable jury could find that defendants knowingly violated and/or aided and abetted violation of federal or state statutes, and that such violation was a proximate cause of Kirsten Englund's death.

B. Negligent Entrustment

PLCCA provides an exception to immunity for actions brought against a seller for negligent entrustment. *15 USC § 7903(5)(A)(ii)*. Congress defines "negligent entrustment" as "the supplying of a qualified product by a seller *for use* by another person when the seller knows, or reasonably should know, *the person to whom the product is supplied* is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." *Id. § 7903(5)(B)* (emphasis added).

World Pawn argues that the negligent entrustment exception is not applicable because the firearms were supplied to Diane Boyce who did not "use" the firearms to commit a violent crime. Plaintiff argues that Diane Boyce's "use" involved transferring the firearms to Jeffrey Boyce, which necessarily involved unreasonably risk to others. The Court is not required to reach the question of whether plaintiff's broad interpretation **[*18]** of "use" is appropriate, or whether the negligent entrustment exception under federal law is applicable, because the Court has determined the predicate exception applies, and, therefore, plaintiff is entitled to bring all well-pleaded claims valid under Oregon law. *See e.g., Williams v. Beemiller, Inc., 100 AD3d 143, 151 (NY App Div 4th Dep't 2012)*, *amended by 103 AD3d 1191 (NY App Div 4th Dep't 2013)*; *Smith & Wesson Corp. v. City of Gary, 875 NE2d 422, 434-45 (Ind Ct App 2007)*.

Because the predicate exception applies, the Court must determine solely whether plaintiff has sufficiently alleged ultimate facts to support a negligent entrustment claim under Oregon law. Oregon courts commonly rely on the Restatement (Second) of Torts when evaluating legal concepts. *See e.g., Marlow v. City of Sisters, 281 Or App 462, 470 (2016)* (relying on the Restatement (Second) of Torts in analyzing common trespass principles). *Section 390 of the Restatement (Second) of Torts* defines "negligent entrustment" as:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965). In short,

the Court concludes that plaintiff is entitled to go **[*19]** forward on a theory that defendants supplied these firearms to Jeffrey Boyce, through a third person, Diane Boyce, having reason to know that such supplying involved unreasonable risk to others based upon the inherent dangerous nature of straw-purchase transactions.

Plaintiff has essentially alleged that J&G and Word Pawn supplied the firearms to Jeffrey Boyce through Diane Boyce, a third person. *See e.g.*, FAC 117, 118, 120. The Court finds that plaintiff has alleged sufficient facts to infer that Diane Boyce had actual knowledge that Jeffrey Boyce was likely to use the firearms in an unsafe manner. More to the point, the Court concludes that plaintiff has alleged sufficient facts to infer that J&G and World Pawn had reason to know that Jeffrey's possession of the weapons would likely create an unreasonable risk of harm due to the inherent dangerous nature of straw-purchase arrangements. The fundamental purpose of background checks is to prevent firearms from coming into the possession of people that Congress determined are dangerous for one reason or another. A common method of bypassing such background checks for buyers who are ineligible to purchase firearms is what took place in **[*20]** this case: a straw purchase. Plaintiff alleges that J&G knew that a number of weapons it sold previously were transferred through straw buyers and ultimately used in dangerous crimes. *Id.* ¶¶ 40, 41. In addition, plaintiff alleges that World Pawn had reason to know that Jeffrey Boyce not only received the Rock Island through a straw purchase, but also the Makarov and the Ak-47. And Jeffrey Boyce's receipt of the so-called "arsenal of weapons he acquired through J&G and [World Pawn]" increased the degree of unreasonable risk to others. FAC ¶¶ 85.

For the foregoing reasons, defendants' motions to dismiss plaintiff's negligent entrustment claim is denied. The Court, accepting as true all well-pleaded allegations and giving plaintiff, as the nonmoving party, the benefit of all favorable inferences that may be drawn from those allegations, concludes that plaintiff has alleged sufficient ultimate facts to bring a negligent entrustment claim under Oregon law.

C. Negligence *Per Se*

Turning now to plaintiff's negligence *per se* claim. As previously explained, because the predicate exception applies, the Court need not determine whether the negligence *per se* exception is specifically applicable. **[*21]** *See e.g.*, Williams v. Beemiller, Inc., 100 AD3d 143, 151 (NY App Div 4th Dep't 2012), *amended by* 103 AD3d 1191 (NY App Div 4th Dep't 2013); Smith & Wesson Corp. v. City of Gary, 875 NE2d 422, 434-45 (Ind Ct App 2007).

Oregon courts recognize that violation of a statutory duty constitutes negligence *per se* if the statute "so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine." Shahtout v. Emco Garbage, Co., 298 Or 598, 601 (1985). As defendant J&G acknowledges, to establish a claim for negligence *per se*, a plaintiff must provide factual allegations to support that (1) defendant violated a statute or rule; (2) plaintiff was injured as a result of that violation; (3) plaintiff was a member of the class of persons intended to be protected by the statute or rule; and (4) the injury plaintiff suffered was of a type that the statute or rule was designed to protect. Scheffel v. Or. Beta Chapter of Phi Kappa Psi Fraternity, 237 Or App 390, 415 (2015).

Defendant J&G argues that the complaint does not adequately contains facts to support violation of 18 USC § 922(d), ORS § 166.416, and ORS § 166.418. Defendant J&G seems to rely upon a technical and overly limited reading of those statutes by asserting J&G

did not transfer firearms to Diane Boyce or Jeffrey Boyce and instead transferred firearms to World Pawn. The Court cannot read the complaint in such a limited fashion for reasons discussed above. The gravamen of plaintiff's complaint alleges facts sufficient to support a finding that J&G and World **[*22]** Pawn knowingly violated and/or aided and abetted each other and Diane Boyce in unlawfully completing Form 4473 in addition to executing the straw purchases associated with the Makarov and Rock Island.

The Court also finds that World Pawn's argument regarding whether negligence *per se* exists in Oregon rests upon semantics. It is the case that Oregon courts recognize a cause of action based upon a theory of negligence *per se*. *See* Doyle v. City of Medford, 356 Or 336, 345 n 7 (2014) ("Negligence *per se* is a shorthand descriptor for a judicially recognized negligence claim based on a duty that is imposed by a statute or regulation") (citing Abraham v. T. Henry Const., Inc., 350 Or 29, 36 n 5 (2011)). It is also true that the plain language of the statutory provision authorizes "an action against a seller * * * for negligence *per se*." 15 USC § 7903(5)(A)(ii). Fundamentally, section 7903(5)(A)(ii) authorizes a negligence *per se* theory to go forward regardless of whether it is technically a standalone action or an alternate method of establishing a standard of care for a negligence claim. The Court finds no persuasive basis to conclude that Congress intended to prohibit negligence *per se* claims in jurisdictions that characterize negligence *per se* as a subspecies of common law negligence instead of a standalone cause of action.

World Pawn also **[*23]** disputes the question of whether violation of a gun safety law can constitute the basis of a negligence *per se* theory of recovery. The Court notes that, to its knowledge, no clear binding precedent exists to resolve this question. Nevertheless, the Eleventh Circuit Court of Appeals, in King v. Story's, Inc., 54 F3d 696 (1995), held that a retailer's sale of a rifle without obtaining the buyer's signature on Form 4473 violated a federal regulation, 27 CFR § 178.124, and, therefore, constituted negligence *per se*. Id. at 697. Here, the focused gun safety statutes established a fixed standard of care applicable to defendants. Those focused gun safety statutes were designed to prevent innocent civilians, such as Kirsten Englund, from becoming victims of gun violence. Consequently, the Court concludes plaintiff has adequately alleged that defendants' violation of state and federal statutes constituted negligence *per se*.

III. Motion to Strike and Motion to Make More Definite and Certain

After reviewing defendants' motions to strike and World Pawn and Sinatra's motion to make more definite and certain, the Court denies the motions to strike entirely and denies in part and grants in part the motion to make more definite and certain. Specifically, the Court **[*24]** grants World Pawn and Sinatra's request to make more definite and certain allegations regarding the nature and amount of economic damages set forth in paragraphs 135 through 138 of plaintiff's complaint.

IV. Conclusion

For the foregoing reasons, defendants' motions to dismiss plaintiff's claims of negligence, negligence *per se*, negligent entrustment, gross negligence, and public nuisance are denied, because the predicate exception applies to this case, and plaintiff has alleged ultimate facts that, if taken as true and from which reasonable inferences are drawn, could support her claims. In addition, defendants' motions to strike are denied. Lastly, the Court grants in part and denies in part World Pawn and Sinatra's motion to make more definite and certain.

SIGNED this 30th day of June, 2017.

/s/ Michael A. Greenlick

Michael A. Greenlick

Circuit Court Judge

End of Document

EXHIBIT 2

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

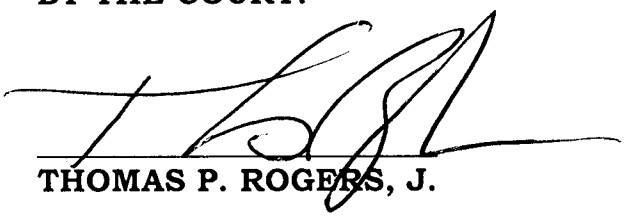
LYNSAY R. FOX, as Administrator and Personal Representative of the Estate of BRADLEY M. FOX and LYNSAY R. FOX, on her own behalf	:	No. 2014-24619
v.		
L & J SUPPLY, LLC, d/b/a IN SITE FIREARMS & LAW ENFORCEMENT SUPPLIES, L & J SUPPLY, LLC, and LUKE J. KELLY III		

ORDER: MOTION FOR SUMMARY JUDGMENT REGARDING BAR TO ALL CLAIMS BY THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT FILED BY DEFENDANTS LUKE J. KELLY, III AND L & J SUPPLY, LLC

AND NOW, this 26th day of November 2018, upon consideration of the Motion for Summary Judgment Regarding Bar to all Claims by the Protection of Lawful Commerce in Arms Act Filed by Defendants Luke J. Kelly, III and L & J Supply, LLC ("Motion") and Brief in support, Plaintiff's Response in opposition and Memorandum of Law in support, this Court's thorough review of the extensive record as well as the relevant and applicable law and the Court having heard Oral Argument on Tuesday, October 30, 2018, it is hereby **ORDERED** that Defendants' Motion is **DENIED**.[1]

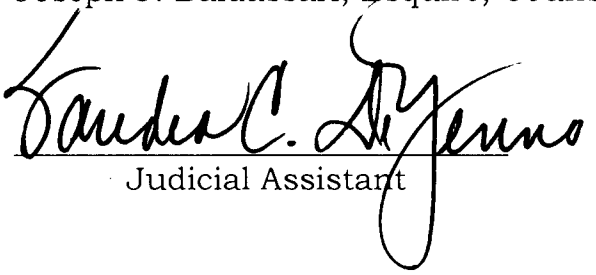
[1] This Court concludes that the "predicate exception" provided by 15 U.S.C. § 7903(5)(iii) applies to this case, thereby removing the entire action out from under the statutory immunity provided in the Protection of Lawful Commerce in Arms Act. *See* 15 U.S.C. §§ 7901-7903. Addressing Defendants' second question presented, our Superior Court recently reiterated the applicable standard as follows:

BY THE COURT:



THOMAS P. ROGERS, J.

Copies of the above Order sent on 11/26/18 to the following:
By Interoffice Mail:
Denise S. Vicario, Esquire, Chief Deputy Court Administrator
Elizabeth A. Catalano, Second Deputy, Court Administration, Civil Division
By First-Class Mail:
Hope S. Freiwald, Esquire, Counsel for Plaintiff, Lynsay R. Fox as Administrator and Personal Representative of the Estate of Bradley M. Fox, and Lynsay R. Fox, on her own behalf
Jonathan E. Lowy, Esquire, *Pro Hac Vice* Counsel for Plaintiff, Lynsay R. Fox as Administrator and Personal Representative of the Estate of Bradley M. Fox, and Lynsay R. Fox, on her own behalf
Edward J. McGinn, Esquire, Counsel for Defendants, L & J Supply, LLC and Luke J. Kelly, III
Joseph J. Baldassari, Esquire, Counsel for Defendant, Luke J. Kelly, III



Judicial Assistant

> [S]ummary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Moreover, when any court considers a motion for summary judgment, it is required to accept all the facts of record as well as the reasonable inferences from those facts in favor of the non-moving party. Additionally, the trial court "must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt."

Krolczyk v. Goddard Systems, Inc., 164 A.3d 521, 526 (Pa.Super. 2017) (internal citations omitted). This Court concludes that there remain genuine issues of material fact precluding summary judgment.

EXHIBIT 3

STATE OF SOUTH CAROLINA) COUNTY OF SPARTANBURG))	IN THE COURT OF COMMON PLEAS
Cindy Coxie,))	Civil Action No. 2018-CP-42-04297
PLAINTIFF,) v.))	**Form 4** **SCRCP Rule 21(b)(6) Motion To Dismiss Denied**
Academy, Ltd., d/b/a Academy Sports and Outdoors; and, Dustan Lawson,))	
DEFENDANT)	

CHECK ONE:

[ ] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED. (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k),SCRCP(Settled); [ ] Other _____.

[ ] ACTION STRICKEN (*CHECK REASON*): [ ] Rule 40(j), SCRCP; [ ] Bankruptcy; [ ] Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

IT IS ORDERED AND ADJUDGED: [ ] See attached order; [X] Statement of judgment by the Court:

This matter came before the Court on the defendant Academy's Motion to Dismiss pursuant to SCRCP Rule 12(b)(6), asserting that the plaintiff has failed to state facts sufficient to constitute a cause of action.

The standard of review which this Court is required to apply in ruling on a SCRCP Rule 12(b)(6) motion is well-established in South Carolina and is not contested by the parties. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. If the facts alleged in the complaint and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case, then a court must deny the motion. The relevant question is whether, in viewing the complaint in a light most favorable to the plaintiff, and with every reasonable doubt resolved in the plaintiff's favor, the complaint states a valid claim for relief. See *Dye v. Gainey*, where "every" doubt is resolved in the plaintiff's favor when ruling on a 12(b)(6) motion. *Dye v. Gainey*, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. A judgment on the pleadings against the plaintiff is not proper where there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. All well-pleaded factual allegations are deemed admitted for the purpose of considering the motion for judgment on the pleading. Where

allegations in the complaint give rise to competing inferences on a question of material facts, dismissal under 12(b)(6) is not appropriate. In sum, under a 12(b)(6) analysis, the allegations of the complaint must be considered to be true.

Accordingly, a court considering a 12(b)(6) motion must base its ruling solely upon the allegations set forth on the face of the complaint. However, if matters outside the pleadings are presented during the course of a 12(b)(6) motion, and are not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56. Furthermore, if converted to a Rule 56 motion, all parties shall be given reasonable notice to present all material made pertinent to such a motion by that same rule.

As a general rule, important questions of novel impression should not be decided on a motion to dismiss. Where, however, the dispute is not as to the underlying facts but to the interpretation of law, and where the development of the record will not aid in the resolution of the issues, it is proper to decide novel issues on a motion to dismiss.

After reviewing the twenty-eight-page complaint, wherein monetary and injunctive relief are sought, and after considering the written and oral arguments presented by counsel, the present motion cannot be granted. The plaintiff's Complaint presents facts which, at this juncture, are deemed true, and when those facts are viewed in the light most favorable to the plaintiff and all reasonable inferences drawn therefrom are done so in a manner most favorable to the plaintiff, this Court cannot rule that, as a matter of law, the provisions of PLCAA prevent the case from moving forward.

Additionally, this court cannot rule that either the plaintiff's claims for negligence per se or negligent entrustment, as a matter of law, should be dismissed. In *State Farm Fire & Cas. Ins. Co. v. Sproull*, Judge Quattlebaum noted that,

> The South Carolina Supreme Court has never determined whether the negligent entrustment factors set forth in *Gadson* limit the claim in South Carolina to situations only involving an intoxicated driver. Instead, in *Gadson*, the South Carolina Supreme Court only stated that it declined to adopt a broader definition of negligent entrustment as set forth in the Restatement based on the set of facts before the Court. *State Farm Fire & Cas. Ins. Co. v. Sproull*, 329 F. Supp. 3d 238, 247 (D.S.C. 2018).

In another case, *Whitlaw v. Kroger Co.*, the Court found that a statute designed to protect the general public could be the basis for a negligence per se claim if the causal link is established. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991). Therefore, under South Carolina law the claims of negligent entrustment and negligence per se, are novel as applied to the facts alleged in the present complaint and require a developed factual record in the present case.

This case presents many novel issues of law and analysis. Defendant Academy acknowledges the novelty of this case and the arguments presented to this Court where, in its Reply in Support of the Motion to Dismiss, the defendant states that there is no binding precedent from the United States or South Carolina Supreme Courts. The defendant further

advises this Court that it is free to make its own determination of how the PLCAA exceptions to immunity should be applied. Again, this is a novel case where a more-developed record will assist in evaluating the application of the PLCAA, its immunity provisions, and its predicate exception to Academy's actions. As evinced by the factual arguments made in the memoranda, it is this court's impression that many of the parties' disputes are founded largely upon factual matters that will require development and argument that goes beyond the four corners of the complaint.

The better approach for all of the claims alleged in the complaint is to remain consistent with the standard of review required by a SCRCP Rule 12(b)(6) analysis and to allow a more thorough record to be developed.

As part of the arguments presented, this Court was asked to take judicial notice of certain sections of the indictment issued against Mr. Lawson. While in certain situations, judicial notice of indictments is appropriate, for the purposes of a 12(b)(6) motion this Court declines to do so as to avoid the issues related to notice, addressed supra, occasioned by a 12(b)(6) motion's conversion to a Rule 56 motion. Additionally, given sixteen-plus years of experience with criminal trial and pleas, it is this Court's impression that indictments are, generally speaking, documents drafted to provide notice of the crime being prosecuted against an accused and to establish a court's jurisdiction. As a matter of course, as with the present indictment, facts are stated broadly. Nevertheless, even if this Court took judicial notice of the contents of the indictment, the present motion would still be denied due to the allegation asserted in the Complaint that Academy violated federal and state law. Also this Court notes that the allegations in the complaint can reasonably be read to include allegations against Academy that involve conduct going beyond the sale of guns to the co-defendant Lawson.

Since this Court's present decision makes no final ruling on the merits, no other formal order will be issued by this Court.

THIS ORDER: Ends the case [ ]; Does not end the case [X]

Dated at Spartanburg, South Carolina, this the 29th day of July 2019.

J MARK HAYES
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2018, and a copy mailed first class this _____ day of _____, 2018 to attorneys of record or to parties (where appearing *pro se*) as follows:

CLERK OF COURT

Plaintiff's Attorney:

J. David Standeffer
PO Box 35, 2124 North 81 Highway
Anderson, SC 29622

Defendants' Attorneys:

Matthew A. Abee
1320 Main St., 17th Floor
Columbia, SC 29201

Chadwick S. Devlin
PO Box 11070
Columbia, SC 29211

D. Lawrence Kristinick, III
PO Box 11070
Columbia, SC 29211

EXHIBIT 4

Chiapperini v Gander Mtn. Co., Inc.

Supreme Court of New York, Monroe County

December 23, 2014, Decided

14/5717

Reporter
48 Misc. 3d 865 *; 13 N.Y.S.3d 777 **; 2014 N.Y. Misc. LEXIS 5910 ***; 2014 NY Slip Op 24429 ****

[**1]** Kimberly Chiapperini, as Personal Representative of the Estate of Michael Chiapperini, Deceased, et al., Plaintiffs, v Gander Mountain Company, Inc., et al., Defendants.

Outcome
Motions granted in part and denied in part.

Core Terms

grand jury, public nuisance, minutes, plaintiffs', negligent entrustment, gun, motion to dismiss, seller, permanent injunction, firearms, affirmation, allegations, cause of action, disclosure, preemption, civil liability, protocols, note of issue, state court, confirmation, manufacturer, indictment, witnesses, stricken, grand jury testimony, injunctive relief, red flag, convictions, violations, discovery

Case Summary

Overview

HOLDINGS: [1]-The Protection of Lawful Commerce in Arms Act did not preempt state claims against a sporting goods store brought by the representatives of shooting victims because the representatives' negligent entrustment and negligence per se claims were exempt, and, in support of their general negligence claim, the representatives cited specific federal gun laws the store allegedly violated, *15 U.S.C.S. § 7903(5)(A)(ii)*, *(iii)*; [2]-The representatives were not entitled to the entire set of Grand Jury minutes from the criminal trial because the representatives' generic claim concerning unidentified people was insufficient to warrant wholesale disclosure of the entire Grand Jury presentation; the representatives were entitled to Grand Jury testimony from any store personnel who did not also testify at trial, *CPL 190.25(4)(a)*.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1 **Motions to Dismiss, Failure to State Claim**

In determining a *CPLR 3211(a)(7)* motion, the subject pleading is to be afforded a liberal construction. *CPLR 3026*. Under this liberal construction, the facts pleaded are to be presumed to be true and are to be accorded every favorable inference in a plaintiff's favor to see if they fit within any cognizable legal theory. Thus, the criterion is whether the plaintiff has a cause of action, not whether he or she properly stated one.

Torts > Procedural Matters > Commencement & Prosecution > Dismissal

Torts > Products Liability > General Overview

Torts > Procedural Matters > Preemption > Express Preemption

HN2[] Commencement & Prosecution, Dismissal

The purpose of the Protection of Lawful Commerce in Arms Act (PLCAA) is to shield gun sellers from civil liability for harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended. 15 U.S.C.S. § 7901(b)(1). To achieve its purpose, the PLCAA forbids the commencement of any "qualified civil liability action" in federal or state court. 15 U.S.C.S. § 7902(a). A "qualified civil liability action" is defined as a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. 15 U.S.C.S. § 7903(5)(A).

Torts > Negligence > Types of Negligence Actions > Negligent Entrustment

Torts > ... > Proof > Violations of Law > Statutes

HN3[] Types of Negligence Actions, Negligent Entrustment

See 15 U.S.C.S. § 7903(5)(A)(ii), (iii).

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Torts > Products Liability > General Overview

HN5[] Complaints, Requirements for Complaint

The third exception to the Protection of Lawful Commerce in Arms Act is referred to as the "predicate exception" because it requires that a plaintiff also allege a knowing violation of a predicate statute, i.e., a state or federal statute applicable to the sale or marketing of firearms.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Proof > Evidence > Province of Court & Jury

HN6[] Causation, Proximate Cause

Proximate cause is normally a question of fact for a jury.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN7[] Motions to Dismiss, Failure to State Claim

Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > General Overview

Torts > Products Liability > General Overview

HN8[] Criminal Offenses, Weapons Offenses

In the context of exceptions to the Protection of Lawful Commerce in Arms Act, the Fourth Department found that an alleged violation of 18 U.S.C.S. § 922(m) can occur when a seller knows, or has reason to believe, that the information entered on the ATF Form 4473 is false, including information about the actual buyer. The Fourth Department further found potential accomplice liability for a gun seller aiding and abetting a buyer's false statements.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

HN9[] **Nuisance, Elements**

Public nuisance is defined as an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

HN10[] **Nuisance, Elements**

To allow an individual to prosecute a public nuisance claim, he or she must show that they suffered special injury beyond that suffered by the community at large.

Torts > Negligence > Types of Negligence Actions > Negligent Entrustment

HN11[] **Types of Negligence Actions, Negligent Entrustment**

See the Protection of Lawful Commerce in Arms Act, *15 U.S.C.S. § 7903(5)(B)*.

Torts > Negligence > Types of Negligence Actions > Negligent Entrustment

HN12[] **Types of Negligence Actions, Negligent Entrustment**

The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion. If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

HN13[] **Motions to Strike, Irrelevant Matters**

CPLR 3024(b) provides that a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading. "Unnecessarily" is the key word, and is akin to "irrelevant." Motions to strike are not favored, rest in the sound discretion of the court and will be denied unless it clearly appears that the allegations attacked have no possible bearing on the subject matter of the litigation.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

HN14[] **Equity, Adequate Remedy at Law**

An application for a permanent injunction is an equitable request that is appropriate only upon a showing of threatened irreparable injury, the lack of an adequate remedy at law, and a balancing of equities in the movant's favor.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN15[] **Injunctions, Permanent Injunctions**

A permanent injunction is an extraordinary remedy to be granted or withheld by a court of equity in the exercise of its discretion. Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers. Indeed, equity interferes in the transactions of persons by preventive measures only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong.

Criminal Law & Procedure > ... > Secrecy > Disclosure > General Overview

HN16 **Secrecy, Disclosure**

See CPL 190.25(4)(a).

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Civil Litigants

Criminal Law & Procedure > ... > Secrecy > Disclosure > Judicial Discretion

HN17 **Particularized Need Standard, Civil Litigants**

A court has the limited discretion to order disclosure of grand jury minutes as part of discovery in a civil case. Disclosure may be directed when, after a balancing of a public interest in disclosure against the one favoring secrecy, the former outweighs the latter. But since disclosure is the exception rather than the rule, one seeking disclosure first must demonstrate a compelling and particularized need for access. However, just any demonstration will not suffice. For it and the countervailing policy ground it reflects must be strong enough to overcome the presumption of confidentiality. In short, without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no policies to balance.

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Civil Litigants

HN18 **Particularized Need Standard, Civil Litigants**

At the opposite pole from cases allowing access to vindicate public rights are cases in which purely private civil litigants have sought inspection of Grand Jury minutes for the purpose of preparing suits. Although courts have recognized a limited right in civil litigants to use a trial witness's Grand Jury testimony to impeach, to refresh recollection or to lead a hostile witness, wholesale disclosure of Grand Jury testimony for purposes of trial preparation has been almost uniformly denied to private litigants. In making the discretionary balancing, a court is to consider: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.

Headnotes/Summary

Headnotes

Negligence — Negligent Entrustment — Firearms — Protection of Lawful Commerce in Arms Act — Exceptions

1. The federal Protection of Lawful Commerce in Arms Act (PLCAA) (15 USC § 7901 et seq.) did not bar plaintiffs' negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer. The PLCAA forbids the commencement of any "qualified civil liability action" against a gun seller in federal or state court (15 USC § 7902 [a]). As plaintiffs alleged claims for negligent entrustment and negligence per se, those claims fell outside of the "qualified civil liability action" definition (15 USC § 7903 [5] [A] [ii]). Additionally, under the PLCAA's predicate exception, plaintiffs were required to allege a knowing violation of a statute applicable to the sale or marketing of firearms (15 USC § 7903 [5] [A] [iii]). Without the benefit of discovery, it could not be definitively stated that the federal laws allegedly violated did not apply, or were not related, to

the shootings. Moreover, the customer's criminal acts did not relieve defendant of having to take steps to uncover them, nor did the criminal dispositions against her protect defendant and insulate it from civil litigation.

Torts — Nuisance — Special Injury

2. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, defendant was not entitled to dismissal of plaintiffs' public nuisance claim. For an individual to prosecute a public nuisance claim, he or she must show special injury beyond that suffered by the community at large. Plaintiffs alleged sufficient requisite special injury given the deaths of two victims and the serious physical injury to two others. Moreover, with respect to whether defendant owed a duty of reasonable care to persons injured by illegally obtained handguns, here it was uncontested that defendant sold the firearms, and that it also had direct interactions with the shooter.

Negligence — Negligent Entrustment — Firearms Sold for Use by Convicted Felon — Knowledge of Seller

3. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, defendant was not entitled to dismissal of plaintiffs' negligent entrustment claim. The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use it in an improper or dangerous fashion. Here, defendant should have known of the shooter's criminality if it had taken the appropriate steps in light of red flags suggesting that the shooter was not a lawful gun owner.

Pleading — Striking out Matter Contained in Pleading — Relevance

4. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, defendant was not entitled to have references to protocols issued by the National Shooting Sports Foundation to combat improper firearms sales stricken from the complaint. Pursuant to *CPLR 3024 (b)*, "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." However, motions to strike are not favored, and will be denied unless it clearly appears that the allegations attacked have no possible bearing on the subject matter of the litigation. Here, the protocols were relevant to defendant's standard of care, a necessary component to plaintiffs' general negligence claim.

Injunctions — Permanent Injunction

5. Plaintiffs' request for a permanent injunction compelling defendant gun seller to reform its firearms sales policies was stricken from their complaint alleging that defendant negligently sold firearms used by a convicted felon to commit several shootings. An application for a permanent injunction is an equitable request that is appropriate only upon a showing of threatened irreparable injury, the lack of an adequate remedy at law, and a balancing of equities in the movant's favor. Plaintiffs failed to allege future irreparable injury to them specifically, as opposed to the public in general, and that their other claims, which sought both monetary and punitive damages, would not fully compensate them for their past extraordinary harm.

Grand Jury — Inspection of Grand Jury Minutes

6. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, plaintiffs were entitled to limited disclosure of portions of the grand jury minutes relating to the customer's criminal prosecution. A court has limited discretion to order disclosure of grand jury minutes as part of discovery in a civil case. The court must balance the public interest in disclosure against the one favoring secrecy, considering prevention of flight by a defendant, protection of the grand jurors from interference from those under investigation, prevention of subornation of perjury and witness tampering, protection of an innocent accused, and assurance to prospective witnesses that their testimony will be kept secret. Plaintiffs articulated the requisite compelling and particularized need for some of the grand jury minutes related to defendant's representatives. As plaintiffs had the ability to access the public trial transcript from the prosecution, there was no need to disturb the grand jury process for the trial witnesses. However, the grand jury minutes for any employee of defendant who testified at grand jury but not at trial were ordered to be released to the court for an in camera review before release to the litigants.

Counsel: [*1]** *Brian Stapleton* and *James M. Paulino,*

II for Gander Mountain Company, Inc., defendant.

Michael D. Schissel and *Diana E. Reiter* for plaintiffs.

Judges: HONORABLE J. SCOTT ODORISI, Justice.

Opinion by: J. SCOTT ODORISI

Opinion

[*867] [780]** J. Scott Odorisi, J.

This lawsuit arises out of the 2012 West Webster Christmas Eve ambush and the resulting deaths and personal injuries to first responders. Pending before this court are: (1) defendant Gander Mountain Company, Inc.'s August 25, 2014, motion to dismiss; and, (2) plaintiffs' September **[**781]** 18, 2014, motion for the release of the grand jury minutes of the state criminal prosecution of defendant Dawn Nguyen.[1]

[**2] [***2]** This court hereby: (1) *denies in large part and grants only in limited part* Gander Mountain Company, Inc.'s dismissal motion; and, (2) *grants only in limited part* plaintiffs' motion for release of the grand jury minutes—all for the reasons set forth hereinafter.

[*868] Lawsuit Facts

Background Information[2]

On June 6, 2010, defendant Dawn Nguyen agreed to buy guns for decedent William Spengler—a convicted manslaughter felon. Nguyen and Spengler were **[***3]** present together at defendant Gander Mountain Company, Inc.'s (Gander) Henrietta store perusing long guns. When the pair was approached by a salesperson, Spengler, not Nguyen, refused any assistance. Nguyen ultimately bought two firearms—a Bushmaster semi-automatic rifle and a Mossberg 12 gauge shotgun—by paying $1,425.58 in cash, which was provided by Spengler. To finalize the sale, and with Spengler present, Nguyen completed certain required forms attesting that she was the true gun purchaser and intended end user. Nguyen did not buy any ammunition or make any other inquires about operation of the guns. Spengler took the guns off of the counter and left the store with them, and Nguyen never again possessed them.[3]

In the early morning hours of December 24, 2012, Spengler killed his sister, set his West Webster home on fire, and then used **[**782]** the same Bushmaster rifle Nguyen bought from Gander to shoot volunteer firefighters Michael Chiapperini, Tomasz Kaczowka, Joseph Hofstetter, and Theodore Scardino, who were all responding to a 911 dispatch. Tragically, Chiapperini and Kaczowka died and Hofstetter and Scardino were seriously injured. Spengler committed suicide before being apprehended.

On April 4, 2013, Nguyen was indicted in state court for falsifying business records in the first degree (*Penal Law § 175.10*). Nguyen was also charged federally. On April 15, **[*869]** 2014, Nguyen was convicted in state court after a jury trial.[4] Thereafter, and on June 26, 2014, Nguyen pleaded guilty in federal court to the whole indictment, namely: (1) making a false statement in relation to **[***5]** the acquisition of firearms (*18 USC § 922 [a] [6]*); (2) disposition of firearms to a convicted

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[1] At Special Term, this court already denied plaintiffs' September 17, 2014 cross motion to lift the automatic discovery stay. A separate decision and order, dated December 22, 2014, reflects that denial.

[2] Partly as alleged in the complaint and as accorded every favorable inference in plaintiffs' favor. (*See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152, 773 NE2d 496, 746 NYS2d 131 [2002]*; ***Younis v Martin, 60 AD3d 1373, 876 NYS2d 587 [4th Dept 2009]***.)

[3] Gander objects to this information as hearsay provided by plaintiffs in opposition to dismissal (Gander's reply mem of law at 2, 9). However, this information was first provided to this court by Gander in one of its own motion exhibits, namely Nguyen's plea colloquy transcript (Paulino attorney affirmation, exhibit E at 18). This fact was repeated again in plaintiffs' exhibit wherein, at Nguyen's sentencing, her defense counsel once more stated that Nguyen transferred the guns to Spengler **[***4]** right at Gander's sales counter (plaintiffs' mem of law, exhibit 3 at 8, 18-19). Because Gander first introduced this information, its reply objection is erroneous, especially as it is also contrary to its original request that this court "consider extrinsic matter" (Gander's mem of law at 6).

[4] Nguyen was sentenced on May 18, 2014, to 1⅓ to 4 years, and is currently in state prison.

felon (*18 USC § 922 [d] [1]*); and, (3) possession of firearms by an unlawful user (*18 USC § 922 [g] [3]*).[5] One of the theories of criminal liability in both cases was that Nguyen falsified the forms to deceive Gander as to the identity of the true end user, which fraudulent intent also included an intent to conceal a crime.[6]

Procedural History

The present action was commenced on May 20, 2014, and in general alleges that Gander unlawfully sold the guns to both Nguyen and Spengler as it knew, or should have known, it was an illegal straw purchase for an improper buyer given Spengler's involvement (Paulino **[***6]** attorney affirmation, exhibit A, ¶¶ 1, 3, 44, 55). More specifically, the complaint contains the following causes of action, which plaintiffs designated as "Counts":

1. Negligence against Gander;

2. Negligent entrustment against Gander;

3. Negligent entrustment against Nguyen;

4. Assault and battery against Spengler's estate;

5. Negligence per se against Gander;

6. Negligent training and supervision against Gander;

7. Public nuisance against Gander;

8. Loss of consortium against all defendants (Karen Scardino);

9. Wrong death of Chiapperini against all defendants;

10. Wrong death of Kaczowka against all defendants;

11. Survival action for Chiapperini against all defendants; and,

[*870] 12. Survival action for Kaczowka against all defendants. (Paulino attorney affirmation, exhibit A at 13-26.)

In the complaint's wherefore clause, plaintiffs ask for "an Order compelling Gander Mountain to reform its policies, procedure and training with regard to the sale of firearms, including taking steps necessary to prevent unlawful sales to straw purchasers." (Paulino attorney affirmation, exhibit A at 26.) Plaintiffs also seek **[**783]** compensatory and punitive damages, costs and disbursements, and attorneys' fees.

Gander was served via its registered agent with the pleadings **[***7]** on May 21, 2014.

The next day, Gander filed a notice of removal taking this case to the United States District Court for the Western District of New York on the basis that it involved a federal question. On June 11, 2014, Gander filed a motion to dismiss and/or strike in District Court. On June 12, 2014, plaintiffs cross-moved to remand the matter back to state court. Gander opposed the remand motion, inter alia, on the basis that a local state court judge would be biased in this highly publicized case, would act to garner support for re-election, and would misapply federal law (plaintiffs' mem of law, exhibit 1 at 3, 19; exhibit 2 at 18, 23-25, 29, 30, 32).[7] On July 28, 2014, the remand motion was argued before Judge David G. Larimer who granted it by way of an order dated August 5, 2014.[8]

Motion Contentions Summary

Gander's Dismissal Motion

Instead of answering, and relying upon *CPLR 3024* and *3211*, Gander moved to dismiss the case on the following grounds:

1. The entire complaint is barred by the federal

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[5] At the time that Gander's motion was filed, Nguyen had not yet been sentenced in federal court, but she was later sentenced on September 17, 2014, to eight years to run concurrently with the state sentence.

[6] The Monroe County District Attorney's Office alleged, and the jury was instructed that, Nguyen intended to conceal the crime of criminal purchase of a weapon (*Penal Law § 265.17*) and/or criminal possession of a weapon in the fourth degree (*Penal Law § 265.01*) (Paulino attorney affirmation, exhibit C at 1033-1036).

[7] In opposing a remand, Gander expressed concern about Fourth Department precedent condoning claims against gun sellers and rejecting the identical federal law preemption argument (plaintiffs' mem of law, exhibit 1 at 2, 27-30; exhibit 2 at 24). Also, Gander agreed that plaintiffs' artfully drafted their complaint to avoid federal preemption (plaintiffs' mem of law, exhibit 2 at 26). Plaintiffs accused Gander of forum/judge **[***8]** shopping (plaintiffs' mem of law, exhibit 2 at 25).

[8] Because of the remand, Judge Larimer did not decide the dismissal motion; however, he quickly referenced his belief that federal law did not preempt all of plaintiffs' claims (plaintiffs' mem of law, exhibit 2 at 34-35).

Protection of Lawful Commerce in Arms Act (PLCAA).

2. The claims for negligent entrustment and public nuisance failed to state viable causes of action.

[*871] 3. Plaintiffs' references in the complaint to "extra legal" standards promulgated by private parties should be stricken as prejudicial and unnecessary.

4. Plaintiffs' demand for a permanent injunction compelling Gander to reform its policies should be stricken.

In support of its motion, Gander submitted an affidavit from Kevin R. McKown, its senior director of regulatory and firearm compliance, in which he provided information about Gander's unified and nationwide firearms sale training program, as well as about the subject firearms (McKown aff ¶¶ 4, 7-8, 11, 13-16).

Plaintiffs **[***9]** strenuously opposed the dismissal motion on the following grounds:

1. Per binding Fourth Department precedent, *Williams v Beemiller, Inc. (100 AD3d 143, 952 NYS2d 333 [4th Dept 2012]* [hereinafter *Williams I*], *amended by 103 AD3d 1191, 962 NYS2d 834 [4th Dept 2013]* [hereinafter *Williams II*]), exceptions apply that remove this case from PLCAA's preemption.

2. Plaintiffs sufficiently alleged valid claims for negligent entrustment and public nuisance given Gander's direct dealings with Spengler. (*See also Williams II, 103 AD3d 1191, 962 NYS2d 834*.)

3. The protocols issued by the National Shooting Sports Foundation (NSSF), in **[****3]** conjunction with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), should not be stricken from the complaint because they are highly relevant in defining Gander's standard of care.

[784]** 4. Gander's vagueness challenge to the request for a permanent injunction is premature, and this court has the authority to issue injunctive relief that impacts actions outside of the state.

In its reply, Gander wholly failed to address the *Williams I* case in regard to its main PLCAA preemption argument.

Plaintiffs' Grand Jury Motion

Plaintiffs moved under *Criminal Procedure Law § 190.25 (4) (a)* and *Judiciary Law § 325* for release of the grand jury minutes of Nguyen's state criminal case—*People of the State of New York v Dawn M. Nguyen* (indictment No. 13/269). As it is believed that Gander employees testified before **[***10]** the grand jury, as well as other alleged material witnesses, plaintiffs contend that the minutes are essential to their civil action. Plaintiffs argue that there is no reason to keep this grand jury proceeding secret any longer.

[*872] The Monroe County District Attorney's Office opposed the motion by a letter dated October 9th, but no party interposed a response.

Legal Discussion

Gander's Dismissal Motion

Gander invokes only *CPLR 3211 (a) (7)* to dismiss the whole lawsuit, but that application falters. (*See e.g. Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414, 754 NE2d 184, 729 NYS2d 425 [2001]* [reversing granted *CPLR 3211 (a) (7)* motion as the complaint adequately alleged a claim]; *Matter of City of Syracuse v Comerford, 13 AD3d 1109, 1110, 787 NYS2d 788 [4th Dept 2004]* [same].)

HN1[↑] In determining a *CPLR 3211 (a) (7)* motion, the subject pleading is to be afforded a liberal construction. (*See CPLR 3026*; *Leon v Martinez, 84 NY2d 83, 87, 638 NE2d 511, 614 NYS2d 972 [1994]* [motion to dismiss should have been denied]; *190 Murray St. Assoc., LLC v City of Rochester, 19 AD3d 1116, 795 NYS2d 923 [4th Dept 2005]* [reversing order granting motion to dismiss].) Under this liberal construction, "[t]he facts pleaded are to be presumed to be true and are to be *accorded every favorable inference*" in a plaintiff's favor to see if they fit within any cognizable legal theory. (*Younis, 60 AD3d at 1373* [affirming denial of motion to dismiss] [emphasis added]; *see also 511 W. 232nd Owners Corp., 98 NY2d at 152* [the complaint was sufficient to survive a motion to dismiss].) Thus, the criterion is whether the plaintiff has a cause of action, not whether he or she properly stated **[***11]** one. (*See Guggenheimer v Ginzburg, 43 NY2d 268, 275, 372 NE2d 17, 401 NYS2d 182 [1977]* [reversing grant of motion to dismiss]; *Matter of Syracuse Indus. Dev. Agency v Gamage, 77 AD3d 1353, 1354, 908 NYS2d 503 [4th Dept 2010]* [affirming denial of dismissal motion].)

With the above lenient standard in mind, each of Gander's motion contentions will be addressed.

1. PLCAA Preemption

Gander is not entitled to a dismissal based upon the PLCAA. (*See e.g.* Williams I, 100 AD3d at 147 [Supreme Court erred in dismissing the complaint per the PLCAA].) As in *Williams I*, the PLCAA does not serve as a basis to dismiss the instant complaint.[9]

The PLCAA went into law on October 26, 2005. (*See* 15 USC § 7901.) ***HN2***[↑] Its purpose **[**785]** was to shield gun sellers from civil liability **[*873]** for "harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." (*See* 15 USC § 7901 [b] [1]; *see also* Ileto v Glock, Inc., 565 F3d 1126, 1129 [9th Cir 2009].) To achieve its purpose, the PLCAA forbids the commencement of any "qualified civil liability action" in federal or state court. (15 USC § 7902 [a]; *see also* City of New York v Beretta U.S.A. Corp., 524 F3d 384, 398 [2d Cir 2008].) A "qualified civil liability action" is defined as:

> "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade **[***12]** association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party" (15 USC § 7903 [5] [A]; *see also* 15 USC § 7903 [4] ["qualified product" is a firearm "that has been shipped or transported in interstate or foreign commerce"]; 15 USC § 7903 [6] ["seller" is a federally licensed dealer]; 15 USC § 7903 [9] ["unlawful misuse" is "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product"]).[10]

The case at hand falls squarely within the "qualified civil liability action" definition. However, six categories of actions are exempt, and the two exemptions relevant to this case are as follows:

> ***HN3***[↑] "(ii) an action brought against a seller for *negligent entrustment or negligence per se*;
>
> "(iii) an action in which a manufacturer or seller of a qualified product *knowingly violated a State or Federal statute* applicable to the sale or marketing **[*874]** of the product, and the violation was a *proximate cause* of the harm for which relief is sought, including . . .
>
> "(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or *aided, abetted, or conspired* with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> "(II) any case in which the manufacturer or seller *aided, abetted, or conspired* with any other person to sell or otherwise dispose of a qualified product, **[***14]** *knowing, or having* ***[****4]*** *reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing* or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18" (15 USC § 7903 [5] [A] [emphasis added]).

[1] As to the second exception for negligent entrustment or negligence per se, **[**786]** two exact claims plaintiffs allege in counts 2 and 5, Gander simply states that the "second exclusion speaks for itself," and then never again mentions the same (Gander mem of law at 10; *see also id.* at 18). This court construes this as an implied concession that counts 2 and 5 fall outside of the "qualified civil liability action" definition. Thus, and at this preliminary stage of litigation, those two claims are not preempted by the clear language of the statute. (*See* McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 94; Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 91, 761 NE2d 565, 735 NYS2d 873 [2001] [***HN4***[↑] "(w)here the language of a statute is clear and unambiguous, courts

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[9] This court thoroughly reviewed the appellate record for the *Williams* cases, which had analogous straw sale facts and similar legal allegations.

[10] It is not disputed that the Bushmaster rifle and the Mossberg shotgun are "qualified products," that Gander is a "seller," and that Spengler engaged in an "unlawful misuse" of those guns. (*See* Al-Salihi v Gander Mtn., Inc., 2013 US Dist LEXIS 134685, 2013 WL 5310214 [ND NY, Sept. 20, 2013, No. 3:11-CV-00384 (NAM/DEP)] [granting Gander's unopposed summary judgment motion per the PLCAA for an entirely legal sale when completed discovery showed no factual dispute as to whether it knew, or should have known, that the legal purchaser would eventually use the gun illegally].) The *Al-Salihi* case has material factual differences, and was in an entirely different procedural posture, namely discovery was completed and also it was not opposed by the plaintiff. Due to these key distinctions, *Al-Salihi* ***[***13]*** is distinguishable and thus does not compel a dismissal.

must give effect to its plain meaning"]; *see also* Herdzik v Chojnacki, 68 AD3d 1639, 1642, 892 NYS2d 724 [4th Dept 2009] [reinstating negligence per se claim].)

In light of the unambiguous language of the second exception, Gander is forced to focus on assailing the third exception in an attempt to knock out the remaining claims. ***HN5***[⬆] The third exception is referred to as the "predicate exception" because it requires that a plaintiff also allege **[***15]** "a knowing violation of a 'predicate statute,' i.e., a state or federal statute applicable to the sale or marketing of firearms." (*Williams I*, 100 AD3d at 148; *see also* Martin v Herzog, 228 NY 164, 168, 126 NE 814 [1920].)

[*875] In *Williams I*, the Fourth Department, in applying the liberal pleading standard, found that the plaintiffs sufficiently alleged knowing violations of federal and state law in order to have the first amended complaint fall under the PLCAA's predicate exception. (*See Williams I*, 100 AD3d at 148.) Based upon a review of the first amended complaint in *Williams*, those plaintiffs generically alleged violations of federal and state law without providing specific statutory provisions (*see Williams* appellate record at 112). Nevertheless, the Fourth Department disregarded the lack of citations and still found sufficient facts to make out a statutory violation of the federal Gun Control Act of 1968. (*Id.* at 149.) Unlike *Williams*, the plaintiffs here went a step further and cited specific federal gun laws Gander allegedly violated in support of its general negligence claim in count 1 and negligence per se claim in count 5 (Paulino attorney affirmation, exhibit A, ¶¶ 77, 79, 85, 94, citing 18 USC §§ 2, 371, 922 [a] [1] [A]; [6]; [d] [1]; [g] [1]; [m]; 924 [a] [1] [A]).[11]

Gander claims the cited federal statutes are either "unrelated" or "impossible" for it to have violated, or to have proximately caused Spengler's crimes. Without the benefit of discovery, this court is not convinced that it can be definitively stated that all of these federal laws do not apply, or were not related to Spengler's ambush. ***HN6***[⬆] Proximate cause is normally a question of fact for a jury (*see Williams I*, 100 AD3d at 152; *Williams II*, 103 AD3d at 1192; *Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 1277, 850 NYS2d 813 [4th Dept 2008]; *Hughes v Temple*, 187 AD2d 956, 590 NYS2d 636 [4th Dept 1992]), and the fact that plaintiff **[****5]** might ultimately fail on some alleged violations does not render the initial pleading defective. (*See* EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19, ***[**787]*** 832 NE2d 26, 799 NYS2d 170 [2005] [***HN7***[⬆] "(w)hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss"]; Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 318, 655 NE2d 661, 631 NYS2d 565 [1995]; Stukuls v State of New York, 42 NY2d 272, 275, 366 NE2d 829, 397 NYS2d 740 [1977].)

Additionally, and contrary to Gander's contention that 18 USC § 922 (m) cannot conceivably apply, ***HN8***[⬆] the Fourth Department found that the exact same alleged violation can occur **[*876]** when a seller knows, or has reason to believe, that the information entered on the ATF Form 4473 is false, including information *about the actual buyer*. (*See Williams I*, 100 AD3d at 149-150, citing 27 CFR 478.124; Shawano Gun & Loan, LLC v Hughes, 650 F3d 1070, 1073 [7th Cir 2011]; United States v Nelson, 221 F3d 1206, 1209 [11th Cir 2000]; *see* ***[***17]*** *also* Abramski v United States, 573 US ___, 134 S Ct 2259, 189 L Ed 2d 262 [2014].) The Fourth Department further found potential accomplice liability for a gun seller aiding and abetting a buyer's false statements. (*Williams I* at 150, citing 18 USC § 2 [a]; United States v Carney, 387 F3d 436, 445-446 [6th Cir 2004].) As in *Williams I*, plaintiffs here aver that Gander knew the sale was an illegal straw purchase to a person not legally authorized to possess a gun given certain red flags. (*See Williams I*, 100 AD3d at 150 [felon selected guns, which were paid for in cash, although the straw purchaser filled out the forms].) Given the Fourth Department's express allowance of an accomplice liability theory, Gander's taking offense to an alleged conspiracy is unavailing (Gander's mem of law at 3). Additionally, Gander's motion denial of any aid and assistance simply creates an issue of fact worthy of discovery (Gander's mem of law at 19; *see* Carney v Memorial Hosp. & Nursing Home of Greene County, 64 NY2d 770, 772, 475 NE2d 451, 485 NYS2d 984 [1985]; *Cinelli v Sager*, 13 AD2d 716, 213 NYS2d 487 [4th Dept 1961] [reversing grant of a dismissal as issues of fact existed]).

Furthermore, *Williams I* is also instructive in rejecting yet another of Gander's submissions, namely its piecemeal attack on each claim, particularly the negligent training and supervision claim (count 6) and the public nuisance claim (count 7). Consistent with plaintiffs' position that

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[11] Plaintiffs also allege violations of state laws, **[***16]** but without citation, a situation condoned by the Fourth Department. (*See Williams I*, 100 AD3d at 149.) Plaintiffs may rely upon a verified bill of particulars to further articulate the state law basis of their claims. (*See* CPLR 3041; *Williams I*, 100 AD3d at 149.)

as long as one PLCAA exception applies to one claim the entire action continues, the Fourth Department in **[***18]** *Williams I* declined to address another PLCAA exception to sustain the remaining claims. (*See Williams I, 100 AD3d at 151*.) Having found one applicable PLCAA exception, the Fourth Department allowed the entire case to go forward, including a public nuisance claim. (*See Williams II, 103 AD3d at 1191*.) Similar to *Williams*, this court finds two applicable PLCAA exceptions thereby permitting the entire complaint to proceed through litigation, without the need for a claim-by-claim PLCAA analysis.

Despite the obvious implication of *Williams I*, Gander continually ignored the case in the context of its PLCAA preemption argument written filings, although it appears per the federal court proceedings that *Williams I* was a motivating factor for **[*877]** keeping this case out of state court (plaintiffs' mem of law, exhibit 1 at 2, 27-30). Gander argued before Judge Larimer that *Williams I* was a "wholesale subversion" of federal law, and that a federal judge was needed in order to deviate from its holding (plaintiffs' mem of law, exhibit 2 at 24). Even if Gander disagrees with *Williams I*, it is up to the Fourth Department to reconsider the same on an appeal **[**788]** from this dismissal motion denial. In the meantime, *Williams I* is stare decisis on Gander's primary PLCAA preemption argument, **[***19]** and this court is obligated to follow the **[****6]** same. (*See Matter of Philadelphia Ins. Co. [Utica Natl. Ins. Group], 97 AD3d 1153, 1155, 948 NYS2d 501 [4th Dept 2012]*.)

Moreover, Gander's last-minute suggestion at Special Term that *Williams I* is inapplicable because it involved a different legal theory is incorrect. Just as here, the gun seller (defendant Brown) in *Williams I* also moved under *CPLR 3211 (a) (7)* to dismiss based upon a PLCAA preemption contention (*see Williams'* appellate record at 199; defendant Brown's appellate brief at 1; *Williams I, 100 AD3d at 146*). Although lack of personal jurisdiction was also an issue for defendant Brown in the *Williams I* case, it was not the sole basis for his motion as claimed by Gander at oral argument. Therefore, having failed to distinguish *Williams I* on legal grounds, Gander remains bound by its mandatory precedential authority.

Lastly, Gander's emphasis on Nguyen's convictions to relieve it of liability is misplaced (Gander mem of law at 3, 4, 19-20). First, Nguyen's state and federal convictions in no way negate Gander's independent civil liability given the completely different elements. Second, Gander's statement about never having been criminally charged in relation to the Nguyen sale does not foreclose civil liability, which involves a much lower standard of proof (Gander mem of law at 4). Third, **[***20]** Gander consistently misclassifies Nguyen's crimes as fraud, with it being the victim, which the state court jury found was defrauded (Gander mem of law at 4). Nguyen was not charged with fraud, and her convictions in no way exonerate Gander, or involved an express finding that it was fooled. In other words, Nguyen's criminal acts in no way relieve Gander of having taken steps to uncover the same as plaintiffs allege. In the *Williams* case, the straw purchaser (defendant Upshaw) was convicted of a misdemeanor, but the civil case against the seller still proceeded (*see Williams'* appellate record at 19, 73). Therefore, the criminal dispositions against Nguyen do not protect Gander and insulate it from civil litigation.

[*878] In sum, this court refuses to dismiss the complaint under the PLCAA. (*See Williams I, 100 AD3d at 147*.)

2. Negligent Entrustment and Public Nuisance

As an alternative to the PLCAA preemption argument, Gander seeks to dismiss the public nuisance (count 7) and negligent entrustment (count 2) claims as failing to state valid causes of action. This alternative assertion also falters.

As noted above, the public nuisance claim in *Williams II* was sustained in a case involving a sale of numerous handguns. (*See Williams II, 103 AD3d at 1191*.) Nevertheless, **[***21]** the sale in this case involved two assault-style weapons in an illegal sale that had disastrous direct consequences for plaintiffs above and beyond those suffered by the community at large. This is sufficient to sustain the public nuisance claim in count 7.

The Court of Appeals defined a public nuisance as:

> "*HN9*[] an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency . . . It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all . . . in a manner such as to offend public morals, **[**789]** interfere with use by the public of a public place or *endanger or injure the property, health, safety or comfort of a considerable number of persons*" (*Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568, 362 NE2d 968, 394 NYS2d 169 [1977]* **[****7]** [emphasis added]; *see also Williams II, 103*

AD3d at 1192).

HN10[] **[2]** To allow an individual to prosecute a public nuisance claim, he or she must show that they "suffered special injury beyond that suffered by the community at large." (532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 292, 750 NE2d 1097, 727 NYS2d 49 [2001]; *see also* Baity v General Elec. Co., 86 AD3d 948, 951, 927 NYS2d 492 [4th Dept 2011] [declining to dismiss public nuisance claim].) This court finds that plaintiffs alleged sufficient requisite special injury given the deaths of Mr. Chiapperini and Mr. Kaczowka, and the serious physical injury to Mr. Hofstetter **[***22]** and Mr. Scardino. (*See e.g.* Booth v Hanson Aggregates N.Y., Inc., 16 AD3d 1137, 1138, 791 NYS2d 766 [4th Dept 2005] [reinstating public nuisance claim due to proof of special injury to the plaintiffs]; *see also* Williams II, 103 AD3d at 1192.)

Despite these glaring special injury allegations, Gander seeks to escape liability for a public nuisance by claiming that it **[*879]** owed no specific duty to plaintiffs, citing Hamilton v Beretta U.S.A. Corp. (96 NY2d 222, 750 NE2d 1055, 727 NYS2d 7 [2001]), in which the Court of Appeals concluded that gun manufacturers did not owe a duty of reasonable care to persons injured by illegally obtained handguns. Based upon *Hamilton*, Gander asserts that it has no liability for Spengler's actions. In response, plaintiffs contend that *Hamilton's* holding does not compel a dismissal because there the plaintiff could not identify the actual gun manufacturer thus there was no direct link to Beretta. Juxtaposed to *Hamilton*, here it is uncontested that Gander sold the Bushmaster, and that it also had direct interactions with Spengler.[12] This exact same distinction was drawn in *Williams I* as the basis to distinguish and disregard *Hamilton*. (*See* Williams I, 100 AD3d at 151-152; *see also* City of New York v A-1 Jewelry & Pawn, Inc., 247 FRD 296, 348 [ED NY 2007] [permitting public nuisance claim to proceed against pawnbroker for illegal gun sales].) Accordingly, Gander's heavy reliance on Hamilton as legal authority supporting a dismissal is erroneous. **[***23]**

As to the negligent entrustment claim in count 2, the PLCAA defines that as:

> "HN11[] the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." (15 USC § 7903 [5] [B].)

New York's negligent entrustment cause of action provides:

> HN12[] "The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had *or should have* had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion . . . If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee" (**[**790]** Earsing v Nelson, 212 AD2d 66, 69-70, 629 NYS2d 563 [4th Dept 1995] [affirming denial of motion to dismiss negligent entrustment claim] [emphasis added]; *see also* Weeks v City of New York, 181 Misc 2d 39, 46, 693 NYS2d 797 [Sup Ct, Richmond County 1999] [declining to dismiss **[*880]** negligent entrustment claim]; Restatement [Second] of Torts § 390).

Gander challenges the negligent entrustment claim on the same basis as the public nuisance claim, namely that it cannot have limitless liability, again citing *Hamilton*. As *Hamilton* has been dispelled **[***24]** by *Williams I*, it does not serve as a basis to warrant dismissal of the negligent entrustment cause of action.

[3] Also, Gander submits that it cannot be strictly liable for Spengler's actions of which it had no special knowledge. This court disagrees. According to plaintiffs' allegations (*see* 511 W. 232nd Owners Corp., 98 NY2d at 152; *Younis, 60 AD3d at 1373*), Gander should have known of Spengler's criminality if it had taken the appropriate steps in light of the red flags. Those red flags include: Spengler's presence and his taking the initiative to refuse assistance; the cash payment for the weapons; Nguyen's failure to inquire about ammunition and proper operation; and, Spengler taking possession of the guns right at the sales counter and leaving with them.[13] These red flags could suggest that Spengler

[12] These direct contacts with Spengler also make Gander's case of People v Sturm, Ruger & Co. (309 AD2d 91, 761 NYS2d 192 [1st Dept 2003]) distinguishable.

[13] Gander assails the information that Spengler left the store with the guns, not Nguyen, to discount that it had special knowledge of Spengler's status. As stated before, Gander originally provided this information in conjunction with its request that this court consider extrinsic proof; therefore, it cannot now ask the court to ignore the exact same information

was not a lawful gun owner, and plaintiffs should be allowed to test this claim through discovery. (*See Earsing, 212 AD2d at 69-70*; *Splawnik v Di Caprio, 146 AD2d 333, 335-336, 540 NYS2d 615 [3d Dept 1989]* [refusing to dismiss negligent entrustment claim].) Gander's reply contention that these red flags are just as capable of an "innocuous interpretation as they are a criminal one" is unpersuasive to require dismissal at this very early stage of the litigation (Gander's reply mem of law at 10). As already acknowledged, a complaint's allegations must be " **[***25]** *accorded every favorable inference*" in a plaintiff's favor. (*Younis, 60 AD3d at 1373* [emphasis added]; *see also 511 W. 232nd Owners Corp., 98 NY2d at 152*.) Consequently, and at this preliminary pleading stage, plaintiffs are entitled to the criminal inference to permit its pleading to withstand a dismissal. (*See e.g. J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 21 NY3d 324, 338, 992 NE2d 1076, 970 NYS2d 733 [2013]* [setting aside granted *CPLR 3211* dismissal motion]; *Bergler v Bergler, 288 AD2d 880, 732 NYS2d 616 [4th Dept 2001]* [affirming denial of *CPLR 3211 (a) (7)* motion].)

[*881] In all, Gander cannot secure dismissal of the public nuisance and negligent entrustment claims. (*See Williams II, 103 AD3d at 1191*; *Earsing, 212 AD2d at 70*.)

3. Protocols

Gander is not entitled to have the NSSF protocols removed from the complaint. (*See e.g. Bristol Harbour Assoc. v Home Ins. Co., 244 AD2d 885, 886, 665 NYS2d 142 [4th Dept 1997]* [the lower court did not abuse its discretion in denying motion to strike allegation that the defendant violated the law in insurance policy dispute].) As in *Bristol,* striking of the NSSF protocols is not warranted.

[791]** The subject NSSF protocols are noted at paragraphs 64 and **[***26]** 65 of the complaint and discuss a program called "Don't Lie for the Other Guy," and which discuss additional steps a gun seller should take to combat improper sales.

HN13[↑] The CPLR provides that "[a] party may move to strike any scandalous or prejudicial matter *unnecessarily* inserted in a pleading." (*See CPLR 3024 [b]* [emphasis added].) " 'Unnecessarily' is the key word," and is akin to "irrelevant." (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3024:4; *see also New* ***[****8]*** *York City Health & Hosps. Corp. v St. Barnabas Community Health Plan, 22 AD3d 391, 802 NYS2d 363 [1st Dept 2005]* [modifying by denying motion to strike].) Motions to strike "are *not favored*, rest in the *sound discretion* of the court and will be denied unless it clearly appears that the allegations attacked have no possible bearing on the subject matter of the litigation." (*Vice v Kinnear, 15 AD2d 619, 619-620, 222 NYS2d 590 [3d Dept 1961]* [emphasis added]; *see also Hewitt v Maass, 41 Misc 2d 894, 897, 246 NYS2d 670 [Sup Ct, Suffolk County 1964]*.)

[4] Under the above standard, Gander's strike request cannot withstand judicial scrutiny. (*See e.g. Knibbs v Wagner, 14 AD2d 987, 222 NYS2d 469 [4th Dept 1961]* [sustaining denial of motion to strike evidentiary matters which were relevant and thus not prejudicial].) Gander objects to the NSSF reference because they are not yet proven industry standards, and thus are not yet relevant to its standard of care, citing *Wegman v Dairylea Coop. (50 AD2d 108, 111, 376 NYS2d 728 [4th Dept 1975])*.[14] This court agrees with plaintiffs that *Wegman*, which predates *Bristol Harbour Assoc.,* ***[***27]*** ***[*882]*** *L.P.*, is distinguishable and does not mandate the granting of Gander's application. More specifically, the Fourth Department struck allegations about violations of statutes and regulations governing milk production as they had no bearing upon the breach of contract action. Unlike *Wegman*, the NSSF protocols are relevant to Gander's standard of care which is a necessary component to the general negligence claim, among other things.[15] (*See generally Miner v Long Is. Light.*

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when it hurts it (Paulino attorney affirmation, exhibit E at 18).

[14] Gander also cites *Guiliana v Chiropractic Inst. of N.Y. (45 Misc 2d 429, 430, 256 NYS2d 967 [Sup Ct, Kings County 1965])*, in which the motion to strike was granted. However, and as plaintiffs point out, *Guiliana* has been criticized. (*See* Siegel, NY Prac § 230 [5th ed 2011] [not everything beyond the essential elements of a claim need to be stricken].) Also, the *Bristol Harbour Assoc., L.P.* case, which refused to strike information, was decided after *Guiliana* and is binding precedent.

[15] In addition, Gander's president and CEO, Mike Owens, is a member of NSSF, and the NSSF protocols **[***28]** were part of a press release issued by the Brady Center in regard to this case and thus are already part of the public knowledge (Gander's mem of law at 30; *see e.g.* ***Gibson v Campbell, 16 Misc 3d 1123[A], 847 NYS2d 901, 2007 NY Slip Op 51549[U] [Sup Ct, NY County 2007]*** [refusing to strike information reported widely in the media]). Further proof of the propriety of the protocols allegations remaining in the present

Co., 40 NY2d 372, 381, 353 NE2d 805, 386 NYS2d 842 [1976] [compliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof].) Accordingly, *Wegman* is not controlling, and the more recent case of Bristol Harbour Assoc., L.P. should be followed instead to permit the allegations to stand.

In sum, Gander's request to strike is denied. (*See e.g.* Rice v St. Luke's-Roosevelt Hosp. Ctr., 293 AD2d 258, 259, **[**792]** 739 NYS2d 384 [1st Dept 2002] [ruling that allegations were not so scandalous or prejudicial to warrant being stricken per CPLR 3024 (b)].)

4. Permanent Injunction

Gander's final application is to remove the stand-alone permanent injunction request because it is vague, beyond this court's jurisdiction, and lacking the requisite elements for such a claim. Only the last contention justifies striking, *without prejudice*, the prayer for permanent injunctive relief. (*See e.g.* DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp., 120 AD3d 909, 991 NYS2d 199 [4th Dept 2014] [vacating order granting injunctive relief].)

There is no separate cause of action for a permanent injunction thereby making the request at complaint paragraph 5 and in the wherefore clause an apparent orphan **[****9]** (Paulino attorney affirmation, exhibit A at 13-26). At Special Term, plaintiffs clarified that the injunctive **[***29]** relief was tied just to their public nuisance claim in count 7. (*See generally* Town of Amherst v Niagara Frontier Port Auth., 19 AD2d 107, 114, 241 NYS2d 247 [4th Dept 1963] **[*883]** [the plaintiff sought a permanent injunction in connection with public nuisance claim].) In general, permanent injunctive relief is appropriate in certain public nuisance scenarios, but not the one presently pleaded before this court.

HN14[↑] An application for a permanent injunction is an equitable request that is appropriate only upon a showing of threatened irreparable injury, the lack of an adequate remedy at law, and a balancing of equities in the movant's favor. (*See* Kane v Walsh, 295 NY 198, 205-206, 66 NE2d 53 [1946]; Matter of Shanor Elec. Supply, Inc. v FAC Cont., LLC, 73 AD3d 1445, 1447, 905 NYS2d 383 [4th Dept 2010]; Grogan v Saint Bonaventure Univ., 91 AD2d 855, 856, 458 NYS2d 410 [4th Dept 1982].) The Fourth Department has decreed that

> **HN15**[↑] "[a] permanent injunction 'is an *extraordinary remedy* to be granted or withheld by a court of equity in the exercise of its discretion. . . . Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers. Indeed, "[e]quity . . . interferes in the transactions of [persons] by preventive measures *only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong*" ' " (DiMarzo v Fast Trak Structures, 298 AD2d 909, 910-911, 747 NYS2d 637 [4th Dept 2002] [emphasis added and citation omitted] [vacating permanent injunction]).

[5] In this case, plaintiffs allege that Gander's conduct, which forms the basis of the **[***30]** public nuisance claim, is continuing (Paulino attorney affirmation, exhibit A, ¶ 131). However, wholly absent from the public nuisance claim is any allegation that this continuing conduct poses a future irreparable injury to plaintiffs specifically, as opposed to the public in general (Paulino attorney affirmation, exhibit A, ¶¶ 128-138). Additionally missing is any allegation that plaintiffs' other claims, which seek both monetary and punitive damages, will not fully compensate them for their past extraordinary harm. In fact, plaintiffs even concede that the other actions will provide relief, but claim that this eventuality is irrelevant (plaintiffs' mem of law at 29). This is not a correct statement of the law, and it actually undercuts plaintiffs' application for a permanent injunction. Finally, plaintiffs do not at all address a balancing of equities in their favor.

In all, and based upon the current complaint, this court strikes only the request for a permanent injunction.

[*884] **[**793]** In conclusion of the dismissal motion, Gander must answer all of plaintiffs' substantive claims, and the only portion of the complaint which is stricken is the permanent injunction application.

Plaintiffs' Grand Jury Motion

Plaintiffs are likely **[***31]** entitled to only a very small portion of the grand jury minutes for the state prosecution of defendant Nguyen. (*See e.g.* Matter of Dunlap v District Attorney of Ontario County, 296 AD2d 856, 745 NYS2d 364 [4th Dept 2002] [County Court did not abuse its discretion in denying the petitioner's motion for disclosure of grand jury testimony]; *SSAC, Inc. v Infitec, Inc., 198 AD2d 903, 604 NYS2d 452 [4th*

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complaint is that they were also included in the *Williams*' first amended complaint (*see Williams*' appellate record at 93).

Dept 1993] [sustaining release of grand jury minutes].)

The CPL governs grand jury minutes, and it provides in relevant part that

> ***HN16***[↑] "[g]rand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or *section 215.70 of the penal law*, may, except in the lawful discharge of his duties *or upon written order of the court*, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. . . . Such evidence may not be disclosed to other persons *without a court order*" (*CPL 190.25 [4] [a]* [emphasis added]; *see also Judiciary Law § 325*; *Matter of District Attorney of Suffolk County, 58 NY2d 436, 444, 448 NE2d 440, 461 NYS2d 773 [1983]*).

HN17[↑] A court has the limited discretion to order disclosure of grand jury minutes as part of discovery in a civil case. (*See Matter of Lungen v Kane, 88 NY2d 861, 862, 666 NE2d 1360, 644 NYS2d 487 [1996]*.) However, and as the Court of Appeals articulated:

> "disclosure may be directed when, after a balancing of a public interest in disclosure against the one favoring secrecy, the former outweighs the latter . . . But since disclosure is 'the exception rather **[***32]** than the rule', one seeking disclosure first must demonstrate *a compelling and particularized need for access* . . . However, just any demonstration will not suffice. For it and the countervailing policy ground it reflects must be strong enough to overcome the presumption of confidentiality. In short, without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no **[*885]** policies to balance." (*Matter of District Attorney of Suffolk County, 58 NY2d at 444* [emphasis added and citations omitted]; *see also People v Fetcho, 91 NY2d 765, 769, 698 NE2d 935, 676 NYS2d 106 [1998]*; *People v Douglas, 288 AD2d 859, 732 NYS2d 781 [4th Dept 2001]*.)

As the Fourth Department has decreed:

> ***HN18***[↑] "At the opposite pole [from cases allowing access to vindicate public rights] are cases in which purely private civil litigants have sought inspection of Grand Jury minutes for the purpose of preparing suits. Although courts have recognized a *limited right* in civil litigants to use a trial witness' Grand Jury testimony to impeach, to refresh recollection or to lead a hostile witness . . . *wholesale* disclosure of Grand Jury testimony for purposes of trial preparation has been almost uniformly denied to private litigants" (*Matter of City of Buffalo [Cosgrove], 57 AD2d 47, 50, 394 NYS2d 919 [4th Dept 1977]* [emphasis added]; *see also Matter of Loria, 98 AD2d 989, 470 NYS2d 233 [4th Dept 1983]*).

[794]** In making the discretionary balancing, a court is to consider:

> "(1) prevention of flight by a **[***33]** defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely." (*People v Di Napoli, 27 NY2d 229, 235, 265 NE2d 449, 316 NYS2d 622 [1970]*; *see also Matter of Corporation Counsel of City of Buffalo [Cosgrove], 61 AD2d 32, 35-36, 401 NYS2d 339 [4th Dept 1978]*.)

[6] In the case at bar, plaintiffs have not demonstrated the requisite compelling and particularized need for the **[****10]** entire set of grand jury minutes. (*See e.g. Matter of Carey [Fischer], 68 AD2d 220, 230, 416 NYS2d 904 [4th Dept 1979]* [lower court did not abuse its discretion in denying application to release grand jury evidence].) Plaintiffs seek all of the minutes on the basis that material witnesses appeared before the grand jury, and the minutes can be used on cross-examination and for impeachment of those witnesses. This generic claim concerning unidentified people is insufficient to warrant wholesale **[*886]** disclosure of the entire grand jury presentation. (*See Matter of U.S. Air, 97 AD2d 961, 962, 469 NYS2d 39 [4th Dept 1983]*.) Even plaintiffs' own case law **[***34]** recognizes this. (O'Brien attorney affirmation ¶ 7, citing *Matter of Nelson v Mollen, 175 AD2d 518, 520, 573 NYS2d 99 [3d Dept 1991]*.)

However, plaintiffs articulated a compelling and particularized need for some of the grand jury minutes related to the Gander representatives. (*See e.g. Jones v State of New York, 79 AD2d 273, 277, 436 NYS2d 489*

[4th Dept 1981] [allowing release of grand jury minutes in a wrongful death case].) As shown by all of the motions papers, and as acknowledged at Special Term, plaintiffs have the ability to access the public trial transcript for Nguyen's state prosecution. Thus, there is no need to disturb the grand jury process for those Gander witnesses, or any other witness. Despite this, and as represented at Special Term, plaintiffs understand that one Gander employee testified at grand jury but was not called at the time of trial. Therefore, it appears that only the grand jury minutes exist for this Gander employee, but this information has yet to be confirmed with the Monroe County District Attorney's Office, which did not appear at oral argument. Consequently, this court's limited release ruling is contingent upon confirmation of plaintiffs' position. *This court asks that the Monroe County District Attorney's Office confirm in a letter to this court, and all of the parties, whether any grand jury minutes exist* ***[***35]*** *for a Gander employee who did not ultimately testify at trial*. If this is confirmed to be accurate, and in light of plaintiffs' serious accusations against Gander, and after the careful consideration of the factors enunciated in Di Napoli, this court directs the Monroe County District Attorney's Office to provide just those select minutes within 30 days to the court for an in camera review before further release to the litigants. (*See* People v Gissendanner, 48 NY2d 543, 551, 399 NE2d 924, 423 NYS2d 893 [1979].)

In sum, and subject to the above confirmation, plaintiffs' motion is approved as to only grand jury testimony from any Gander representative who did not also testify at trial. (*See* Matter of Quinn [Guion], 293 NY 787, 788, ***[**795]*** 58 NE2d 730 [1944] [town residents were entitled to grand jury minutes]; Matter of Scotti, 53 AD2d 282, 288, 385 NYS2d 659 [4th Dept 1976] [approving release of grand jury minutes].)

Conclusion

Based upon all of the foregoing, it is the decision and order of this court that:

[*887] 1. Gander's dismissal motion is *denied* as to the PLCAA preemption contention and the failure to state valid claims as to the public nuisance and negligent entrustment causes of action. The application to strike the NSSF protocols from the complaint is also *denied*. However, Gander's request to strike the permanent injunction relief is *granted*, *but without prejudice*. Accordingly, Gander is directed **[***36]** to answer the complaint within *10 days* after service of notice of entry of this decision and order. (*See* CPLR 3211 [f].)

2. Plaintiffs' motion for release of the grand jury minutes is *denied*, with the exception of the minutes of any testimony from a Gander witness who did not later testify at Nguyen's trial. After confirmation, the court will conduct an in camera review.

In furtherance of this court's discretion to oversee its cases, it is *ordered* the **[****11]** following scheduling order dates apply: discovery is to be completed by *December 31, 2015*; the note of issue is due by *January 15, 2016*; and, any summary judgment motions are due within 60 days after the note of issue filing. (*See* CPLR 3212 [a].)

Failure of the plaintiffs to file a note of issue and certificate of readiness by the date provided herein will result in this matter being deemed stricken "off" the court's calendar without further notice pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27. If so dismissed, the case may be restored without motion within one year of such dismissal by: (1) the filing of a note of issue and certificate of readiness; and, (2) the forwarding of a copy thereof with a letter requesting restoration to the court's assignment clerk. Also, restoration after one year shall, **[***37]** before the filing of a note of issue and certificate of readiness, require the additional documentation of a sworn affidavit by a person with knowledge showing a reasonable excuse for the delay, a meritorious cause of action, a lack of prejudice to the defendant, and the absence of intent to abandon the case. *This court shall at anytime after the date listed above, entertain a defense motion to dismiss for want of prosecution which relief could include a dismissal of the complaint. This order shall serve as valid 90-day demand under* CPLR 3216; and it is further ordered, that any extensions of the above deadlines will be granted only upon the showing of extreme good cause requested and approved prior to the above note of issue filing date.

EXHIBIT 5

27 C.F.R. 179.11: MEANING OF TERMS

The SM10 and SM11A1 pistols and SAC carbines are machineguns as defined in the National Firearms Act.

ATF Rul. 82-8

[Status of ruling: Active]

The Bureau of Alcohol, Tobacco and Firearms has reexamined firearms identified as SM10 pistols, SM11A1 pistols, and SAC carbines. The SM10 is a 9 millimeter or .45ACP caliber, semiautomatic firearm; the SM11A1 is a .380ACP caliber, semiautomatic firearm; and the SAC carbine is a 9 millimeter or .45ACP caliber, semiautomatic firearm. The weapons are blowback operated, fire from the open bolt position with the bolt incorporating a fixed firing pin, and the barrels of the pistols are threaded to accept a silencer. In addition, component parts of the weapons are a disconnector and a trip which prevent more than one shot being fired with a single function of the trigger.

The disconnector and trip are designed in the SM10 and SM11A1 pistols and in the SAC carbine (firearms) in such a way that a simple modification to them, such as cutting, filing, or grinding, allows the firearms to operate automatically. Thus, this simple modification to the disconnector or trip, together with the configuration of the above design features (blowback operating, firing from the open bolt position, and fixed firing pin) in the SM10 and SM11A1 pistols and in the SAC carbine, permits the firearms to shoot automatically, more than one shot, without manual reloading, by a single function of the trigger. The above combination of design features as employed in the SM10 and SM11A1 pistols and SAC carbine are normally not found in typical sporting firearms.

The National Firearms Act, 26 U.S.C. § 5845(b), defines a machinegun to include any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

The "shoots automatically" definition covers weapons that will function automatically. The "readily restorable" definition defines weapons which previously could shoot automatically but will not in their present condition. The "designed" definition includes those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by a simple modification or elimination of existing component parts.

Held: The SM10 and SM11A1 pistols and the SAC carbine are designed to shoot automatically more than one shot, without manual reloading, by a single function of the trigger. Consequently, the SM10 and SM11A1 pistols and SAC carbines are machineguns as defined in Section 5845(b) of the Act.

With respect to the machinegun classification of the SM10 and SM11A1 pistols and SAC carbines, under the National Firearms Act, pursuant to 26 U.S.C. § 7805(b), this ruling will not be applied to SM10 and SM11A1 pistols and SAC carbines manufactured or assembled before

June 21, 1982. Accordingly, SM10 and SM11A1 pistols and SAC carbines, manufactured or assembled on or after June 21, 1982, will be subject to all the provisions of the National Firearms Act and 27 C.F.R. Part 179.

EXHIBIT 6

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Parts 447, 478, and 479

[Docket No. ATF 2021R–05; AG Order No. 5051–2021]

RIN 1140–AA54

Definition of ''Frame or Receiver'' and Identification of Firearms

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Department of Justice (''Department'') proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') regulations to provide new regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' because the current regulations fail to capture the full meaning of those terms. The Department also proposes amending ATF's definitions of ''firearm'' and ''gunsmith'' to clarify the meaning of those terms, and to provide definitions of terms such as ''complete weapon,'' ''complete muffler or silencer device,'' ''privately made firearm,'' and ''readily'' for purposes of clarity given advancements in firearms technology. Further, the Department proposes amendments to ATF's regulations on marking and recordkeeping that are necessary to implement these new or amended definitions.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before August 19, 2021. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number ATF 2021R–05, by any of the following methods—

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; *ATTN: ATF 2021R–05.*
- *Fax:* (202) 648–9741.

Instructions: All submissions received must include the agency name and docket number (ATF 2021R–05) for this notice of proposed rulemaking (''NPRM'' or ''proposed rule''). All properly completed comments received will be posted without change to the Federal eRulemaking portal, *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andrew Lange, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Ave. NE, Mail Stop 6N–518, Washington, DC 20226; telephone: (202) 648–7070 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the Gun Control Act of 1968 (''GCA''), as amended, and the National Firearms Act of 1934 (''NFA''), as amended.[1] This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See* 28 U.S.C. 599A(b)(1); 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing the GCA and NFA. *See* 27 CFR parts 478, 479.

Prior to passage of the GCA, the Federal Firearms Act of 1938 (''FFA'') regulated all firearm parts. The FFA and implementing regulations defined the term ''firearm'' to mean ''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.*'' Public Law 75–785, 52 Stat. 1250 (1938); 26 CFR 177.10 (repealed) (emphasis added). The Omnibus Crime Control and Safe Streets Act of 1968 repealed the FFA, replacing it with the GCA. Public Law 90–351, section 907, 82 Stat. 197 (1968). During debate on the GCA and related bills introduced to address firearms trafficking, Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that ''[t]he present definition of this term includes 'any part or parts' of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words 'frame or receiver' for the words 'any part or parts.' '' *See* 111 Cong. Rec. 5527 (March 22, 1965).[2]

A ''firearm'' is defined by 18 U.S.C. 921(a)(3) to include not only a weapon that will, is designed to, or may readily be converted to expel a projectile, but also the ''frame or receiver'' of any such weapon. Because ''frames'' or ''receivers'' are included in the definition of ''firearm,'' any person who engages in the business of manufacturing, importing, or dealing in frames or receivers must obtain a license from ATF. 18 U.S.C. 922(a)(1)(A); *id.* at 923(a). Each licensed manufacturer or importer must ''identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.'' [3] 18 U.S.C. 923(i); *see* 27 CFR 478.92, 479.102. Licensed manufacturers and importers must also maintain permanent records of production or importation, as well as their receipt, sale, or other disposition of firearms, including frames or receivers. 18 U.S.C. 923(g)(1)(A); 27 CFR 478.122, 478.123.

A ''frame or receiver'' is the primary structural component of a firearm to which fire control components are attached.[4] While the GCA does not

[1] NFA provisions still refer to the ''Secretary of the Treasury.'' 26 U.S.C. ch. 53. However, the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002), transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). Thus, for ease of reference, this notice of proposed rulemaking refers to the Attorney General throughout.

[2] *See also* H.R. Rep. 90–1577, at 4416 (June 21, 1968) (''Under former definitions of 'firearm,' any part or parts of such a weapon were included. It was found impractical to have controls over each small part of a firearm. Thus, this definition includes only the major parts of the firearm, that is, the frame or receiver.''); S. Rep. No. 90–1097, at 2200 (April 29, 1968) (same).

[3] Additionally, a firearm frame or receiver that is not a component part of a complete weapon at the time it is sold, shipped, or disposed of must be identified in the manner prescribed with a serial number and all of the other required markings. 27 CFR 478.92(a)(2); *id.* at 479.102(e); ATF Ruling 2012–1.

[4] *See* Webster's Third New International Dictionary, pp. 902, 1894 (1971) (a ''frame'' is ''the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm''; ''receiver'' means ''the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached''); *Olson's Encyclopedia of Small Arms,* p.72 (1985) (the term

define the term ''frame or receiver,'' to implement the statute, the terms ''firearm frame or receiver'' and ''frame or receiver'' were defined in regulations several decades ago as that part of a firearm that 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 CFR 478.11 (implementing GCA, Title I); 27 CFR 479.11 [5] (implementing GCA, Title II). The 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.

At the time these definitions were published around 50 years ago, single-framed firearms such as revolvers and break-open shotguns were far more prevalent for civilian use than split/multi-piece receiver weapons, such as semiautomatic rifles and pistols with detachable magazines. Single-framed firearms incorporate the hammer, bolt or breechblock, and firing mechanism within the same housing. Years after these definitions were published, split/multi-piece receiver firearms, such as the AR–15 semiautomatic rifle (upper receiver and lower receiver), Glock semiautomatic pistols (upper slide assembly and lower grip module), and Sig Sauer P320 (M17/18 as adopted by the U.S. military) (upper slide assembly, chassis, and lower grip module), became popular.[6] Additionally, more firearm manufacturers began incorporating a striker-fired mechanism rather than a ''hammer'' in the firing design. With the rise in popularity of striker-fired Glock semiautomatic pistols in the mid-1980s, other manufacturers began incorporating a striker-fired mechanism, rather than a hammer, in semiautomatic handguns.[7]

A. ATF's Application of the Definitions To Split Frames or Receivers

Although ATF's regulatory definitions of ''frame or receiver'' do not expressly capture these types of firearms (*i.e.,* split/multi-piece receivers) that now constitute the majority of firearms in the United States,[8] ATF's position has long been that the weapon ''should be examined with a view toward determining if [either] the upper or lower half of the receiver more nearly fits the legal definition of 'receiver,' '' and more specifically, for machineguns, whether the upper or lower portion has the ability to accept machinegun parts.[9] [10]

Since it began issuing firearm classifications under the GCA and NFA in private letter rulings and for criminal investigations, ATF has considered a variety of factors when examining firearms, including: (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.

Even though neither the upper nor the lower portion of a split/multi-piece receiver firearm alone falls within the precise wording of the regulatory definition, ATF has for many years interpreted the regulatory definition using these factors as a guide in determining which portion of a weapon model is a firearm frame or receiver. Indeed, the current definitions were never intended to be, or understood to be, exhaustive; at the time the current definitions were adopted there were numerous models of firearms that did not contain a part that fully met the regulatory definition of ''frame or receiver,'' such as the Colt 1911, FN–FAL, and the AR–15/M–16, all of which were originally manufactured almost exclusively for military use, and ATF has long applied these factors in determining which component of those weapons qualifies as the frame or receiver.[11]

Existing law recognizes that the definition of ''frame or receiver'' need not be limited to a strict application of the regulation. The prefatory paragraph to the definitional section of 27 CFR 478.11 (Meaning of Terms) states: ''[w]hen used in this part and in forms

''frame'' means ''the basic structure and principal component of a firearm''); *Steindler's New Firearms Dictionary* p. 209 (1985) (''receiver'' means ''that part of a rifle or shotgun (excepting hinged frame guns) that houses the bolt, firing pin, mainspring, trigger group, and magazine or ammunition feed system. The barrel is threaded into the somewhat enlarged forward part of the receiver, called the receiver ring. At the rear of the receiver, the butt or stock is fastened. In semiautomatic pistols, the frame or housing is sometimes referred to as the receiver.'').

[5] The definition of ''frame or receiver'' in § 479.11 differs slightly from the definition in § 478.11 in that it omits an Oxford comma between ''bolt or breechblock'' and ''firing mechanism.''

[6] *See Once Banned, Now Loved and Loathed: How the AR–15 Became 'America's Rifle',* New York Times (Mar. 3, 2018), *https://www.nytimes.com/2018/03/03/us/politics/ar-15-americas-rifle.html* (Once the patent expired in 1977, ''it opened the way for dozens of weapons manufacturers to produce their own models, using the same technology. The term AR–15 has become a catchall that includes a variety of weapons that look and operate similarly''); Paul M. Barrett, *Glock: The Rise of America's Gun* 21–23 (2013) (''Today the Glock is on the hip of more American police officers than any other handgun.''); *A Star Is Born—U.S. Army Chooses Sig Sauer P320 For Its New Service Pistol, Forbes.com* (Jan. 20, 2017) *https://www.forbes.com/sites/frankminiter/2017/01/20/a-star-is-born-u-s-army-chooses-sig-sauer-p320-for-its-new-service-pistol/.* While millions of AR–15s/M–16s existed at the time ATF promulgated the definitions, they were manufactured almost exclusively for military use. *See* Internal Colt Memorandum from B. Northrop, Feb. 2, 1973, p.2 (noting that there were 2,752,812 military versus 25,774 civilian (''Sporters'') serialization of AR–15/M–16 rifles then manufactured).

[7] *A Matter of Purpose: Striker Fire vs. Hammer Fire,* Small Arms Defense Journal (June 8, 2018), *http://www.sadefensejournal.com/wp/a-matter-of-purpose-striker-fire-vs-hammer-fire/* (''Even though Glock wasn't the first to use striker fire on pistols, Glock can be credited for making the striker fire popular in the 1980s when they started using striker fire in their entire line of pistols. As Glock became popular, other manufacturers started using striker fire as well, proliferating it across the firearms manufacturing community on a grand scale.'').

[8] *United States* v. *Rowold,* 429 F. Supp. 3d 469 (N.D. Ohio 2019), Testimony of ATF Firearms Enforcement Officer Daniel Hoffman at Doc. No. 60, Hrg. Tr., Page ID 557 (approximately 10% of currently manufactured firearms in the United States include the three components in the frame or receiver definition); and Defense Expert Daniel O'Kelly at Doc. No. 60, Hrg. Tr. Page ID 482 (''90 some percent of [semiautomatic pistols] do not have a part which has more than one of these four elements in it and, therefore, don't qualify, according to the definition in the CFR.'').

[9] ATF Internal Revenue Service Memoranda #21208 (Mar. 1, 1971) (lower portion of the M–16 is the frame or receiver because it comes closest to meeting the definition of frame or receiver in 26 CFR 178.11 (now 27 CFR 478.11), and is the receiver of a machinegun as defined in the NFA); ATF Memorandum #22334 (Jan. 24, 1977) (upper half of the FN FAL rifle is the frame or receiver because it was designed to accept the components that allow fully automatic fire). The ability to accept machinegun parts is considered because both the GCA and the NFA regulate machinegun receivers as ''machineguns.'' *See* 18 U.S.C. 921(a)(23); 26 U.S.C. 5845(b) (''The term [''machinegun''] shall also include the frame or receiver of any such weapon [which shoots is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger].'').

[10] Regulations implementing the relevant statutes spell the term ''machine gun'' rather than ''machinegun.'' *E.g.,* 27 CFR 478.11, 479.11. For convenience, this notice of proposed rulemaking uses ''machinegun'' except when quoting a source to the contrary.

[11] *See* footnote 9 *supra.*

prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.'' [12] 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. *See* 111 Cong. Rec. 5527 (March 22, 1965). As stated above, Congress replaced the term ''part or parts'' in the FFA definition of ''firearm'' with ''frame or receiver,'' the major parts of a weapon regulated under the GCA. This includes marking these parts with serial numbers for tracing purposes, recording these parts as ''firearms'' in required records, and running a National Instant Criminal Background Check System (''NICS'') background check when individuals purchase or acquire them.

In the past few years, however, some courts have treated the regulatory definition as exhaustive when applied to the lower portion of the AR–15-type rifle, which is the semiautomatic version of the M–16-type machinegun originally designed for the U.S. military. While ATF for decades has classified the lower receiver of the AR–15 rifle as a ''frame or receiver,'' courts recently have read the regulatory definition to mean that the lower portion of the AR–15 is not a ''frame or receiver'' because it only provides housing for the hammer and firing mechanism, but not the bolt or breechblock. *See United States* v. *Rowold,* 429 F. Supp. 3d 469, 475–77 (N.D. Ohio 2019) (''The language of the regulatory definition in § 478.11 lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit that holds three, not two components: 1) the hammer, 2) the bolt or breechblock, and 3) the firing mechanism.''); *United States* v. *Jimenez,* 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016) (''[A] receiver must have the housing for three elements: hammer, bolt or breechblock, and firing mechanism.''); *United States* v. *Joseph Roh,* SACR 14–167–JV, Minute Order p. 6 (C.D. Cal. July 27, 2020) (granting defendant's post-trial motion for acquittal for manufacturing AR–15 lower receivers without a license because ''[n]o reasonable person would understand that a part constitutes a receiver where it lacks the components specified in regulation'').

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.[13] Those firearms would include numerous widely available models, such as Glock-type and Sig Sauer P320 [14] 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.[15] 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, *see* 18 U.S.C. 923(i), and regulated as a firearm, *see* 18 U.S.C. 921(a)(3)(B).[16]

B. Privately Made Firearms or ''Ghost Guns''

Technological advances have also made it easier for unlicensed persons to make firearms at home from standalone parts or weapon parts kits, or by using 3D printers or personally owned or leased equipment, without any records or a background check. Commonly referred to as ''ghost guns,'' these privately made firearms (''PMFs''), when made for personal use, are not required by the GCA to have a serial number placed on the frame or receiver, making it difficult for law enforcement to determine where, by whom, or when they were manufactured, and to whom they were sold or otherwise disposed.

In recent years, the number of PMFs recovered from crime scenes throughout the country has increased.[17] From January 1, 2016, through December 31, 2020, there were approximately 23,906 suspected PMFs reported to ATF as having been recovered by law enforcement from potential crime scenes, including 325 homicides or attempted homicides, and that were attempted to be traced by ATF, broken down by year as follows: [18]

[12] ATF's predecessor agency, the Alcohol, Tobacco and Firearms Division within the Internal Revenue Service, derived this limitation on the application of definitions from the Internal Revenue Code (''IRC''), 26 U.S.C. 7701(a). Courts interpreting definitions in the IRC have not strictly applied those definitions where they would be manifestly incompatible with the intent of the applicable statute. *See, e.g., Pierre* v. *Commissioner,* 133 T.C. 24, 35 (2009) (even though a Limited Liability Company was not among any of the named entities defined in section 7701, it would be manifestly incompatible with the Federal estate and gift tax statutes to exclude them); *Bunnel* v. *Commissioner,* 50 T.C. 837, 841 (1968) (literal application of the definition of ''taxpayer'' in section 7701(a)(14) was avoided where it was manifestly incompatible with the intent of other sections of the IRC); *Davis* v. *Commissioner,* 30 T.C. 462, 466–67 (1958) (strict geographical application of the term ''United States'' in 26 U.S.C. 3797(a)(9) (now 7701(a)(9)) to the territory of American Samoa, rather than in a political sense, would be manifestly incompatible with the intent and purpose of the income tax exemption for persons earning income outside the United States).

[13] *See* footnote 8, *supra.*

[14] The United States military services have adopted variants of the Sig Sauer P320 as their official side arm, and are in the process of purchasing up to 500,000 of these striker-fired pistols. *Army Picks Sig Sauer's P320 Handgun to Replace M9 Service Pistol, Military.com* (Jan. 19, 2017), *https://www.military.com/daily-news/2017/01/19/army-picks-sig-sauer-replace-m9-service-pistol.html; Every U.S. military branch is about to get its hands on the Army's new sidearm of choice, Taskandpurpose.com* (Nov. 18, 2020), *https://taskandpurpose.com/military-tech/modular-handgun-system-fielding/* (Sig Sauer delivered its 200,000th P320 variant pistol to the military despite the obstacles posed by the novel coronavirus).

[15] *See Design of AR–15 could derail charges tied to popular* rifle, *APnews.com* (Jan. 13, 2020), *https://apnews.com/article/396bbedbf4963a28bda99e7793ee6366.*

[16] *See* footnote 2, *supra.*

[17] *See Baltimore police report a 400% increase in untraceable 'ghost guns',* The Baltimore Sun (Feb. 18, 2021), *http://www.baltimoresun.com/news/crime/bs-pr-md-ci-cr-ghost-gun-ban-20210218-ae2dortu6ngn5llmfmq6yxtx6m-story.html; Syracuse joins lawsuit against feds amid rise in ghost guns,* WRVO Syracuse (Aug. 27, 2020), *https://www.wrvo.org/post/syracuse-joins-lawsuit-against-feds-amid-rise-ghost-guns#stream/0; Ghost Guns: The build-it-yourself firearms that skirt most federal gun laws and are virtually untraceable,* CBS News (May 10, 2020), *https://www.cbsnews.com/news/ghost-guns-untraceable-weapons-criminal-cases-60-minutes-2020-05-10/; Untraceable ghost guns proliferate as Philadelphia grapples with violence,* The Morning Call (Mar. 18, 2020), *https://www.mcall.com/news/pennsylvania/mc-nws-pa-philadelphia-ghost-guns-20200318-jzyt4thyvvgntproexbleyleay-story.html; Ghost Guns Are Everywhere in California,* The Trace (May 17, 2019), *https://www.thetrace.org/2019/05/ghost-gun-california-crime/; The Rise of Untraceable Ghost Guns,* Wall Street Journal (Jan. 4, 2018), *https://www.wsj.com/articles/the-rise-of-untraceable-ghost-guns-1515061800; How D.C. Is Addressing An Ongoing Spike In Gun Violence,* NPR Washington (Mar. 2, 2020), *https://www.npr.org/local/305/2020/03/02/811194978/how-d-c-is-addressing-an-ongoing-spike-in-gun-violence; Untraceable 'Ghost Guns' sold across Central Florida,* WKMG–TV Orlando (Nov. 15, 2016), *https://www.clickorlando.com/getting-results/2016/11/15/untraceable-ghost-guns-sold-across-central-florida/.*

[18] Source: ATF Office of Strategic Intelligence and Information. These numbers (as of March 4, 2021)

2016: 1,750
2017: 2,507
2018: 3,776
2019: 7,161
2020: 8,712

It is, therefore, not unexpected that numerous Federal criminal cases have been brought by the Department to counter illegal trafficking in unserialized home-completed and assembled weapons, and possession of such weapons by prohibited persons.[19]

The problem of untraceable firearms being acquired and used by violent criminals and terrorists is international in scope. On May 28, 2019, citing intelligence reports by the Department of Homeland Security (''DHS''), the Federal Bureau of Investigation (''FBI''), and the National Counterterrorism Center (''NCTC''), the House Committee on Homeland Security issued a report concluding that ''[g]host guns not only pose a challenge on the front end, enabling prohibited buyers to purchase deadly weapons with just a few clicks online, but also on the back end, hamstringing law enforcement's ability to investigate crimes committed with untraceable weapons'' and that the ''wide availability of ghost guns and the emergence of functional 3D-printed guns are a homeland security threat. Terrorists and other bad actors may seek to exploit the availability of these weapons for dangerous ends.'' H.R. Rep. No. 116–88, at 2 (May 28, 2019).[20] Criminal investigations and studies highlight this concern.[21]

The GCA ''insists that the dealer keep certain records, to enable federal authorities both to enforce the law's verification measures and to trace firearms used in crimes.'' *Abramski* v. *United States,* 573 U.S. 169, 173 (2014) (citing H. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968)). ''That information helps to fight serious crime.'' *Id.* at 182; *see also* Identification Markings Placed on Firearms, 66 FR 40597 (Aug. 3, 2001) (''Firearms tracing is an integral part of

are likely far lower than the actual number of PMFs recovered from crime scenes because some law enforcement departments incorrectly trace some PMFs as commercially manufactured firearms, or may not see a need to use their resources to attempt to trace firearms with no serial number or other identifiable markings. The term ''suspected PMF'' is used because of the difficulty of getting law enforcement officials to uniformly enter PMF trace information into ATF's electronic tracing system (''eTrace''), resulting in reporting inconsistencies of PMFs involved in crime. For example, often PMFs resemble commercially manufactured firearms, or incorporate parts from commercially manufactured firearms bearing that manufacturer's name, so some firearms suspected of being PMFs were entered into eTrace using a commercial manufacturer's name rather than as one privately made by an individual. The term ''potential crime scenes'' is used because ATF does not know if the firearm being traced by the law enforcement agency was found at a crime scene as opposed to one recovered by them that was stolen or otherwise not from at the scene of a crime. This is because the recovery location or correlated crime is not always communicated by the agency to ATF in the tracing process.

[19] *See, e.g., 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; Grass Valley Man Sentenced to 5 Years in Prison for Unlawfully Manufacturing Ghost Guns and Selling Them on Dark Web,* DOJ Office of Public Affairs (Sept. 21, 2018), *https://www.justice.gov/usao-edca/pr/grass-valley-man-sentenced-5-years-prison-unlawfully-manufacturing-ghost-guns-and; Rhode Island Man Charged with Building, Selling* ''*Ghost*'' *Machine Gun,* DOJ Office of Public Affairs (Dec. 12, 2018), *https://www.justice.gov/usao-ri/pr/rhode-island-man-charged-building-selling-ghost-machine-gun; Conroe Man Ordered to Prison for Making* ''*Ghost Guns*'', DOJ Office of Public Affairs (Feb. 21, 2019) *https://www.justice.gov/usao-sdtx/pr/conroe-man-ordered-prison-making-ghost-guns; Seven Felons Indicted, Dozens of Firearms Seized as Part of Investigation Targeting Criminal Gun Sales in Orange County,* DOJ Office of Public Affairs (Oct. 10, 2019), *https://www.justice.gov/usao-cdca/pr/seven-felons-indicted-dozens-firearms-seized-part-investigation-targeting-criminal-gun; Man Sentenced to 15 Years for Trafficking* ''*Ghost Guns*'' *and Drugs,* DOJ Office of Public Affairs (Feb. 14, 2020), *https://www.justice.gov/usao-edva/pr/man-sentenced-15-years-trafficking-ghost-guns-and-drugs; Tampa Man Sentenced To Over Five Years For Manufacturing Counterfeit Credit Cards, Fake IDs, And Illegal Firearms,* DOJ Office of Public Affairs (June 26, 2020), *https://www.justice.gov/usao-mdfl/pr/tampa-man-sentenced-over-five-years-manufacturing-counterfeit-credit-cards-fake-ids-and; Alleged Dealer of Ghost Guns and Machinegun Conversion Devices Arraigned,* DOJ Office of Public Affairs (July 15, 2020), *https://www.justice.gov/usao-edva/pr/alleged-dealer-ghost-guns-and-machinegun-conversion-devices-arraigned; Connecticut Man Charged with Firearm Trafficking,* DOJ Office of Public Affairs (Aug. 12, 2020), *https://www.justice.gov/usao-ma/pr/connecticut-man-charged-firearm-trafficking; Operation 'Black Phoenix' Leads to Federal Charges Against 25 Who Allegedly Engaged in Illegal Narcotics and Firearms Sales,* DOJ Office of Public Affairs (Sept. 15, 2020), *https://www.justice.gov/usao-cdca/pr/operation-black-phoenix-leads-federal-charges-against-25-who-allegedly-engaged-illegal; D.C. Felon Pleads Guilty in Federal Court in Maryland to Illegal Possession of a* ''*Ghost Gun*'' *Firearm and Ammunition,* DOJ Office of Public Affairs (Sept. 22, 2020), *https://www.justice.gov/usao-md/pr/dc-felon-pleads-gui&lty-federal-court-maryland-illegal-possession-ghost-gun-firearm-and; Ghost Gun and Machine Gun Conversion Device Dealer Pleads Guilty,* DOJ Office of Public Affairs (Sept. 29, 2020), *https://www.justice.gov/usao-edva/pr/ghost-gun-and-machine-gun-conversion-device-dealer-pleads-guilty; Felon sentenced to more than five years in prison for arsenal of 'ghost guns' and smuggled silencers,* DOJ Office of Public Affairs (Oct. 9, 2020), *https://www.justice.gov/usao-wdwa/pr/felon-sentenced-more-five-years-prison-arsenal-ghost-guns-and-smuggled-silencers; Montgomery County Man Admits to Unlawfully Selling* ''*Ghost Guns*'', DOJ Office of Public Affairs (Nov. 5, 2020), *https://www.justice.gov/usao-ndny/pr/montgomery-county-man-admits-unlawfully-selling-ghost-guns; Drug Dealer Who Sold* ''*Ghost Guns,*'' *Silencers, and a Machinegun Sentenced to Thirty Years in Federal Prison,* DOJ Office of Public Affairs (Nov. 6, 2020), *https://www.justice.gov/usao-ndia/pr/drug-dealer-who-sold-ghost-guns-silencers-and-machinegun-sentenced-thirty-years-federal; Baltimore Man Sentenced to 21 Years in Federal Prison for Five Bank Robberies, Five Armed Robberies of Liquor Stores, and Related Firearms Charges,* DOJ Office of Public Affairs (Nov. 12, 2020), *https://www.justice.gov/usao-md/pr/baltimore-man-sentenced-21-years-federal-prison-five-bank-robberies-five-armed-robberies; Philadelphia Man Sentenced to 12½ Years for Trafficking Methamphetamine and Weapons, Including 'Ghost Guns,' Near Schools,* DOJ Office of Public Affairs (Dec. 30, 2020), *https://www.justice.gov/usao-edpa/pr/philadelphia-man-sentenced-12-12-years-trafficking-methamphetamine-and-weapons; Vineland Boys Gang Member Pleads Guilty to Racketeering Offenses, Including Attempted Murder and Narcotics Trafficking,* DOJ Office of Public Affairs (Jan. 22, 2021), *https://www.justice.gov/usao-cdca/pr/vineland-boys-gang-member-pleads-guilty-racketeering-offenses-including-attempted; Burbank Man Arrested on Federal Complaint Alleging He Sold 'Ghost Guns' Out of His Hookah Lounge,* DOJ Office of Public Affairs (Jan. 29, 2021), *https://www.justice.gov/usao-cdca/pr/burbank-man-arrested-federal-complaint-alleging-he-sold-ghost-guns-out-his-hookah; Saratoga County Man Admits to Unlawfully Selling* ''*Ghost Guns*'' *and Methamphetamine Distribution,* DOJ Office of Public Affairs (Feb. 3, 2021), *https://www.justice.gov/usao-ndny/pr/saratoga-county-man-admits-unlawfully-selling-ghost-guns-and-methamphetamine; Orange County Man Sentenced to 10 Years in Federal Prison for Brokering Illegal Sales of 'Ghost Guns,' Other Firearms,* DOJ Office of Public Affairs (Feb. 8, 2021), *https://www.justice.gov/usao-cdca/pr/orange-county-man-sentenced-10-years-federal-prison-brokering-illegal-sales-ghost-guns.*

[20] Specifically, the House Report cited a January 11, 2019, Joint Intelligence Bulletin issued by DHS, FBI, and NCTC concluding that ''these rapidly evolving technologies pose an ongoing, metastasizing challenge to law enforcement in understanding, tracking, and tracing ghost guns,'' and an April 19, 2019, DHS intelligence assessment that ''repeated the warning that ghost guns pose an urgent and evolving threat to the homeland, particularly in the hands of ideologically motivated lone wolf actors.'' H.R. Rep. No. 116–88, at 2.

[21] *CBP: 3–D-printed full-auto rifle seized at Lukeville crossing, tucsonsentinel.com* (Feb. 8, 2016), *http://www.tucsonsentinel.com/local/report/020816_3d_printed_gun/cbp-3-d-printed-full-auto-rifle-seized-lukeville-crossing/; Firearms using 3D-printed components seized in Sweden,* Armament Research Services (May 19, 2017), *https://armamentresearch.com/3d-printed-firearms-seized-in-sweden/; The TSA Has Found 3D-Printed Guns at Airport Checkpoints 4 Times Since 2016,* Time (Aug. 2, 2018), *https://time.com/5356179/3d-printed-guns-tsa/; Indiana Residents Indicted on Terrorism and Firearms Charges,* DOJ Office of Public Affairs (July 11, 2019), *https://www.justice.gov/opa/pr/indiana-residents-indicted-terrorism-and-firearms-charges; Use of 3D printed guns in German synagogue shooting must act as warning to security services, experts say, independent.co.uk* (Oct. 11, 2019), *https://www.independent.co.uk/news/world/europe/3d-gun-print-germany-synagogue-shooting-stephan-balliet-neo-nazi-a9152746.html; TSA Confiscated 3D-Printed Guns at Raleigh-Durham International Airport, nextgov.com* (Mar. 4, 2020), *https://www.nextgov.com/emerging-tech/2020/03/tsa-confiscated-3d-printed-guns-raleigh-durham-international-airport/163533/; Man Sentenced for Attempting to Board International Flight with a Loaded Firearm,* DOJ Office of Public Affairs (Mar. 12, 2021), *https://www.justice.gov/usao-sdca/pr/man-sentenced-attempting-board-international-flight-loaded-firearm; Glock ghost guns up for grabs on the dark web,* Australian National University (Mar. 23, 2021), *https://www.anu.edu.au/news/all-news/glock-ghost-guns-up-for-grabs-on-the-dark-web; Spain dismantles workshop making 3D-printed weapons,* BBC, (Apr. 19, 2021), *https://www.bbc.com/news/world-europe-56798743.*

any investigation involving the criminal use of firearms.''); *Blaustein & Reich, Inc.* v. *Buckles,* 220 F. Supp. 2d 535, 537 (E.D. Va. 2002) (ATF has a statutory duty pursuant to the GCA to trace firearms to keep them out of the hands of criminals).[22] An accurate firearm description is necessary to trace a firearm and is required to be recorded by a person licensed to engage in the business of manufacturing, importing, or dealing in firearms, or by a licensed collector of curio or relic firearms, regardless of whether it is a business or personal firearm.[23]

ATF traces firearms found by law enforcement at a crime scene by first contacting the licensed manufacturer or importer marked on the frame or receiver who maintains permanent records of their manufacture or importation and disposition. Using the information obtained from those required records, ATF then contacts each licensed dealer or other licensee who recorded their receipt and disposition to locate the first unlicensed purchaser to help find the perpetrator or otherwise solve the crime.[24] However, because PMFs do not bear a serial number or other markings of a licensed manufacturer or importer, ATF has found it extremely difficult to complete such traces on behalf of law enforcement to individual unlicensed purchasers. From January 1, 2016, through March 4, 2021, ATF could only complete traces of suspected PMFs recovered by law enforcement to an individual purchaser in approximately 151 out of 23,946 attempts, generally by tracing a serial number engraved on a handgun slide, barrel, or other firearm part not currently defined as a frame or receiver, but recorded by licensees in the absence of other markings.[25]

With the proliferation of PMFs, ATF has also received numerous requests from licensees seeking clarity on how they may be accepted and recorded so that they can track their inventories, process warranty claims, reconcile any missing inventory, respond to trace requests, and report lost or stolen PMFs to police and insurance companies. Federal law and regulations require licensees, before conducting business, to inventory the firearms possessed for such business and record it in a Firearms Acquisition and Disposition Record (''A&D Record'').[26] After commencing business, licensees must record all firearms received and disposed of by the business in the A&D Record to include the following information separated into columns: Manufacturer and/or importer, model, serial no., type, and caliber or gauge.[27] When a firearm is disposed to an unlicensed person, licensees are required to complete a Firearms Transaction Record, ATF Form 4473 (''Form 4473'').[28] Like the A&D Record, this form requires licensees to record the manufacturer and importer, model (if designated), serial number, type, and caliber or gauge of the firearm. Licensees are also required by law to report the theft or loss of firearms on a Federal Firearms Licensee Theft/Loss Report, ATF Form 3310.11, which includes a description of the manufacturer, importer, model, serial number, type, and caliber/gauge of each firearm stolen or lost.[29] And when licensees sell or otherwise dispose of multiple pistols or revolvers within five consecutive business days to the same person, they must report to ATF the type, serial number, manufacturer, model, importer, and caliber on a Report of Multiple Sale or Other Disposition of Pistols and Revolvers, ATF Form 3310.4.[30]

However, because PMFs do not have markings identifying the name of a licensed manufacturer or importer, model, serial number, or caliber/gauge, licensees might only record a ''type'' of firearm (*e.g.,* pistol, revolver, rifle, or shotgun) in their A&D Records and on ATF Forms 4473. Over time, as more PMFs are accepted into inventory, it will become increasingly difficult, if not impossible, for licensees and ATF (during inspections) to distinguish between those PMFs physically in the firearms inventory and those recorded in required A&D Records, as well as determine which PMFs recorded as disposed on ATF Form 4473, were those recorded as disposed in the A&D Record.[31] Likewise, it will be difficult for licensees and ATF to accurately determine which PMFs were stolen or lost from inventory, and for police to locate stolen PMFs in the business inventories of pawnbrokers,[32] or to return any recovered stolen or lost PMFs to their rightful owners.

Not only does the inability to distinguish between unmarked firearms

[22] *See also* ATF Ruling 2009–5, p.2 (''The unique marks of identification of firearms serve several purposes. First, the marks are used by Federal firearms licensees to effectively track their firearms inventories and maintain all required records. Second, the marks enable law enforcement officers to trace specific firearms used in crimes from the manufacturer or importer to individual purchasers, and to identify particular firearms that have been lost or stolen. Further, marks help prove in certain criminal prosecutions that firearms used in a crime have travelled in interstate or foreign commerce.'').

[23] *See* 18 U.S.C. 923(g)(1)(D); 27 CFR 478.125(f) (disposition records of a Federal firearms licensee's personal collection firearms must contain a complete description of the firearm); House Consideration and Passage of S.2414, 99th Cong., 2d Sess., 132 Cong. Rec. 15229 (June 24, 1986) (Statement of Rep. Hughes) (''In order for the law enforcement Firearm Tracing Program to operate, some minimal level of recordkeeping is required [for sales from dealers' personal collections]. Otherwise, we will not have tracing capability. This provision simply requires that a bound volume be maintained by the dealer of the sales of firearms which would include a complete description of the firearm, including its manufacturer, model number, and its serial number and the verified name, address, and date of birth of the purchaser. There is only a minimal inconvenience for the dealer, yet obtaining and recording this information is critical to avoid serious damage to the Firearm Tracing Program.'').

[24] Licensees must respond to ATF trace requests within 24 hours. 18 U.S.C. 923(g)(7); *see also J&G Sales Ltd.* v. *Truscott,* 473 F.3d 1043, 1045–46 (9th Cir. 2007) (describing the tracing process).

[25] Source: ATF Office of Strategic Intelligence and Information. These figures were extracted on May 5, 2021, and include traces for both U.S. and international law enforcement agencies.

[26] 27 CFR 478.125(e).

[27] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.125(e), (f).

[28] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.124.

[29] 18 U.S.C. 923(g)(6); 27 CFR 478.39a(b).

[30] 18 U.S.C. 923(g)(3)(A); 27 CFR 478.126a. Pursuant to 18 U.S.C. 923(g)(5)(A), licensed dealers along the Southwest border are also required by demand letter to report to ATF multiple sales of certain rifles during five consecutive business days to the same person on ATF Form 3310.12, including the rifle's serial number, manufacturer, importer, model, and caliber. Also under that statute, licensed dealers with 15 or more trace requests with a ''time-to-crime'' of three years or less must report to ATF the acquisition date, model, caliber or gauge, and the serial number of a secondhand firearm transferred by the dealer.

[31] In *United States* v. *Biswell,* 406 U.S. 311, 315–16 (1972), the Supreme Court explained that ''close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.'' (citation omitted).

[32] Most states require pawnbrokers to record or report any serial number and other identifying markings on pawned merchandise so that police can determine their origin. *See* Ala. Code section 5–19A–3(1); Alaska Stat. section 08.76.180(a)(4); Ariz. Rev. Stat. section 44–1625(C)(5); Colo. Rev. Stat. section 29–11.9–103(1); Conn. Gen. Stat. section 21–41(c); Del. Code tit. 24, section 2302(a)(1)(b); DC Code section 47–2884.11(d); Fla. Stat. section 538.04(1)(b)(3),(9); Ga. Code section 44–12–132(4); Haw. Rev. Stat. section 445–134.11(c)(10); 205 Ill. Comp. Stat. section 510/5(a); Ind. Code section 28–7–5–19(a)(4); Ky. Rev. Stat. Ann. section 226.040(1)(d)(7); La. Stat. Ann. section 37:1782(16)(a); Mass. Gen. Laws ch. 140 section 79; Mich. Comp. Laws section 446.205(5)(1),(4); Minn. Stat. section 325J.04(Sub.1)(1); Miss. Code Ann. section 75–67–305(1)(a)(iii),(ix); Mo. Rev. Stat. section 367.040(6)(b); Neb. Rev. Stat. section 69–204(3); N.M. Stat. section 56–12–9(A)(3); N.C. Gen. Stat. section 66–391(b)(1); Ohio Rev. Code section 4727.07; Okla. Stat. tit. 59 section 1509(D)(h); S.C. Code Ann. section 40–39–80(B)(1)(l)(iii),(ix); Tenn. Code Ann. section 45–6–209(b)(1)(C),(H); Tex. Fin. Code section 371.157(4); Utah Code section 13–32a–104(1)(h)(i)(A); Va. Code Ann. section 54.1–4009(A)(1); Wash. Rev. Code section 19.60.020(1)(e); W. Va. Code section 47–26–2(b)(1); Wis. Stat. section 134.71(8)(c)(2).

make it extremely difficult for law enforcement to trace PMFs involved in crime, it also makes it more difficult for Federal, State, and local law enforcement to identify and prosecute illegal firearms traffickers who are often tied to violent criminals and armed narcotics traffickers.[33] The ATF Form 4473 is the primary evidence used to prosecute straw purchasers who buy firearms from a Federal firearms licensee on behalf of prohibited persons, such as felons, and other persons who could use them to commit a violent crime. The form is typically the key evidence that the straw purchaser who bought the firearm (and who can pass a background check) made a false statement to the Federal firearms licensee concerning the identity of the actual purchaser when acquiring that firearm, in violation of 18 U.S.C. 922(a)(6) and 924(a)(1)(A), or State law.[34] But as unmarked and difficult-to-trace PMFs proliferate throughout the marketplace, it is likely to become increasingly difficult to prove that firearms acquired under false pretenses on a Form 4473 were the ones found in the hands of the true purchaser—and thus more difficult to prosecute straw purchasers for making false statements.[35] This assumes, of course, that the PMF involved in the crime could even be traced to the Federal firearms licensee, or that the correct Form 4473 could be located. Likewise, the absence of identifying firearm information on multiple sales forms and theft/loss reports makes it more difficult for ATF to identify firearms traffickers and thieves.[36]

Although clarifying the definition of ''frame or receiver'' in this rule would help the firearms industry and the public understand which part of a complete weapon is the regulated ''frame or receiver,'' and more commercially manufactured frames or receivers are likely to be marked by licensed manufacturers as a result, PMFs are increasingly being made or 3D printed at home without any identifying marks, recordkeeping, or background checks. In turn, these firearms are progressively finding their way to licensees who may wish to acquire them so they can advertise and market them broadly, or who may repair, customize, or accept them as security in pawn for a loan. Rulemaking is therefore 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.[37] Indeed, several States and municipalities have banned or severely restricted unserialized or 3D printed firearms.[38]

II. Proposed Rule

Due to judicial developments as well as continued technological advancements in firearms manufacturing, maintaining the current definitions negatively affects both public safety and the regulated firearms industry. For these reasons, the Department proposes amending ATF's regulations to clarify the definition of ''firearm'' and to provide a more comprehensive definition of ''frame or receiver'' so that those definitions more accurately reflect firearm configurations not explicitly captured under the existing definitions in 27 CFR 478.11 and 479.11. Further, this NPRM proposes new terms and definitions to take into account technological developments and modern terminology in the firearms industry, as well as amendments to the marking and recordkeeping requirements that would be necessary to implement these definitions. However, nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State, and local law. Also, while licensed manufacturers who sell or distribute firearms to law enforcement agencies would be subject to this rule, law enforcement agencies (not engaged in the business of manufacturing firearms for sale or distribution) would be excluded from this rule, including associated amendments to the marking and recordkeeping requirements necessary to implement its definitions.

[33] *See United States* v. *Marzzarella,* 614 F.3d 85, 100 (3rd Cir. 2010) (''The direct tracing of the chain of custody of firearms involved in crimes is one useful means by which serial numbers assist law enforcement. But serial number tracing also provides agencies with vital criminology statistics—including a detailed picture of the geographical source areas for firearms trafficking and ''time-to-crime'' statistics which measure the time between a firearm's initial retail sale and its recovery in a crime—as well as allowing for the identification of individual dealers involved in the trafficking of firearms and the matching of ballistics data with recovered firearms.''); *Following the Gun, Enforcing Federal Laws Against Firearms Traffickers,* ATF Publication, pp.1, 26 (June 2000) (serial number obliteration is a clear indicator of firearms trafficking to, among other criminals, armed narcotics traffickers).

[34] *See, e.g., Abramski* v. *United States,* 573 U.S. 169 (2014); *Marshall* v. *Commonwealth,* 822 S.E.2d 389 (Va. App. 2019); *Commonwealth* v. *Baxter,* 956 A.2d 465 (Pa. Super 2008).

[35] *See, e.g., United States* v. *Powell,* 467 F. Supp. 3d 360, 368, 374 (E.D. Va. 2020) (indictment charging false statements on ATF Form 4473 in connection with the purchase of specific handguns listed by date of purchase, make, caliber, model, serial number, and name of FFL); *United States* v. *McCurdy,* 634 F. Supp. 2d 118 (D. Me 2009) (denial of a motion for a new trial discussing whether the firearm sold as documented on the ATF Form 4473 and the firearm introduced at trial were the same).

[36] The lack of firearm description information in theft/loss reports makes it difficult for ATF to match recovered firearms with those reported as lost or stolen, thereby hindering ATF's efforts to enforce the numerous provisions of the GCA that prohibit thefts. *See* 18 U.S.C. 922(i) (transporting or shipping stolen firearms in interstate or foreign commerce); *id.* at 922(j) (receiving, possessing, concealing, storing, bartering, selling, disposing, or pledging or accepting as security for a loan any stolen firearm which has moved in interstate or foreign commerce); *id.* at 922(u) (stealing a firearm that has been shipped or transported in interstate or foreign commerce from the person or premises of an FFL); *id.* at 924(l) (stealing a firearm which is moving in or has moved in interstate commerce); and *id.* at 924(m) (stealing a firearm from a licensee).

[37] *See* Public Law 90–351, sec. 901(a), 82 Stat. 212, 225–26 (1968); 18 U.S.C. 922(b)(2) (prohibiting licensees from selling or delivering any firearm to any person in a State where the purchase or possession by such person of such firearm would be in violation of any State law or published ordinance applicable at the place of sale, delivery, or other disposition); *id.* at 922(t)(2),(4) (NICS background check denied if receipt of firearm by transferee would violate State law); *id.* at 923(d)(1)(F) (requiring license applicants to certify compliance with the requirements of State and local law applicable to the conduct of business).

[38] *See* Cal. Pen. Code. section 29180 (prohibiting ownership of firearms that do not bear a serial number or other mark of identification provided by the State); Conn. Gen. Stat. section 29–36a(a) (prohibiting manufacture of firearms without permanently affixing serial numbers issued by the State); DC Code section 7–2504.08(a) (prohibiting licensees from selling firearms without serial numbers); Haw. Rev. Stat. section 134–10.2 (prohibiting unlicensed persons from producing 3D printed or parts kit firearms without a serial number); Mass. Gen. Laws 269 section 11E (prohibiting manufacture or delivery of unserialized firearms to licensed dealer); N.J. Stat. Ann. section 2C:39–3(n) (prohibiting possession of firearms manufactured or assembled without serial number); N.Y. Penal Law sections 265.50, 265.55 (prohibiting manufacture/possession of undetectable firearms); R.I. Gen. Laws section 11–47–8(e) (prohibiting possession of ''a ghost gun or an undetectable firearm or any firearm produced by a 3D printing process''); Va. Code. Ann. section 18.2–308.5 (prohibiting possession of undetectable firearms); Wash. Rev. Code section 9.41.190 (prohibiting the manufacture with intent to sell of undetectable and untraceable firearms); *see also Philadelphia Becomes First City To Ban 3D-Printed Gun Manufacturing, Reason.com* (Nov. 22, 2013), *https://reason.com/2013/11/22/philadelphia-becomes-first-city-to-ban-3/; County Council Unanimously Approves Ghost Gun Bill, Mocoshow.com (April 6, 2021), https://mocoshow.com/blog/county-council-unanimously-approves-ghost-gun-bill/?fbclid=IwAR1KCyFal3AId31WKCTLanR-uEUj_-dW_T32lND5gfKmle_-nvIbZyT052.*

A. Definition of ''Firearm''

Under the GCA and implementing regulations, the term ''firearm'' includes:

''(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.'' 18 U.S.C. 921(a)(3); 27 CFR 478.11 (emphasis added). Although weapon parts kits in their unassembled, incomplete, and/or unfinished state or configuration generally will not expel a projectile by the action of an explosive at the time of sale or distribution, weapon parts kits that are ''designed to'' [39] or ''may readily be converted'' [40] to expel a projectile by the action of an explosive are ''firearms'' under the GCA.[41]

In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called ''80% receivers,'' [42] either directly from manufacturers of the kits or retailers, without background checks or recordkeeping. Some of these parts kits contain most or all of the components (finished or unfinished) necessary to complete a functional weapon within a short period of time. Some of them include jigs, templates, instructions, drill bits, and tools that allow the purchaser to complete the weapon to a functional state with minimal effort, expertise, or equipment. Weapon parts kits such as these are ''firearms'' under the GCA because they are *designed to* or *may readily be converted* to expel a projectile by the action of an explosive.[43] Manufacturers of such parts kits must be licensed, abide by the marking and recordkeeping requirements, and pay Federal Firearms Excise Tax on their sales price.[44] Any Federal firearms licensee that sells such kits to unlicensed individuals would need to complete ATF Forms 4473, conduct NICS background checks, and abide by the recordkeeping requirements applicable to fully completed and assembled firearms.[45] Therefore, to reflect existing case law, this proposed rule would add a sentence at the end of the definition of ''firearm'' in 27 CFR 478.11 providing that ''[t]he term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive.''

Nonetheless, this amendment is not intended to affect the classification of a weapon, including a weapon parts kit, in which each frame or receiver (as defined in this proposed rule) of such weapon is properly destroyed in accordance with ATF standards. Because such weapons have been completely destroyed or permanently redesigned not to expel a projectile by the action of an explosive, and cannot readily be converted to do so, ATF would not consider them as either ''designed to'' or ''readily assembled, completed, converted, or restored to expel a projectile by the action of an explosive.'' To make this clear, this proposed rule would add another sentence to the end of the definition of ''firearm'' in 27 CFR 478.11 to provide that ''[t]he term shall not include a weapon, including a weapon parts kit, in which each part defined as a frame or receiver of such weapon is destroyed.'' (see Section II.B.5 of the preamble)

B. Definition of ''Frame or Receiver''

The proposed new regulatory definition of ''frame or receiver'' would be a multi-part definition added to 27

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[39] *See* H.R. Rep. 90–1577, at 4416 (June 21, 1968) (''This provision makes it clear that so-called unserviceable firearms come within the definition.''); S. Rep. No. 90–1097, at 2200 (April 29, 1968) (same). Numerous courts have held that weapons *designed to* expel a projectile by the action of an explosive are ''firearms'' under 18 U.S.C. 921(a)(3)(A) even if they cannot expel a projectile in their present form or configuration. *See, e.g., United States* v. *Hardin,* 889 F.3d 945, 946 (8th Cir. 2017) (pistol with broken trigger and numerous missing internal parts was a weapon designed to expel a projectile by the action of an explosive); *United States* v. *Dotson,* 712 F.3d 369 (7th Cir. 2013) (damaged pistol with corroded, missing and broken components); *United States* v. *Rivera,* 415 F.3d 284, 285–87 (2nd Cir. 2005) (pistol with a broken firing pin and flattened firing-pin channel); *United States.* v. *Brown,* 117 F.3d 353 (7th Cir. 1997) (no firing pin); *United States* v. *Reed,* 114 F.3d 1053 (10th Cir. 1997) (shotgun with broken breech bolt); *United States* v. *Hunter,* 101 F.3d 82 (9th Cir. 1996) (pistol with broken firing pin); *United States* v. *Yannott,* 42 F.3d 999, 1005 (6th Cir. 1994) (shotgun with broken firing pin); *United States* v. *Ruiz,* 986 F.2d 905, 910 (5th Cir. 1993) (revolver with hammer filed down); *United States.* v. *York,* 830 F.2d 885, 891 (8th Cir. 1987) (revolver with no firing pin and cylinder did not line up with barrel). *But see United States* v. *Wada,* 323 F. Supp. 2d 1079 (D. Or. 2004) (firearms redesigned as ornaments that ''would take a great deal of time, expertise, equipment, and materials to attempt to reactivate'' were no longer designed to expel a projectile by the action of an explosive and could not readily be converted to do so).

[40] *See, e.g., United States* v. *Wick,* 697 F. App'x 507, 508 (9th Cir. 2017) (complete UZI parts kits ''could 'readily be converted to expel a projectile by the action of an explosive,' meeting the statute's definition of firearm under section 921(a)(3)(A)'' because the ''kits contained all of the necessary components to assemble a fully functioning firearm with relative ease''); *United States* v. *Stewart,* 451 F.3d 1071, 1073 n.2 (9th Cir. 2006) (upholding district court's finding that .50 caliber rifle kits with incomplete receivers were ''firearms'' under 921(a)(3)(A) because they could easily be converted to expel a projectile); *United States* v. *Morales,* 280 F. Supp. 2d 262, 272–73 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within short period of time could readily be converted to expel a projectile).

[41] The plain language of the definition of ''firearm'' in 18 U.S.C. 921(a)(3)(A) states that a weapon need not function so long as it is designed to, or may readily be converted to, expel a projectile. Even though they generally cannot function to expel a projectile when sold, weapon parts kits are still ''weapons''—real combat instruments, such as pistols, revolvers, rifles, or shotguns—in an unassembled, unfinished, and/or incomplete state or configuration. There is no minimum utility or lethality requirement in the GCA or NFA for an item to be considered a ''weapon.'' *Cf. United States* v. *Thompson/Center Arms,* 504 U.S. 505, 513, n.6 (1992) (a rifle was ''made'' under the NFA when a pistol was packaged together with a disassembled rifle parts kit); *United States* v. *Hunter,* 843 F. Supp. 235, 256 (E.D. Mich. 1994) (''If Defendants believe that machinegun conversion kits are not in and of themselves 'weapons' under § 921(a)(3), they forget that that section clearly envisions machineguns as weapons.''); *United States* v. *Drasen,* 845 F.2d 731, 736–37 (7th Cir. 1988) (rejecting argument that a collection of rifle parts cannot be a ''weapon'').

[42] The term ''80% receiver'' is a term used by some industry members, the public, and the media to describe a frame or receiver that has not yet reached a stage in manufacture to be classified as a ''frame or receiver'' under Federal law. However, that term is neither found in Federal law nor accepted by ATF.

[43] *See* footnotes 39 and 40, *supra.*

[44] The Internal Revenue Code of 1954, 26 U.S.C. 4181, imposes on the manufacturer, producer, or importer an excise tax of 10% (pistols and revolver) or 11% (other firearms) on the sales price of firearms manufactured, produced, or imported, including complete, but unfinished, weapon parts kits. *See* Rev. Rul. 62–169 (IRS RRU), 1962–2 C.B. 245 (kits which contain all of the necessary component parts for the assembly of shotguns are complete firearms in knockdown condition even though, in assembling the shotguns the purchaser must 'final-shape,' sand, and finish the fore-arm and the stock); *cf.* Rev. Rul. 61–189 (IRS RRU), 1961–2 C.B. 185 (kits containing unassembled components and tools to complete artificial flies for fisherman were sporting goods subject to excise tax); *Hine* v. *United States,* 113 F. Supp. 340, 343 (Ct. Cl. 1953) (''True enough, [these fishing rod kits] might be called 'blanks' by those engaged in the trade, but what could they be called or to what practical use could they be put other than 'fishing rods?' Plaintiff says that it would be extremely difficult if not impossible to case with a 'blank' rod and this is true, but we can conceive of no other practical use for them except as fishing rods. . . . Having reached the stage of manufacture or development where they became recognizable as one of the sporting goods described in Section 3406(a)(1) the rods upon being sold were subject to tax even though there remained one or more finishing operations to be performed.'') (citations omitted).

[45] Additionally, persons who engage in the business of selling or distributing such weapon parts kits cannot avoid licensing, marking, recordkeeping, or excise taxation by selling or shipping the parts in more than one box or shipment to the same person, or by conspiring with another person to do so. *See, e.g., United States* v. *Evans,* 928 F.2d 858 (9th Cir. 1991) (conspiracy to cause and aid and abet the possession of unregistered machineguns where one defendant sold parts kits containing all component parts of Sten machineguns except receiver tubes, and the other sold customers blank receiver tubes along with detailed instructions on how to complete them); Internal Revenue Service Technical Advice Memorandum 8709002, 1986 WL 372494, at 4 (Nov. 13, 1986) (for purposes of imposing Firearms Excise Tax it is irrelevant whether the components of a revolver in an unassembled knockdown condition are sold separately to the same purchaser in various related transactions, rather than sold as a complete kit in a single transaction).

CFR 478.11 and 479.11 (referencing section 478.11). First, there would be a general definition of ''frame or receiver'' with non-exclusive examples that illustrate the definition. This would be followed by supplements that further explain the meaning of the term ''frame or receiver'' for certain firearm designs and configurations, as follows: (a) Firearm muffler or silencer frame or receiver; (b) split or modular frame or receiver, also followed by examples of the frames or receivers for common firearm designs that are distinguishable because of differences in firing cycle, method of operation, or physical design characteristics; (c) partially complete, disassembled, or inoperable frame or receiver; and (d) destroyed frame or receiver. 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. ATF would also continue to consider the same factors when classifying firearms (see Section I.A of the preamble).

1. General Definition of ''Frame or Receiver''

ATF proposes to replace the respective regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' in 27 CFR 478.11 and 479.11 because they too narrowly limit the definition of receiver with respect to most current firearms and have led to erroneous district court decisions. Indeed, most firearms currently in circulation in the United States do not have a specific part that expressly falls within the current ''frame or receiver'' regulatory definitions. Most concerning is that the interpretation of these definitions by some courts, relying on the current regulations, would make it easier to obtain the majority of existing firearms, including some of the most advanced semiautomatic weapons, without complying with the requirements of the GCA, and make it far more difficult to trace those firearms after a crime. Should the current definition remain in place and courts continue to interpret it such that no part or parts of most firearms are defined as the frame or receiver, these unserialized parts, easily purchased and assembled to create functioning firearms, would be untraceable, thereby putting the public at risk. While a ''frame or receiver'' is clearly within the statutory definition of what constitutes a ''firearm'' under the GCA, 18 U.S.C. 921(a)(3)(B), clarifying that this term includes how most modern-day firearms operate would help ensure that the regulatory definition of ''frame or receiver'' will not be misinterpreted by the courts, the firearms industry, or the public at large to mean that most firearms in circulation have no part identifiable as a frame or receiver.

As a threshold matter, 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 the identifying markings for tracing purposes. Nonetheless, as explained in Section II.B.3 of the preamble, an internal frame or chassis at least partially exposed to the exterior to allow identification may be determined by ATF to be the frame or receiver of a split or modular frame or receiver.

Next, the new definition more broadly describes a ''frame or receiver'' as one that provides housing or a structure designed to hold or integrate any fire control component. Unlike the prior definitions of ''frame or receiver'' that were rigidly tied to three specific fire control components (*i.e.,* those necessary for the firearm to initiate or complete the firing sequence), the new regulatory definition is intended to be general enough to encompass changes in technology and parts terminology. With respect to the fire control components housed by the frame or receiver, the definition would include, at a minimum, any housing or holding structure for a hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. However, the definition is not limited to those particular fire control components.[46] There may be future changes in firearms technology or terminology resulting in housings or holding structures for new or different components that initiate, complete, or continue the firing sequence of weapons that expel a projectile by the action of an explosive. For further clarity, the definition would then give four nonexclusive examples with illustrations of common single-framed firearms: (1) Hinged or single frame revolver (structure to hold the trigger, hammer, and cylinder); (2) bolt-action rifle (structure to hold the bolt and firing pin, and attach the trigger mechanism); (3) break action, lever action, or pump action rifle or shotgun (housing for the bolt and firing pin, or a structure designed to integrate the breechblock); and (4) semiautomatic firearm or machinegun with a single receiver housing all fire control components (housing for the hammer, bolt, trigger mechanism, and firing pin, *e.g.,* AK-type firearms).

Finally, the definition would make clear to persons who may acquire or possess a part now defined as a ''frame or receiver'' that is identified with a serial number that they must presume, absent an official determination by ATF or other reliable evidence to the contrary, that the part is a firearm ''frame or receiver'' without further guidance.

2. Firearm Muffler or Silencer Frame or Receiver

Under the GCA, licensed manufacturers and importers must identify the frame or receiver of each firearm, including a firearm muffler or silencer, with a serial number in accordance with regulations. 18 U.S.C. 921(a)(3)(C), 923(i). The NFA requires firearm manufacturers, importers, and makers to identify each firearm, including a firearm muffler or silencer, with a serial number and such other identification as may be prescribed by regulations. 26 U.S.C. 5842(a); *id.* at 5845(a)(7). Because under the NFA each individual part of a firearm muffler or silencer is a ''firearm'' [47] that must be registered in the National Firearms Registration and Transfer Record (''NFRTR''), the regulations currently assume that every part defined as a silencer must be marked in order to be registered, and expressly require that they be marked whenever sold, shipped, or otherwise disposed even though they may be installed by a qualified licensee within a complete muffler or silencer device.[48]

However, this result has caused confusion and concern among many silencer manufacturers because some silencer parts defined as ''silencers,'' such as baffles, are difficult to mark, and make little sense to mark for tracing purposes when the outer tube or

[46] The prefatory paragraph to the definitional sections in the GCA and NFA regulations explain that ''[t]he terms 'includes' and 'including' do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.'' 27 CFR 478.11, 479.11.

[47] A firearm ''muffler or silencer'' is defined to include ''any combination of parts'' designed and intended for the use in assembling or fabricating a firearm silencer or muffler and ''any part intended only for use in such assembly or fabrication.'' 18 U.S.C. 921(a)(24); 26 U.S.C. 5845(a)(7); 27 CFR 478.11; *id.* at 479.11. This rule defines the term ''complete muffler or silencer device'' not to say that individual silencer parts are not considered a firearm ''muffler or silencer'' subject to the requirements of the NFA, but to advise industry members when those individual silencer parts must be marked and registered in the NFRTR when they are used in assembling or fabricating a muffler or silencer device.

[48] *See* 27 CFR 479.101(b); 478.92(a)(4)(iii); 479.102(f)(1).

housing of the complete device is marked and registered. Not only is it difficult for manufacturers to apply identifying markings, there is also the administrative difficulty in timely filing and processing numerous ATF Forms 2, Notice of Firearms Manufactured or Imported upon manufacture of each part, and ATF Forms 3, Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer upon sale or other disposition of each part to another qualified licensee.

For these reasons, ATF is proposing a number of amendments to clarify how and when firearm muffler or silencer parts must be marked and registered in the NFRTR. Among other changes (see Section II.H.9 of the preamble, below), this rule defines the term ''frame or receiver'' as it applies to a ''firearm muffler or silencer frame or receiver'' and adds the term ''complete muffler or silencer device'' (see Section II.D of the preamble). Under the NPRM, the term ''frame or receiver'' means, ''in the case of a firearm muffler or firearm silencer, a part of the firearm that, when the complete device is assembled, is visible from the exterior and provides housing or a structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device, including any of the following: baffles, baffling material, or expansion chamber.'' These new definitions would clarify for manufacturers and makers of complete muffler or silencer devices that they need only mark each part (or specific part(s) previously determined by the Director) of the device defined as a ''frame or receiver'' under this rule. However, individual muffler or silencer parts must be marked if they are disposed of separately from a complete device unless transferred by qualified manufacturers to other qualified licensees for the manufacture or repair of complete devices (see Section II.H.9 of the preamble).[49]

ATF anticipates that, under this supplemental definition, the outer tube of a complete muffler or silencer device would be considered the frame or receiver with respect to most commercial silencer designs currently on the market. This is because the outer tube would be the only housing for essential internal components (*e.g.,* baffles or baffling material) of the complete device. Marking the outer tube, as distinguished from a smaller non-housing component like an end cap that can be damaged upon expulsion of projectiles, best preserves the ability of law enforcement to trace the silencer device if used in crime, and is consistent with recommendations ATF has received from the firearms industry.[50]

Nonetheless, like the definition of ''frame or receiver'' for projectile weapons, this sub-definition would be flexible enough to encompass changes in technology and parts terminology. This is because any housing or structure designed to hold or integrate an essential internal component of the muffler or silencer device would meet the definition. While the proposed definition gives examples of internal components that manufacturers must consider as essential, *e.g.,* baffles, baffling material, or expansion chamber, it is not limited to those particular components.[51]

3. Split or Modular Frame or Receiver

This second supplement explains that ATF may determine ''in the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential components'' whether one or more specific part(s) of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. It then sets forth the factors ATF considers in making this determination: ''(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 or integrated; (e) whether the component may 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; (f) whether classifying the particular component is consistent with the legislative intent of the Act and this part; and (g) whether classifying the component as the frame or receiver is consistent with the Director's prior classifications.'' No single factor is controlling. It would further make clear that ''[f]rames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.''

This supplement to the general definition addresses one of the core problems of the current definition of ''firearm frame or receiver;'' namely, that a majority of firearms now use a split or modular design in which more than one part houses a different fire control component and/or incorporates a striker instead of a hammer. It would make clear that even though a firearm, including a silencer, may have more than one part that falls within the definition of ''frame or receiver,'' ATF may classify a specific part or parts to be the ''frame or receiver'' of a particular weapon. For this reason, manufacturers may wish to submit samples to ATF for classification of one or more particular components as the frame or receiver so that they need only mark a specific part or parts of a weapon, rather than all qualifying parts (see Section II.H.10 of the preamble) or obtain a marking variance (see Section II.H.6 of the preamble). However, this supplemental definition would also make clear that ATF would not classify an internal frame or chassis as a ''frame or receiver'' unless it is at least partially exposed to the exterior to allow identification so that licensees accepting them into inventory can quickly record the identifying markings, and law enforcement officers who recover the weapon can easily see the identifying markings for tracing purposes.[52]

One 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

[49] This rule is consistent with ATF enforcement policy. *See* footnote 72 *infra.*

[50] In 2016, ATF issued an Advance Notice of Proposed Rulemaking in response to a petition for rulemaking from a firearms industry trade association recommending that regulations be amended to require that a silencer be marked on the outer tube (as opposed to other locations), unless a variance is granted by the Director on a case-by-case basis for good cause. *See* 81 FR 26764 (May 4, 2016).

[51] *See* footnote 46, *supra.*

[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.'').

ATF classifications. To provide more clarity, this supplement to the definition would include a nonexclusive list of common weapons with a split/multi-piece frame or receiver configuration for which ATF has previously determined a specific part to be the frame or receiver. If a manufacturer produces or an importer imports a firearm falling within one of these designs as they exist as of the date of publication of a final rule, it can refer to this list to know which part is the frame or receiver. The manufacturer or importer can then mark without needing to ask ATF for a classification. The nonexclusive list identifies the frame or receiver for the following firearms: (i) Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols; (ii) Glock-type striker fired semiautomatic pistols; (iii) Sig Sauer P320-type semiautomatic pistols; (iv) certain locking block rail system semiautomatic pistols; (v) AR–15-type and Beretta AR–70-type firearms; (vi) Steyr AUG-type firearms; (vii) 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; (viii) Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns and semiautomatic variants thereof; and (ix) Sten, Sterling, and Kel-tec Sub-2000-type firearms. However, if there is a present or future split or modular design for a firearm that is not comparable to an existing classification, then the definition of ''frame or receiver'' would advise that more than one part is the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF, as described above.

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

This third supplement would define ''frame or receiver'' to 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.'' To determine this status, ''the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials.'' For clarification, ''partially complete'' for purposes of this definition ''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.''

This supplement addresses another core challenge of the existing, definition of firearm ''frame or receiver;'' namely, that it does not address the question when an object becomes a frame or receiver. While the GCA and implementing regulations define a ''firearm'' to include the ''frame or receiver,'' neither delineates when a frame or receiver is created. The crucial inquiry, then, is the point at which an unregulated piece of metal, plastic, or other material becomes a regulated item under Federal law. ATF has long held that a piece of metal, plastic, or other material becomes a frame or receiver when it has reached a critical stage of manufacture. This is the point at which a substantial step has been taken, or a critical line crossed, so that the item in question may be so classified under the law. 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.[53]

Clarifying this issue is needed to deter the increased sale or distribution of unlicensed and unregulated partially complete or unassembled frames or receivers often sold within parts kits that can readily be completed or assembled to a functional state.[54] Many kits that include unfinished frame or receivers have been sold by nonlicensees who were not required to run a background check or maintain transaction records. Accordingly, prohibited persons have easily obtained them.[55] Moreover, without any markings, they are nearly impossible to trace. Although this addition is intended to capture when an item becomes a frame or receiver that is regulated irrespective of the type of technology used to complete the assembly, frame or receiver molds that can accept metal or polymer, unformed blocks of metal, and other articles only in a primordial state would not—without more—be considered a ''partially complete'' frame or receiver. However, when a frame or receiver is broken or has been disassembled into pieces that can readily be made into a frame or receiver, or is a partially complete frame or receiver forging, casting, or additive printing[56] that has reached a stage in manufacture where it can readily be made into a functional frame or receiver, that article would be a ''frame or receiver'' under the GCA.

5. Destroyed Frame or Receiver

This fourth supplement would exclude from the definition of ''frame or receiver'' any frame or receiver that is destroyed. The supplement describes what it means to be a ''destroyed'' frame or receiver: One permanently altered not to provide housing or a structure that may hold or integrate any fire control or essential internal component, and that may not readily be assembled, completed, converted, or restored to a functional state. This new definition then would set forth nonexclusive acceptable methods of destruction, which have been provided by ATF in past guidance.[57]

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[53] ATF Letter to Private Counsel #907010 (Mar. 20, 2015).

[54] The Polymer 80 assembly, for example, may be completed in under thirty minutes. *See, e.g., Silverback Reviews, Polymer 80 Lower Completion/Parts Kit Install,* YouTube (Aug. 19, 2019), *https://www.youtube.com/watch?v=ThzFOIYZgIg* (21-minute video of completion of a Polymer 80 lower parts kit with no slide). Indeed, the internet is replete with people with no experience completing these firearms. *See* HandleBandle, *DIY: How to Build a Gun at Home (That Shoots) Part 1,* YouTube (Oct. 7, 2018), *https://www.youtube.com/watch?v=nO-8Pns9aq4;* HandleBandle, *Polymer 80 with No Experience Tips (Build Part 2),* YouTube (Oct. 7, 2018), *https://www.youtube.com/watch?v=a0JM5v45vsg;*HandleBandle, Legally Building a Gun in My Living Room (5D Tactical Glock Kit), YouTube (Oct. 18, 2018), *https://www.youtube.com/watch?v=5SaNLrhnnuA.*

[55] *See Bridgeport Felon Sentenced to More Than 5 Years in Federal Prison for Possessing Firearms,* Justice.gov (Jan. 7, 2021), *https://www.justice.gov/usao-ct/pr/bridgeport-felon-sentenced-more-5-years-federal-prison-possessing-firearms; Winthrop man had homemade 'ghost' guns and 3,000 rounds of ammunition, prosecutors say, Boston.com* (Aug. 5, 2020), *https://www.boston.com/news/crime/2020/08/05/winthrop-man-had-homemade-ghost-guns-prosecutors-say; 'Ghost Gun' used in shooting that killed two outside Snyder County restaurant,* Penn Live (Jul. 14, 2020), *https://www.pennlive.com/crime/2020/07/ghost-gun-used-in-shooting-that-killed-two-outside-snyder-county-restaurant.html; The gunman in the Saugus High School shooting used a 'ghost gun,'* sheriff says, CNN (Nov. 21, 2019), *https://www.cnn.com/2019/11/21/us/saugus-shooting-ghost-gun/index.html; How the felon killed at Walmart got his handgun, DA says, LehighValleyLive.com* (March 28, 2018), *https://www.lehighvalleylive.com/news/2018/05/how_the_felon_killed_at_walmar.html; 'Ghost guns': Loophole allows felons to legally buy gun parts* online, *KIRO7.com*, *https://www.kiro7.com/news/local/ghost-guns-federal-loophole-allows-felons-to-legally-buy-gun-parts-online-build-assault-weapons/703695149/.*

[56] ATF does not believe the production of 3D printed frames or receivers is substantial at this time when compared with commercially produced firearms. For the most part, individuals currently make PMFs from parts kits produced commercially, not by using 3D printers. However, the cost, capabilities, and availability of 3D printers are quickly improving.

[57] *See How to Properly Destroy Firearms, ATF.gov, https://www.atf.gov/firearms/how-properly-destroy-firearms;* ATF Rul. 2003–1 (destruction of Browning M1919 type receivers); ATF Rul.2003–2 (FN FAL type receivers); ATF Rul. 2003–3 (H&K G3 type receivers); ATF Rul. 2003–4 (Sten type receivers).

C. Definition of ''Readily''

To provide guidance on how the term ''readily'' is used to classify firearms, including frame or receiver parts kits or weapon parts kits sold with incomplete or unassembled frames or receivers, the NPRM adds this term to 27 CFR 478.11 and 479.11 and defined as ''a process that is fairly or reasonably efficient, quick, and easy, but not necessarily the most efficient, speedy, or easy process.'' It would further list factors relevant in making this determining to include: (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. This definition and factors considered in determining whether a weapon, including a weapon parts kit, or unfinished or damaged frame or receiver may readily be assembled, completed, converted, or restored to function are based on case law interpreting the terms ''may readily be converted to expel a projectile'' in 18 U.S.C. 921(a)(3)(A) and ''can be readily restored to shoot'' in 26 U.S.C. 5845(b).[58] Thus, defining the term ''readily'' is necessary to provide further clarity in determining when incomplete weapons or configurations of parts become a ''firearm'' regulated under the GCA and NFA.

D. Definitions of ''Complete Weapon'' and ''Complete Muffler or Silencer Device''

This proposed rule would add definitions for ''complete weapon'' and ''complete muffler or silencer device'' to 27 CFR 478.11 and 479.11. A ''complete weapon'' would be defined as ''a firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.'' Likewise, a ''complete muffler or silencer device'' would be defined as ''a firearm muffler or firearm silencer that contains all of the component parts necessary to function as designed whether or not assembled or operable.'' These definitions are needed to explain when a frame or receiver of a firearm, including a firearm muffler or silencer, as the case may be, must be marked.

E. Definition of ''Privately Made Firearm''

The NPRM proposes adding a definition of ''privately made firearm'' to 27 CFR 478.11 to mean ''[a] firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings placed by a licensed manufacturer at the time the firearm was produced.'' The term would not include a firearm identified and registered in the NFRTR pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date). This proposed definition explains that PMFs are those firearms that were made by nonlicensees without the markings required by this part, and excludes those already marked and registered in the NFRTR, and any firearm made before enactment of the GCA which, unlike the repealed law it replaced, required all firearms to be marked under federal law.[59] The term ''made'' is incorporated within the term ''privately made firearm'' rather than ''manufacture'' to distinguish between firearms manufactured (or ''made'') by private individuals without a license and those manufactured by persons licensed to engage in the business of manufacturing firearms.[60]

F. Definition of ''Importer's or Manufacturer's Serial Number''

The proposed rule would define the term ''importer's or manufacturer's serial number'' in 27 CFR 478.11 as: ''[t]he 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.'' Because ''privately made firearms'' are manufactured by someone other than a licensed manufacturer, the serial number that incorporates the abbreviated Federal firearms license (''FFL'') number placed by a licensee on a PMF under this rule is the ''importer's or manufacturer's serial number.'' This definition would help ensure that the serial numbers and other markings necessary to ensure tracing, including those placed by a licensee on a ''privately made firearm'' or marked with an ATF-issued serial number,[61] to include imported firearms, are considered the ''importer's or manufacturer's serial number'' protected by 18 U.S.C. 922(k), which prohibits their removal, obliteration, or alteration.[62]

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[58] *See United States* v. *Dodson,* 519 F. App'x 344, 352–53 (6th Cir. 2013) (gun that was restored with 90 minutes of work, using widely available parts and equipment and common welding techniques, fit comfortably within the readily restorable standard); *United States* v. *TRW Rifle 7.62x51mm Caliber,* 447 F.3d 686, 692 (9th Cir. 2006) (a two-hour restoration process using ordinary tools, including a stick weld, is within the ordinary meaning of ''readily restored''); *United States* v. *Mullins,* 446 F.3d 750, 756 (8th Cir. 2006) (a starter gun that can be modified in less than one hour by a person without any specialized knowledge to fire may be considered ''readily convertible'' under the GCA); *United States* v. *One TRW, Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 422–24 (6th Cir. 2006) (''[T]he Defendant weapon here had all of the necessary parts for restoration and would take no more than six hours to restore.''); *United States* v. *Woods,* 560 F.2d 660, 664 (5th Cir. 1977) (holding that a weapon was a shotgun within the meaning of 26 U.S.C. 5845(d) and stating ''[t]he fact that the weapon was in two pieces when found is immaterial considering that only a minimum of effort was required to make it operable.''); *United States* v. *Smith,* 477 F.2d 399, 400–01 (8th Cir. 1973) (machinegun that would take around an eight-hour working day in a properly equipped machine shop was readily restored to shoot); *United States* v. *16,179 Molso Italian .22 Caliber Winler Derringer Convertible Starter Guns,* 443 F.2d 463 (2d Cir. 1971) (starter guns converted in no more than 12 minutes to fire live ammunition were readily convertible under the GCA); *United States* v. *Morales,* 280 F. Supp. 2d 262, 272–73 (S.D.N.Y. 2003) (partially disassembled Tec-9 pistol that could be assembled within a short period of time could readily be converted to expel a projectile); *United States* v. *Catanzaro,* 368 F. Supp. 450, 453 (D. Conn. 1973) (a sawed-off shotgun was ''readily restorable to fire'' where it could be reassembled in one hour and the necessary missing parts could be obtained at a Smith & Wesson plant); *compare with United States* v. *Seven Miscellaneous Firearms,* 503 F. Supp. 565, 574–75 (D.D.C. 1980) (weapons could not be ''readily restored to fire'' when restoration required master gunsmith in a gun shop and $65,000 worth of equipment and tools).

[59] The Federal Firearms Act of 1938 (repealed), the predecessor to the GCA, made it unlawful for a person to receive a firearm that had the manufacturer's serial number removed, obliterated or altered. 15 U.S.C. 902(i). Regulations promulgated to implement this law required each firearm manufactured after July 1, 1958, to be identified with the name of the manufacturer or importer, a serial number, caliber, and model. However, there was an exception from the serial number and model requirements for any shotgun or .22 caliber rifle unless that firearm was also subject to the NFA. 26 CFR 177.50 (rescinded).

[60] Both the GCA and NFA define the term ''manufacturer'' as any person ''engaged in the business of manufacturing firearms,'' and the GCA further defines the term ''licensed manufacturer'' as ''any such person licensed under the provisions of this chapter.'' 18 U.S.C. 921(a)(10); 26 U.S.C. 5845(m). The NFA further defines the term ''make,'' and the various derivatives of that word, to include ''manufacturing (other than by one qualified to engage in the business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.'' 26 U.S.C. 5845(i).

[61] ATF occasionally issues serial numbers for placement on firearms in which the serial numbers were not originally placed, *see* 26 U.S.C. 5842(b), or were accidentally removed, damaged, or worn due to routine use or other innocent reason.

[62] In addition to Federal law, 18 U.S.C. 922(k) and 26 U.S.C. 5861(g), (h), (i), almost every state prohibits the removal, alteration, or obliteration of a firearm's serial number or possession of a firearm with a serial number that has been removed,

G. Definition of ''Gunsmith'' [63]

To provide greater access to professional marking, this proposed rule would clarify that the meaning of the term ''gunsmith'' includes persons who engage in the business of identifying firearms for nonlicensees so that gunsmiths may become licensed as dealer-gunsmiths solely to provide professional PMF marking services. Specifically, this proposed rule would amend the definition of ''engaged in the business'' as it applies to a ''gunsmith'' in 27 CFR 478.11 to clarify the meaning of that term as someone ''who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms.''

This amendment would make clear that businesses that routinely repair or customize existing firearms, make or fit special barrels, stocks, or trigger mechanisms, or mark firearms as a service performed on firearms not for sale or distribution by a licensee, may be licensed as dealer-gunsmiths rather than as manufacturers.[64] Under this rule, PMFs would first need to be recorded by the dealer-gunsmith as an acquisition in the licensee's A&D Records upon receipt from the private owner (whether or not the licensee keeps the PMF overnight), and once marked, the licensee would update the acquisition entry with the identifying information, and then record its return as a disposition to the private owner. This would ensure that the PMF, if ever found by police at a crime scene, can be traced. However, no ATF Form 4473 or NICS background check would be required upon return of the marked firearm to the person from whom it was received, pursuant to 27 CFR 478.124(a).

H. Marking Requirements for Firearms

1. Information Required To Be Marked on the Frame(s) or Receiver(s)

To properly implement the new definitions, this proposed rule would amend 27 CFR 478.92(a) and 479.102 to explain how and when markings must be applied on each part defined as a frame or receiver, particularly since there could be more than one part of a complete weapon, or complete muffler or silencer device, that is the frame or receiver (*i.e.,* when ATF has not identified specific part(s) as the frame or receiver). After publication of a final rule, each frame or receiver of a new firearm design or configuration manufactured or imported after the date of publication of the final rule would need to be marked with a serial number, and *either:* (a) The manufacturer's or importer's name (or recognized abbreviation), and city and State (or recognized abbreviation) where the manufacturer or importer maintains their place of business, or in the case of a maker of an NFA firearm, where the firearm was made; or (b) the manufacturer's or importer's name (or recognized abbreviation), and the serial number beginning with the licensee's abbreviated FFL number as a prefix, which is the first three and last five digits followed by a hyphen, and then followed by a number (which may incorporate letters and a hyphen) as a suffix, *e.g.,* ''12345678–[number].'' The serial number (with or without the FFL prefix) identified on each part of a weapon defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee on any other firearm.

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.

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. At the same time, it would give an option for manufacturers and importers to avoid marking their city and state as currently required at §§ 478.92(a)(1)(ii)(D), (E) and 479.102(a)(1)(iv) and (v), or obtain a marking variance from this requirement, by allowing them to mark their abbreviated license number as a prefix to the serial number as an alternative because this information can be obtained by looking up the licensee's information. Except for silencer parts transferred by manufacturers to other qualified manufacturers and dealers for completion or repair of devices (see Section II.H.9 of the preamble), there would be no change to the existing requirement that each part defined as a machinegun or silencer that is disposed of separately and not part of a complete weapon or device be marked with all required information because individual machinegun conversion and silencer parts are ''firearms'' under the NFA that must be registered in the NFRTR. 26 U.S.C. 5841(a)(1); *id.* at 5845(a), (b). However, for frames or receivers, and individual machinegun conversion or silencer parts defined as ''firearms'' that are disposed of separately, the model designation and caliber or gauge may be omitted if it is unknown at the time the part is identified.

altered, or obliterated. *See* Ala. Code section 13A–11–64; Alaska Stat. section 11.61.200; Ariz. Rev. Stat. section 13–3102; Ark. Code section 5–73–107; Cal. Penal Code section 23900; Colo. Rev. Stat. section 18–12–103; Conn. Gen. Stat. section 29–36; Del. Code tit. 11 section 1459; Fla. Stat. Ann. section 790.27; Ga. Code. Ann. section 16–9–70; Haw. Rev. Stat. section 134–10; Idaho Code Ann. section 18–2410; 720 Ill. Comp. Stat. section 5/24–5; Ind. Code section 35–47–2–18; Kan. Stat. Ann. section 21–6306; Ky. Rev. Stat. section 527.050; La. Stat. Ann. section 40:1788; Me. Stat. tit. 17–A section 705(E); Md. Code Pub. Safety section 5–142; Mass. Gen. Laws 269 section 11C; Mich. Comp. Laws section 750.230; Minnesota Stat. section 609.667; Mo. Rev. Stat. section 571.050; Mont. Code Ann. section 45–6–326; Neb. Rev. Stat. sections 28–1207, 28–1208; Nev. Rev. Stat. section 202.277; N.H. Rev. Stat. Ann. section 637:7–a; N.J. Stat. Ann. section 2C:39–3(d); N.Y. Penal Law section 265.02(3); N.C. Gen. Stat. section 14–160.2; N.D. Cent. Code section 62.1–03–05; Ohio Rev. Code section 2923.201; Okla. Stat. tit. 21 section 1550(B); Or. Rev. Stat. section 166.450; 18 Pa. Cons. Stat. sections 6110.2, 6117; R.I. Gen. Laws section 11–47–24; S.C. Code. Ann. section 16–23–30(C) (handguns); S.D. Codified Laws 22–14–5; Tenn. Code Ann. section 39–14–134; Tex. Penal Code section 31.11; Utah Code section 76–10–521 (handguns); Va. Code Ann. section 18.2–311.1; Wash. Rev. Code section 9.41.140; W. Va. Code section 18.2–311.1; Wis. Stat. section 943.37(3).

[63] The term ''gunsmith'' is not used in the GCA; however, the Firearm Owners' Protection Act, Public Law 99–308, amended the GCA to define ''engaged in the business'' as applied to dealers to clarify when gunsmiths must have a license. *See* 18 U.S.C. 921(a)(11)(B); *id.* at (a)(21)(D); 132 Cong. Rec. 9603–04 (May 6, 1986) (statement of Sen. McClure).

[64] By clarifying the definition of gunsmith to mean a service routinely performed on existing firearms that are not for sale or distribution by a licensee, this rule would supersede ATF Ruling 2010–10, which allows gunsmiths under specified conditions to engage in certain manufacturing activities for licensed manufacturers. This would eliminate a significant source of confusion among regulated industry members and the public as to who needs a license to manufacture firearms. *See Broughman* v. *Carver,* 624 F.3d 670 (4th Cir. 2010) (distinguishing dealer-gunsmiths from manufacturers).

2. Size and Depth of Markings

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), but for sake of clarity, consolidates them into a standalone paragraph along with the existing method of measuring the size and depth of markings set forth in 27 CFR 478.92(a)(5) and 479.102(b).

3. Period of Time To Identify Firearms

Neither the GCA nor the NFA explain at what point in the manufacturing process the required markings must be placed. In this regard, the proposed rule would make a distinction between the manufacture or making of a complete weapon or complete muffler or silencer device, and each part, including a replacement part, defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed. Complete weapons or complete muffler or silencer devices, as defined in this rule, would be allowed to be marked up to seven days from completion of the active manufacturing process for the weapon or device, or prior to disposition, whichever is sooner. Except for silencer parts produced by qualified manufacturers for transfer to other licensees to complete or repair silencer devices (see Section II.H.9 of the preamble), parts defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that are not component parts of a complete weapon or device when disposed of would be allowed to be marked up to seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. Adding this language would codify ATF Ruling 2012–1, and this ruling would become obsolete upon publication of the rule. As explained in that ruling, whether the end product is to become a complete weapon or device, or a frame or receiver to be disposed of separately, firearms that are actively awaiting materials, parts, or equipment repair to be completed are still considered to be actively in the manufacturing process.

4. Marking of Privately Made Firearms

Because privately made firearms do not have the identifying markings required of commercially manufactured firearms, this rule proposes to amend 27 CFR 478.92 to require FFLs to mark, or supervise the marking of, the same serial number on each frame or receiver (as defined in this rule) of a weapon that begins with the FFL's abbreviated license number (first three and last five digits) as a prefix followed by a hyphen on any ''privately made firearm'' (as defined) that the licensee acquired (*e.g.,* ''12345678–[number]''). Unless previously identified by another licensee, PMFs acquired by licensees on or after the effective date of the rule would need to be marked in this manner within seven days of receipt or other acquisition (including from a personal collection), or before the date of disposition (including to a personal collection), whichever is sooner.[65] For PMFs acquired by licensees before the effective date of the rule, licensees would be required to mark or cause them to be marked by another licensee either within 60 days from that date, or before the date of final disposition (including to a personal collection), whichever is sooner. With respect to polymer firearms, including those that are produced using additive manufacturing (also known as ''3D printing''), the method of marking would typically require the licensee to embed (or use pre-existing) metal serial number plates within the plastic to ensure they cannot be worn away during normal use.[66] Incorporation of this metal plate along with other metal components would also help ensure that the polymer firearm does not violate the Undetectable Firearms Act, 18 U.S.C. 922(p), which prohibits the manufacture and possession of firearms that are not as detectable as the ''Security Exemplar'' that contains 3.7 ounces of material type 17–4 PH stainless steel.[67]

PMFs currently in inventory that a licensee chooses not to mark may also be destroyed or voluntarily turned in to law enforcement within the 60-day period. Also, this proposed rule would not require Federal firearms licensees to accept any PMFs, or to mark them themselves. Licensees would be able to refuse to accept PMFs, or arrange for private individuals to have them marked by another licensee before accepting them, provided they are properly marked in accordance with this proposed rule. To provide greater access to professional marking, as stated previously, this rule would clarify that the meaning of the term ''gunsmith'' includes persons who engage in the business of identifying firearms for nonlicensees so that gunsmiths may become licensed as dealer-gunsmiths solely to provide professional PMF marking services.

Consistent with the language and purpose of the GCA, this proposed provision is necessary to allow ATF to trace all firearms acquired and disposed of by licensees, prevent illicit firearms trafficking, and provide guidance to FFLs and the public with respect to PMF transactions with the licensed community. This provision is crucial in light of advances in technology that allow unlicensed persons easily to produce firearms at home from parts ordered online, or by using 3D printers or personally owned or leased equipment. Such privately made firearms have and will continue to make their way to the primary market in firearms throughout the licensed community.[68] At the same time, consistent with the intent of the GCA,[69] nothing in this rule would restrict persons not otherwise prohibited from possessing firearms from making their own firearms at home without markings solely for personal use (not for sale or distribution) in accordance with Federal, State, and local law.[70] Persons should consult the laws and officials in their own States and localities to determine the lawfulness of PMFs.

[65] Under this rule, licensed collectors would only need to mark PMFs they receive or otherwise acquire that are defined as ''curios or relics.'' *See* 27 CFR 478.11 (definitions of ''firearm'' and ''curios or relics'').

[66] When the size and depth of markings regulations were first promulgated, ATF recognized that ''all markings can be removed by someone who wishes to make a deliberate effort to remove the markings. Realistically, we need to be concerned about markings that could be worn away during normal use or markings that could survive normal refinishing processes, *e.g.,* blueing, plating, etc. . . . As such, ATF has required manufacturers and importers who use polymer plastic frames to mark serial numbers in a steel plate embedded within the plastic.'' 66 FR 40599 (Aug. 3, 2001).

[67] Handguns that are 3D printed are also subject to the registration and taxation requirements of the NFA if they have a smooth bore and are capable of being concealed on the person, thereby falling within the definition of ''any other weapon.'' *See* 26 U.S.C. 5845(e).

[68] Under Federal law, for example, certain firearm transactions must be conducted through Federal firearms licensees. *See* 18 U.S.C. 922(a)(5) (prohibiting any person other than a licensee, subject to certain limited exceptions, from selling or delivering a firearm to an unlicensed out of state resident).

[69] *See* Public Law 90–351, sec. 901(b), 82 Stat. 227.

[70] This rule is also consistent with the Second Amendment. As the Supreme Court stated in *District of Columbia* v. *Heller,* 554 U.S. 570, 626–27 & n.26 (2008), ''presumptively lawful regulatory measures'' include those ''imposing conditions and qualifications on the commercial sale of arms.'' *See also United States* v. *Marzzarella,* 614 F.3d 85, 99 (3d Cir. 2010) (concluding that even if strict scrutiny were to apply, 18 U.S.C. 922(k) (prohibiting possession of firearms with obliterated serial numbers) would be upheld under the Second Amendment because ''serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms. Because it assists law enforcement in this manner, we find its preservation is not only a substantial but a compelling interest.'').

5. Meaning of Marking Terms

An additional amendment to 27 CFR 478.92 and 478.102 would clarify the meaning of the terms ''legible'' and ''legibly'' to ensure that ''the identification markings use exclusively Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen,'' and that the terms ''conspicuous'' and ''conspicuously'' are understood to mean that ''the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.'' This would codify the meaning of those terms as explained in ATF Ruling 2002–6 (''legible''), and ATF's final rule at 66 FR 40599 (Aug. 3, 2001) (referencing U.S. Customs Service regulations on the definition of ''conspicuous'').

6. Alternate Means or Period of Identification

This proposed rule would not alter the Director's ability to authorize other means of identification, or a ''marking variance,'' for any part defined as a firearm (including a machinegun or silencer) upon receipt of a letter application or an Application for Alternate Means of Identification of Firearms (Marking Variance), ATF Form 3311.4, showing that such other identification is reasonable and does not hinder the effective administration of the regulations. The amendment would also allow ATF to grant a variance from the period in which to mark firearms.

7. Destructive Device Period of Identification

Similar to other firearms, because the proposed rule would now specify the seven-day grace period in which to mark all completed firearms, including destructive devices, this rule would also allow ATF to grant a variance from this period. The marking requirements for destructive devices are otherwise unchanged.

8. Adoption of Identifying Markings

This rule proposes to authorize licensed manufacturers and importers to adopt an existing serial number, caliber/gauge, model, or other markings already identified on a firearm provided they legibly and conspicuously place, or cause to be placed, on each part (or part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated FFL number, which is the first three and last five digits followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number],'' to ensure the traceability of the firearm. This language would supersede ATF Ruling 2013–3 as it applies to licensed manufacturers and importers, but the ruling would remain effective for makers of NFA firearms. This change would help avoid multiple markings on firearms that could be confusing to law enforcement and alleviate concerns of some manufacturers and importers regarding serial number duplication when firearms are remanufactured or reimported.

9. Firearm Muffler or Silencer Parts Transferred Between Qualified Licensees

Licensed and qualified firearm muffler or silencer manufacturers routinely transfer small internal muffler or silencer components to each other to produce complete devices, and between qualified licensees when repairing existing devices. Because of the difficulties and expense of marking and registering small individual components used to commercially manufacture a complete muffler or silencer device with little law enforcement benefit, this proposed rule would allow qualified manufacturers to transfer parts defined as a firearm muffler or silencer to other qualified manufacturers without immediately identifying or registering them. Once the new device is complete with the part, the manufacturer would be required to identify and register the device in the manner and within the period specified in this rule for a complete device. Likewise, the proposed rule would allow qualified manufacturers to transfer muffler or silencer replacement parts to qualified manufacturers and dealers to repair existing devices already identified and registered in the NFRTR. Further, this rule would amend the definition of ''transfer'' to clarify that the temporary conveyance of a lawfully possessed NFA firearm, including a silencer, to a qualified manufacturer or dealer for the sole purpose of repair, identification, evaluation, research, testing, or calibration, and return to the same lawful possessor is not a ''transfer'' requiring additional identification or registration in the NFRTR. This change would be consistent with the definition of ''transfer'' in 26 U.S.C. 5845(j) because a temporary conveyance for these purposes is not a sale or other disposition.[71] These proposed rules are intended to reduce the practical and administrative problems of marking and registering silencer parts by the regulated industry, and avoid a potential resource burden on ATF to process numerous tax-exempt registration applications with little public safety benefit.[72]

10. Voluntary Classification of Firearms and Armor Piercing Ammunition

For many years, ATF has acted on voluntarily requests from persons, particularly manufacturers who are developing new products, by issuing determinations or ''classifications'' whether an item is a ''firearm'' or ''armor piercing ammunition'' as defined in the GCA or NFA. This helps regulated industry members and the public determine what laws and regulations may be applicable to the product, and any steps that they may need to take to be compliant with those laws and regulations. To clarify this process, this proposed rule would set forth the procedure and conditions by which persons may voluntarily submit such requests to ATF. Each request would be submitted in writing or on an ATF form executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. Upon completion of the examination, ATF may return the sample to the person who made the request unless a determination is made that return of the

[71] The definition of ''transfer'' in the NFA only includes ''selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of'' a firearm. *See United States* v. *Smith,* 642 F.2d 1179, 1182 (9th Cir. 1981) (''We cannot agree that Congress intended to impose a transfer tax and require registration whenever mere physical possession of a firearm is surrendered for a brief period.'').

[72] These changes are consistent with ATF enforcement policy. *See NFA Handbook,* ATF E-Publication 5320.8 (April 2009), pp. 46, 60 sections 7.4.6; 9.5.1. With regard to silencer repairs, in order to avoid any appearance that an unlawful ''transfer'' has taken place, ATF recommends that an Application for Tax Exempt Transfer and Registration of Firearm, ATF Form 5, be submitted for approval prior to conveying the firearm for repair or identifying the firearm. The conveyance may also be accomplished by submission of a letter from the registrant to the qualified FFL advising the FFL that the registrant is shipping or delivering the firearm for repair/identification and describing the repair or identification. Return of the registered silencer to the registrant may likewise be accomplished by submission of an ATF Form 5 or by a letter from the FFL to the registrant that accompanies the silencer.

sample would be or place the person in violation of law.

ATF's decision whether to classify an item voluntarily submitted is entirely discretionary. The proposed procedure would assist ATF more efficiently to determine the design and intent of the manufacturer of the item through its written statements, and by examining the objective design features of an actual sample along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item (though ATF is not limited to examining the items submitted to make its determination). The proposed rule would further codify ATF's policy not to evaluate a firearm accessory or attachment ''unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used,'' and would further explain that ''[a] determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.''

I. Recordkeeping

1. Acquisition and Disposition Records

This proposed rule would make minor amendments to 27 CFR 478.122, 478.123, 478.125, and 478.125a, pertaining to the acquisition and disposition records maintained by importers, manufacturers, and dealers. Due to the possibility that a firearm may have more than one frame or receiver as defined in this rule, and the changes to marking regulations, this rule would make technical amendments to these recordkeeping regulations to make certain words plural, (*e.g.,* manufacturer(s), importer(s), and serial number(s)) in the regulations and for the formatting of their records as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that Federal firearms licensees record more than one manufacturer, importer, or serial number, if appropriate, when acquiring or disposing of firearms with multiple components marked as the frame or receiver, or that have been remanufactured or reimported by another licensee. This is consistent with prior ATF guidance to the firearms industry.[73] However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce these format changes to the A&D Record until an existing paper record book is completed (*i.e.,* ''closed out'') or electronic record version updated in the normal course of business, provided the information is accurately recorded as required in the existing record.

Over the years, licensed importers and manufacturers have asked ATF to allow them to consolidate their records of importation or manufacture and acquisition and disposition of firearms, rather than maintaining separate records as required by 27 CFR 478.122(d) and 478.123(d). Because separate records are also difficult for ATF to inspect, this rule would amend §§ 478.122 and 478.123 to require licensed importers and manufacturers to consolidate their records of importation, manufacture, or other acquisition, and their sale or other disposition in a format containing the applicable columns specified in a table included in § 478.122(b). The columns may be in a different order than the specified format provided they contain all required information. These changes would supersede ATF Rulings 2011–1 and 2016–3, and those rulings would become obsolete upon publication of a final rule.

This rule would also make minor clarifying edits to the format of the Firearms Acquisition and Disposition Record in § 478.125(e). The column titled ''Name and address or name and license No.'' would be retitled as ''Name and address of nonlicensee; or if licensee, name and License No.'' In addition, the column titled ''Address or License No. if licensee, or Form 4473 Serial No. if Forms 4473 filed numerically'' would be retitled ''Address of nonlicensee; License No. of licensee; or Form 4473 Serial No. if such forms filed numerically.'' This change would make clear that both the name and license number (not the address) of a licensee from whom firearms are received and to whom they are disposed are recorded in the A&D Record. However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce these format changes to the A&D Record until an existing paper record book is completed (*i.e.,* ''closed out'') or electronic record version updated in the normal course of business, provided the information is accurately recorded as required in the existing record.

The proposed changes to § 478.125 would also include a minor amendment to paragraph (f) to make it clear that in the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee must record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. This change is needed to ensure that acquisition records are closed out when firearms are no longer in inventory.[74] This would resolve a significant problem that ATF Industry Operations Investigators have when trying to reconcile the inventory of a Federal firearms licensee, and that Federal firearms licensees have when timely responding to trace requests, particularly when old A&D Records are ''closed out'' and stored, which, under this proposed rule, could be in a separate warehouse depending on their age (see Section II.J of the preamble).

2. Firearms Transaction Records

Some technical amendments would be needed at 27 CFR 478.124 pertaining to information recorded on the ATF Form 4473. Like changes to the recordkeeping regulations, these amendments would make certain words plural, (*e.g.,* manufacturer(s), importer(s), and serial number(s)) to ensure that the Federal firearms licensee is recording more than one manufacturer, importer, and serial number, if appropriate, on Forms 4473. In addition, the proposed changes to § 478.124 would include a minor technical amendment to paragraph (f) by removing a phrase that indicates that a Federal firearms licensee must fill out the firearm description information only after filling out the information about the transferee. Making this deletion would codify ATF Procedure 2020–1, which sets forth an alternative method of complying with § 478.124(f) for non-over-the-counter firearm transactions. ATF recently issued that procedure in light of changes to ATF Form 4473 (May 2020), which now requires completion of the form in an order different from that provided in § 478.124(f).

3. Recordkeeping for Privately Made Firearms

Minor changes to the above regulations regarding recordkeeping by licensees would also be needed to account for any voluntary receipts or other acquisitions (including from a personal collection) of privately made firearms, and corresponding dispositions (including to a personal collection). Since PMFs are not

[73] *See* FFL Newsletter, May 2012, p.5 (''If a firearm is marked with two manufacturer's names, or multiple manufacturer and importer names, FFLs should record each manufacturers' and importers' name in the A&D record.'').

[74] This is consistent with prior ATF guidance to the firearms industry. *See* FFL Newsletter, Sept. 2011, p.5.

commercially manufactured, if a PMF were received or otherwise acquired by a licensee or disposed of, or imported, the abbreviation ''PMF'' would be recorded as the manufacturer in the appropriate column on a licensee's acquisition and disposition record, ATF Form 4473, or import application, as well as the PMF serial number beginning with the abbreviated FFL number in the serial number column. For PMFs received prior to the effective date of a final rule that are to be identified by the licensee in accordance with § 478.92, or by another licensee at the licensee's request, the licensee would be required to first record the firearm as an acquisition in the licensee's A&D Records upon receipt from the private owner (whether or not the licensee keeps the PMF overnight). Once marked, the licensee would update the acquisition entry with the identifying information, and then record its return as a disposition to the private owner. However, to reduce costs incurred by licensees, ATF anticipates that it would exercise its discretion not to enforce a title format change to the A&D Record to add ''and/or PMF'' in the manufacturer column until an existing paper record book is completed (*i.e.,* ''closed out'') or electronic record version updated in the normal course of business, provided each PMF received is accurately recorded as a ''PMF'' in the manufacturer column.

4. NFA Forms Update

Minor technical amendments would also be needed in 27 CFR 479.62, 479.84, 479.88, 479.90, and 479.141, pertaining to NFA Form 1 (Application to Make), NFA Form 4 (Application to Transfer), NFA Form 3 (Tax Exempt Transfers—SOTs), NFA Form 5 (Tax Exempt Transfers—Governmental Entities), and the Stolen or Lost Firearms report, respectively. Due to the new definitions and changes to marking regulations, the technical amendments here would make certain words plural (*e.g.,* manufacturer(s), importer(s), serial number(s)) in the regulations as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that more than one name, manufacturer, importer, or serial number, if appropriate, is recorded when completing the NFA forms.

5. Importation Forms Update

Minor technical amendments would also be needed in 27 CFR 447.42, 447.45, 478.112, 478.113, 478.114, and 479.112, pertaining to the importation of firearms. Again, due to the new definition and changes to marking regulations, the technical amendments here would make certain words plural (*e.g.,* manufacturer(s), country or countries of manufacture, and serial number(s)) in the regulations as applicable. Although under §§ 478.11 and 479.11 singular terms in the regulations must always be read to include the plural form, and vice versa, these changes are necessary to ensure that more than one name, manufacturer, country, importer, or serial number, if appropriate, is recorded when completing importation forms.

J. Record Retention

This rule also 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 following the date of sale or disposition of the firearm. The proposed changes would require Federal firearms licensees to retain all records until business or licensed activity is discontinued, either on paper or in an electronic format approved by the Director,[75] at the business or collection premises readily accessible for inspection. There would also be an amendment to 27 CFR 478.50(a) to allow all licensees, including manufacturers and importers, to store paper records and forms with no open disposition entries and with no dispositions recorded within 20 years at a separate warehouse, which would be considered part of the business premises for this purpose and subject to inspection.

In view of advancements in electronic scanning and storage technology, and ATF's acceptance of electronic recordkeeping, these amendments would reverse a 1985 rulemaking allowing non-manufacturer/importer Federal firearms licensees to destroy their records after 20 years.[76] The durability and longevity of firearms means that they are often in circulation for more than 20 years, while the cost of storing firearm transaction records has decreased dramatically through electronic recordkeeping. The proposed amendments would enhance public safety by ensuring that records of active licensees will be available for tracing purposes. ATF has encountered some firearms retailers who have destroyed large numbers of records more than 20 years old so that they would no longer need to be stored physically. This resulted in some traces of firearms involved in crimes to be returned incomplete for lack of records. This provision is also essential if PMFs involved in crime are marked and traced directly to licensed dealers who, unlike licensed manufacturers and importers, are not presently required to maintain permanent records.

III. Statutory and Executive Order Review

A. Executive Orders 12866 and 13563

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic benefits, environmental benefits, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has determined that while this proposed rule is not economically significant, it is a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because this proposed rule raises novel legal or policy issues arising out of legal mandates. Accordingly, the rule has been reviewed by OMB.

This proposed rule would update the new definition of ''frame or receiver,'' among other items. Table 1 provides a summary of the provisions of this proposed rule, along with the estimated affected population, costs, and benefits.

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS

Category	NPRM
Applicability	• New Definition of Receiver.

[75] ATF previously approved electronic storage of certain records under the conditions set forth in ATF Rulings 2016–1 (Acquisition and Disposition Records) and 2016–2 (ATF Forms 4473).

[76] *See* 50 FR 26702 (June 28, 1985).

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS—Continued

Category	NPRM
Affected Population	• Update Marking Requirements. • New Gunsmithing Definition. • Update Record Retention. • Other Technical Amendments. • 113,204 FFLs (Record Retention). • Unknown number of FFLs manufacturers and importers (Definition of Receiver). • 35 Non-FFL manufacturers (Definition of Receiver). • 6,044 FFL retailers (PMFs). • 36 Non-FFL retailers (PMFs). • Unknown number of Individual Owners.
Total Costs to Industry, Public, and Government (7% Discount Rate)	$1.1 million; $149,995 7% annualized.
Benefits (7% Discount Rate)	N/A.
Benefits (Qualitative)	• Provides clarity to courts on what constitutes a firearm frame or receiver. • Applies to new technology. • Makes consistent marking requirements. • Eases certain marking requirements. • Increases tracing of crime scene firearms to prosecute criminals.

1. New Definition of Firearm Frame or Receiver

The proposed definition of this term would maintain current classifications and current marking requirements of firearm frames or receivers, except that the licensed manufacturer or importer must mark on new designs or configurations either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated FFL number, on each part defined as a frame or receiver, along with the serial number. To ensure traceability if the parts are separated, there would no longer be an option *only* to mark the FFL's name, city, and state on the slide or barrel. More specifically—

- The proposed definitions would take into account the fact that modern firearms do not house all the components as defined in the current definition. These definitions account for firearms such as split frames or multi-piece firearms;
- The proposed definition would recognize the current classifications of a firearm ''frame or receiver.'' It is intended to encompass the majority, if not all, of existing regulated firearms, and no new marking requirements would be required for these existing designs and configurations;
- After this proposed rule is finalized, markings on new designs or configurations of firearms manufactured or imported may be accomplished by marking each frame or receiver with the licensee's name, city, and state, and serial number, or with the licensee's name and abbreviated license number prefix and number (serial number) in the manner prescribed by existing marking requirements;
- Markings would need to be accomplished within 7 days of completion of the active manufacturing process for the complete weapon (or frame or receiver of such weapon if not being sold as a complete weapon); and
- The proposed rule would require acquisition and disposition record changes to accommodate recording multiple frames or receivers that have different serial numbers if the original frames or receivers (with the same serial number) become separated and are reassembled with frames or receivers bearing different serial numbers.

ATF believes that the majority of the industry currently complies with these requirements, so the cost would be minimal. While the new definitions would mostly affect new designs or configurations of firearms, manufacturers would still be able to receive a determination or a variance on the design from ATF; therefore, they may not experience an additional cost or burden. For more details, please refer to Chapter 2 of the Regulatory Impact Analysis.[77]

2. Partially Complete, Disassembled, or Inoperable Firearm Kits

This section addresses non-FFL manufacturers who manufacture partially complete, disassembled, or inoperable frame or receiver kits, to include both firearm parts kits that allow a person to make only a frame or receiver, and those kits that allow a person to make a complete weapon. When a partially complete frame or receiver parts kit reaches a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state, it would be considered a firearm ''frame or receiver'' that must be marked. Further, under the proposed rule, weapon parts kits with partially complete frames or receivers containing the necessary parts such that they may readily be completed, assembled, converted, or restored to expel a projectile by the action of an explosive would be ''firearms'' for which each frame or receiver of the weapon, as defined under this rule, would need to be marked.

For non-FFL manufacturers of firearm parts kits containing a part defined as a firearm frame or receiver, ATF anticipates there would be a significant impact on these individual companies, but notes that the overall industry impact would also be minimal. Based on current marketing related to the unregulated sale of certain firearm parts kits, ATF anticipates that these non-FFLs would either become FFLs to sell regulated frames or receivers or complete weapons (either as kits or fully assembled), or would take a loss in revenue to sell unregulated items or parts kits that do not contain a frame or receiver (*i.e.,* unregulated raw materials or molds, fire control components, barrels, accessories, tools, jigs, or instructions), but not both. For more details, please refer to Chapter 3 of the Regulatory Impact Analysis.

3. Gunsmithing

The proposed rule would result in a one-time cost for contract gunsmithing, estimated to be $180,849. For more details, please refer to Chapter 4 of the Regulatory Impact Analysis.

[77] The Regulatory Impact Analysis is available on *www.regulations.gov* in the same docket as this rule.

4. Silencers

The proposed rule would require silencers to be marked on any housing or structure, such as an outer tube or modular piece, designed to hold or integrate one or more essential internal components of the device. Currently, the regulations assume that each part defined as a muffler or silencer must be marked and registered.[78] While this proposed change would increase the number of certain parts—firearm muffler or silencer frames or receivers—that need to be marked for modular silencers, this proposed change is not intended to require marking of all silencer parts so long as they are incorporated into a complete device by the original manufacturer or maker that is marked and registered. More specifically, none of the internal nonstructural parts of a complete muffler or silencer device would need to be marked so long as each frame or receiver as defined in this rule is marked. However, as with current regulations, silencer parts sold, shipped, or otherwise disposed of separately would still be considered ''silencers'' that require all markings prior to disposition except when transferred between qualified manufacturers for the production of new devices, and to qualified manufacturers and dealers for the repair of existing devices (see Section II.H.9 of the preamble).

However, the proposed rule would now require some manufacturers of silencers to mark the outer tube rather than the endcap. ATF anticipates only minimal costs associated with moving the serial number and other identifying information from the end cap or adding the same information to the outer tube on certain silencers. Furthermore, there may be a savings for individual owners of silencers. This proposed rule would expressly allow for repairs on silencer devices without having to undergo the additional NFA transfer and registration process, so long as the device is returned to the sender. For more details, please refer to Chapter 5 of the Regulatory Impact Analysis.

5. Privately Made Firearms

A firearm, including a frame or receiver, assembled or otherwise produced by a non-licensee without any markings by a licensee at the time of production or importation is defined as a ''privately made firearm (PMF)'' in the proposed rule. This does not include a firearm identified and registered in the NFRTR pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date). Under the proposed rule, FFLs would be required to mark PMFs within 7 days of the firearm being received by a licensee, or before disposition, whichever first occurs. Licensees would have 60 days to mark PMFs already in inventory after a final rule becomes effective. FFLs would have the option to mark their existing PMFs themselves. Both FFLs and non-FFLs would have the option to contract with an FFL, such as a gunsmith, for this purpose, dispose of them, or send them to ATF or another law enforcement agency for disposal. The industry cost for this section is $563,340. For more details, please refer to Chapter 6 of the Regulatory Impact Analysis.

6. Record Retention

Currently, licensees other than manufacturers and importers do not have to store their ATF Forms 4473 or A&D records beyond 20 years. This proposed rule would require licensed dealers and collectors to store their Forms 4473 or A&D records indefinitely. The industry cost for this section would be minimal because FFLs could drop off their overflow records to ATF or have ATF ship them directly. The government cost for this provision is $68,939 annually. For more details, please refer to Chapter 7 of the Regulatory Impact Analysis.

7. ATF Form Updates

This proposed rule would modify existing forms and records, such as ATF Forms 4473, NFA forms, importation forms, the Stolen or Lost Firearms Reports, and A&D Records, to help ensure that if more than one manufacturer or serial number is identified on any firearm, those names or serial numbers are recorded. As paper forms run out, FFLs would be able to order forms as part of their normal operations. In other words, FFLs using paper forms requested from ATF are not anticipated to incur any additional cost. For FFLs maintaining transaction records electronically, these FFLs would also only be required to update their software during their next regularly scheduled update. Because software updates occur regularly, and costs are already incorporated for those, ATF does not anticipate any additional costs would be incurred for these changes. There is no cost associated with this section. For more details, please refer to Chapter 8 of the Regulatory Impact Analysis.

8. Total Cost of the Proposed Rule

The total 10-year undiscounted cost of this proposed rule is estimated to be $1.3 million. The total 10-year discounted cost of the rule is $1.0 million and $1.2 million at 7 percent and 3 percent respectively. The annualized cost of this proposed rule would be $147,048 and $135,750, also at 7 percent and 3 percent, respectively.

9. Alternatives

ATF considered various alternatives when preparing this proposed rule. For a more detailed analysis, please refer to Chapters 1 and 10 of the Regulatory Impact Analysis.

a. This Proposed Rule

ATF chose to propose promulgating new definitions of ''frame or receiver,'' ''privately made firearm,'' ''gunsmithing,'' and an update to records retention and new requirements for marking silencers, because they would maximize benefits.

b. Other Considered Alternatives

Alternative 1—No change. While this alternative minimizes cost, it does not meet any of the objectives outlined in this proposed rule.

Alternative 2—Everytown for Gun Safety petition. ATF received a petition for rulemaking from Everytown for Gun Safety, a non-profit organization, proposing to define ''firearm frame or receiver'' in 27 CFR 478.11. That proposed definition focused on housing the ''trigger group''; however, it did not define ''trigger group'' and even if it did, it would not address firearms that do not house trigger components within a single housing, or which have a remote trigger outside the weapon. In other words, this alternative would fall short of addressing all technologies or designs of firearms that are currently available, or may become available in the future. It also does not address potential changes in firearms terminology. Thus, while the alternative requested by that petition would reduce the cost by reducing the number of entities affected, it does not fully address the objectives of this proposed rule.

Alternative 3—Grandfather all existing firearms and receivers. This alternative would grandfather in all existing firearms that would not meet the serialization standard for partially complete and split frames or receivers. This was considered and incorporated into the proposed alternative, where feasible. However, in order to enforce the regulation, a complete grandfathering of existing firearms and silencers is problematic in that manufacturers could continue to

[78] *See* footnote 47, *supra.*

produce non-compliant firearm frames or receivers and falsely market them as grandfathered firearms. This could potentially pose an enforcement issue that may not be resolved for years if not decades.

Alternative 4—Require serialization of all partially complete firearms or split receivers. This would require all firearms purchased by individuals to be retroactively serialized. However, the cost would increase considerably and the GCA only regulates the manufacture of firearms by Federal firearm licensees, not the making of firearms for personal use by private unlicensed individuals.

B. Executive Order 13132

This proposed rule will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. This rule is not intended to supersede State requirements unless there is a direct and positive conflict between them such that they cannot be reconciled or consistently stand together.[79] States can require markings on firearms for individuals. This rule does not require individuals to mark their personal firearms. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

D. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (''RFA''), ATF prepared an Initial Regulatory Flexibility Analysis (''IRFA'') that examines the impacts of the proposed rule on small entities (5 U.S.C. 601 *et seq.*). The IRFA is included here and as part of the RFA. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000 people. 5 U.S.C. 601(6).

Because this proposed rule affects different populations in different ways, the analysis for the IRFA has been broken up by provision. Certain provisions may have a significant impact on certain small entities, such as non-FFL manufactures of firearm parts kits with incomplete firearm frames or receivers. Based on the information from this analysis:

- ATF estimates that this proposed rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufacturers and retailers of firearm parts kits with incomplete firearm frames or receivers, but anticipates that the majority of entities affected by this rule would experience minimal or no additional costs.
- Non-FFL manufacturers are anticipated to be small and would potentially have a significant impact on their individual revenue.
- The second largest impact would be $12,828 if a manufacturer had to retool their existing production equipment, but ATF anticipates this is unlikely because this proposed rule encompasses the majority of existing technology. This would not affect future production because this work would be part of their normal operations in creating new firearms.
- ATF estimates the majority of affected entities are small entities that would experience a range of costs; therefore, this rule may have a significant impact on small entities.

Under the RFA, we are required to consider what, if any, impact this rule would have on small entities. Agencies must perform a review to determine whether a rule will have such an impact. Because the agency has determined that it will, the agency has prepared an initial regulatory flexibility analysis as described in the RFA. Under Section 603(b) of the RFA, the regulatory flexibility analysis must provide or address:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule; and
- Descriptions of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

1. A Description of the Reasons Why Action by the Agency Is Being Considered

One of the reasons ATF is considering this proposed regulation is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the by-product of a transaction between two parties that is not accounted for in the transaction.

This proposed rule would update the existing definition of frame or receiver 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. In light of recent court cases, the majority of regulated firearms may not meet the existing definition of firearm frame or receiver. This may result in no part of a firearm being regulated as a ''frame or receiver'' contrary to the requirements in the GCA that ensure tracing to solve crime and help prevent prohibited persons from coming into possession of weapons. Furthermore, finding information in support of criminal cases may be hindered because records are destroyed after 20 years despite the fact that firearms may last longer than 20 years and be used in criminal activities.

This proposed rule would also account for advances in technology in performing transactions such as electronic storage. For more specific details regarding the need for regulation, please refer to the specific chapters pertaining to each provision of this proposed rule.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The Attorney General is responsible for enforcing the GCA, as amended, and the NFA, as amended. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A); *id.* at 7805(a). Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. *See*

[79] *See* 18 U.S.C. 927.

28 U.S.C. 599A(b)(1); 28 CFR 0.130(a)(1)–(2). Accordingly, the Department and ATF have promulgated regulations implementing both the GCA and the NFA. *See* 27 CFR parts 478, 479.

The proposed rule provides new regulatory definitions of ''firearm frame or receiver'' and ''frame or receiver'' because they are outdated. The proposed rule would also amend ATF's definitions of ''firearm'' and ''gunsmith'' to clarify the meaning of those terms, and to add new regulatory terms such as ''complete weapon,'' ''complete muffler or silencer device,'' ''privately made firearm,'' and ''readily'' for purposes of clarity given advancements in firearms technology. Further, the proposed rule would amend ATF's regulations on marking and recordkeeping that are necessary to implement these new or amended definitions.

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

- ATF estimates that this rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufactures and retailers of firearm kits, but anticipates that the majority of entities affected by this rule would experience minimal or no additional costs.
- ATF anticipates the majority of affected entities are small entities and would experience any range of costs; therefore this rule would have a significant impact on a substantial number of small entities.

4. An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

This proposed rule does not duplicate or conflict with other Federal rules.

5. Descriptions of any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize any Significant Economic Impact of the Proposed Rule on Small Entities

The significant alternatives considered are set forth in Section IV(A)(9) of this preamble. For more details, please refer to Chapters 1 and 10 of the Regulatory Impact Analysis.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804.

F. Unfunded Mandate Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48.

G. Paperwork Reduction Act of 1995

This proposed rule would call for collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–20). As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Under the provisions of this proposed rule, there would be a one-time increase in paperwork burdens of identification markings placed on firearms as well as additional transaction records. This requirement would be added to an existing approved collection covered by OMB control number 1140–0050 and 1140–0067.

Title: Identification Markings Placed on Firearms.

OMB Control Number: OMB 1140–0050.

Proposed Use of Information: The Bureau of Alcohol, Tobacco, Firearms, and Explosives would use this information in fighting crime by facilitating the tracing of firearms used in criminal activities. The systematic tracking of firearms from the manufacturer or U.S. importer to the retail purchaser also enables law enforcement agencies to identify suspects involved in criminal violations, determine if a firearm is stolen, and provide other information relevant to a criminal investigation.

Description and Number of Respondents: Currently there are 12,252 licensed manufacturers of firearms and 1,343 licensed importers. Of the potential number of licensed dealers and licensed pawnbrokers, ATF estimates that those directly affected would be a one-time surge of 5,298 licensed dealers, 710 licensed pawnbrokers, and 36 non-licensed dealers that would be affected. This proposed rule would affect a one-time surge of 6,044 respondents.

Frequency of Response: There will be a recurring response for all currently existing 13,595 licensed manufactures and licensed importers. This proposed rule would affect a one-time number of responses of 12,088 responses (6,044 respondents * 2 responses).

Burden of Response: This includes recurring time burden of 1 minute. ATF anticipates a one-time hourly burden of 0.25 hours per respondent.

Estimate of Total Annual Burden: The current burden listed in this collection of information is 85,630 hours. The new burden, as a result of this proposed rulemaking, is a one-time hourly burden of 3,022 (6,044 respondents * 2 responses * 0.25 hourly burden per respondent).

Title: Licensed Firearms Manufactures Records of Production, Disposition, and Supporting Data.

OMB Control Number: OMB 1140–0067.

Proposed Use of Information: The Bureau of Alcohol, Tobacco, Firearms, and Explosives would use this information for criminal investigation or regulatory compliance with the Gun Control Act of 1968. The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer, without such reasonable cause or warrant, and during the course of a criminal investigation of a person or persons other than the licensee in order to ensure compliance with the recordkeeping requirements of 18 U.S.C. 923(g)(1)(A) and (B). The Attorney General may also inspect or examine any records relating to firearms involved in a criminal investigation that is traced to the licensee, or firearms that may have been disposed of during the course of a bona fide criminal investigation.

Description and Number of Respondents: The current number of respondents is 9,056 firearm manufacturers, but this proposed rule would have a one-time surge for an unknown select few licensed manufacturers.

Frequency of Response: There will be a recurring response for all 9,056 licensed manufacturers, but only a one-time surge of 6,790 responses ((2,649 licensed dealer submissions + 710 license pawnbroker submissions + 36 non-licensed dealers) * 2 firearms or firearm kits) to licensed manufactures.

Burden of Response: This includes recurring time burden of 1.05 minutes. The burden resulting from this proposed

rule is 0.25 hours per set of submittals by licensed dealers and licensed pawnbrokers to licensed manufacturers.

Estimate of Total Annual Burden: The current burden listed in this collection of information is 201,205 hours. The new burden, as a result of this proposed rulemaking, is 1,698 hours (6,790 responses * 0.25 hours).

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), a copy of this proposed rule will be submitted to OMB for its review of the collections of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it can help us perform our functions better; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information becomes effective, we will publish a notice in the **Federal Register** and request additional comments regarding the collection of information prior to OMB's decision to approve, modify, or disapprove the proposed collection.

IV. Public Participation

A. Comments Sought

ATF requests comments on the proposed rule from all interested persons. ATF specifically requests comments on the feasibility of implementing the new definition of firearm ''frame or receiver'' in 27 CFR 478.11 and 27 CFR 479.11, and related definitions and amendments that ensure the proper marking, recordkeeping, and traceability of all firearms manufactured, imported, acquired and disposed by Federal firearms licensees. ATF also requests comments on the costs or benefits of the proposed rule and on the appropriate methodology and data for calculating those costs and benefits.

All comments must reference this document's docket number ATF 2021R–05, be legible, and include the commenter's complete first and last name and full mailing address. ATF may not consider, or respond to, comments that do not meet these requirements or comments containing profanity. ATF will retain all comments as part of this rulemakings administrative record. ATF will treat all comments as originals and will not acknowledge receipt of comments. In addition, if ATF cannot read your comment due to technical difficulties and cannot contact you for clarification, ATF may not be able to consider your comment.

ATF will carefully consider all comments, as appropriate, received on or before the closing date, and will give comments after that date the same consideration if practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

ATF will make all comments meeting the requirements of this section, whether submitted electronically or on paper, available for public viewing at ATF and on the internet through the Federal eRulemaking Portal, and subject to the Freedom of Information Act (5 U.S.C. 552). Commenters who do not want their name or other personal identifying information posted on the internet should submit comments by mail or facsimile, along with a separate cover sheet containing their personal identifying information. Both the cover sheet and comment must reference this docket number (2021R–05). For comments submitted by mail or facsimile, information contained on the cover sheet will not appear when posted on the internet but any personal identifying information that appears within a comment will not be redacted by ATF and it will appear on the internet.

A commenter may submit to ATF information identified as proprietary or confidential business information. The commenter shall place any portion of a comment that is proprietary or confidential business information under law on pages separate from the balance of the comment with each page prominently marked ''PROPRIETARY OR CONFIDENTIAL BUSINESS INFORMATION'' at the top of the page.

ATF will not make proprietary or confidential business information submitted in compliance with these instructions available when disclosing the comments that it received, but will disclose that the commenter provided proprietary or confidential business information that ATF is holding in a separate file to which the public does not have access. If ATF receives a request to examine or copy this information, it will treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). In addition, ATF will disclose such proprietary or confidential business information to the extent required by other legal process.

C. Submitting Comments

Submit comments in any of three ways (but do not submit the same comment multiple times or by more than one method). Hand-delivered comments will not be accepted.

- *Federal eRulemaking Portal:* ATF recommends that you submit your comments to ATF via the Federal eRulemaking portal at *www.regulations.gov* and follow the instructions. Comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that is provided after you have successfully uploaded your comment.
- *Mail:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12-point font size (.17 inches), include the commenter's first and last name and full mailing address, be signed, and may be of any length.
- *Facsimile:* Submit comments by facsimile transmission to (202) 648–9741. Faxed comments must:

1. Be legible and appear in minimum 12 point font size (.17 inches);
2. Be 8½″ x 11″ paper;
3. Be signed and contain the commenter's complete first and last name and full mailing address; and
4. Be no more than five pages long.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received in response to it will be available through the Federal eRulemaking portal, at *www.regulations.gov* (search for ATF 2021R–05), and for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Ave. NE, Washington, DC 20226; telephone: (202) 648–8740.

List of Subjects

27 CFR Part 447

Administrative practice and procedure, Arms control, Arms and

munitions, Authority delegation, Chemicals, Customs duties and inspection, Imports, Penalties, Reporting and recordkeeping requirements, Scientific equipment, Seizures and forfeitures.

27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

27 CFR Part 479

Administrative practice and procedure, Arms and munitions, Excise taxes, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Transportation.

Authority and Issuance

For the reasons discussed in the preamble, 27 CFR parts 447, 478, and 479 are proposed to be amended as follows:

PART 447—IMPORTATION OF ARMS, AMMUNITION AND IMPLEMENTS OF WAR

■ 1. The authority citation for 27 CFR part 447 continues to read as follows:

Authority: 22 U.S.C. 2778; Exec. Order 13637, 78 FR 16129 (Mar. 8, 2013).

§ 447.42 [Amended]

■ 2. Amend § 447.42 as follows:
■ a. In paragraph (a)(1)(ii), remove the word ''country'' and add in its place the term ''country or countries'';
■ b. In paragraph (a)(1)(iv)(A), remove ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)''; and
■ c. In paragraph (a)(1)(iv)(G), remove ''serial number'' and add in its place ''serial number(s)''.

§ 447.45 [Amended]

■ 3. Amend § 447.45 as follows:
■ a. In paragraph (a)(2)(ii), remove ''manufacturer of the defense article'' and add in its place ''manufacturer(s) of the defense article or privately made firearm (if privately made in the United States)'';
■ b. In paragraph (a)(2)(iii), remove the word ''country'' and add in its place the term ''country or countries''; and
■ c. In paragraph (a)(2)(vii), remove ''serial number'' and add in its place ''serial number(s)''.

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 4. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 921–931; 44 U.S.C. 3504(h).

■ 5. In § 478.11:
■ a. Add, in alphabetical order, definitions for ''Complete muffler or silencer device'' and ''Complete weapon'';
■ b. Revise the definition of ''Engaged in the business'' paragraph (d) ''Gunsmith'' and the definition of ''Firearm'';
■ c. Remove the definition of ''Firearm frame or receiver''; and
■ d. Add, in alphabetical order, definitions for ''Frame or receiver'', ''Importer or manufacturer's serial number'', ''Privately made firearm (PMF)'', and ''Readily''.

The additions and revisions read as follows:

§ 478.11 Meaning of terms.

* * * * *

Complete muffler or silencer device. A firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

Complete weapon. A firearm other than a firearm muffler or firearm silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

* * * * *

Engaged in the business— * * *

(d) Gunsmith. A person who, as a service performed on existing firearms not for sale or distribution by a licensee, devotes time, attention, and labor to repairing or customizing firearms, making or fitting special barrels, stocks, or trigger mechanisms to firearms, or identifying firearms in accordance with this chapter, as a regular course of trade or business with the principal objective of livelihood or profit, but such term shall not include a person who occasionally repairs or customizes firearms, or occasionally makes or fits special barrels, stocks, or trigger mechanisms to firearms;

* * * * *

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

* * * * *

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: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails. The following are nonexclusive examples that illustrate this definition:

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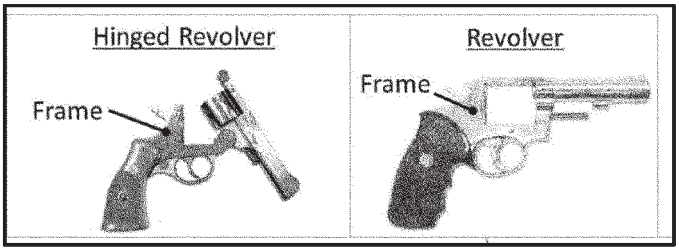
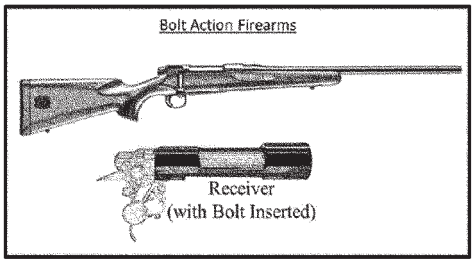
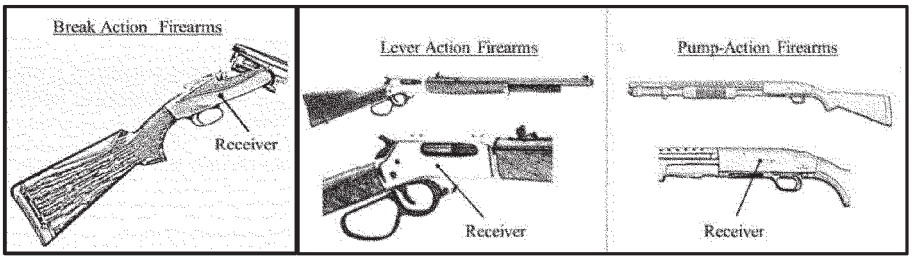
Example 1 – Hinged or single framed revolver: The frame or receiver is the part of the revolver that provides a structure designed to hold the trigger, hammer, and cylinder.



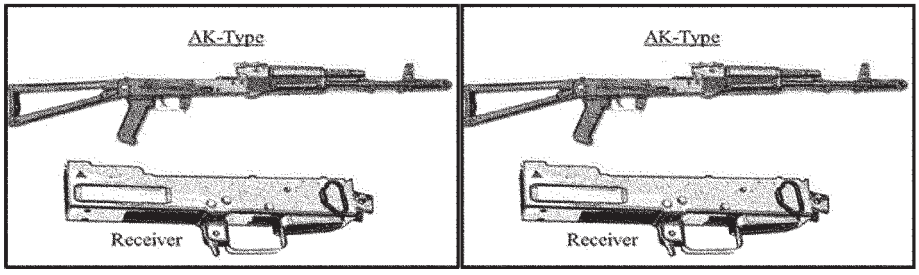
Example 2 – Bolt action rifle: The frame or receiver is the part of the rifle that provides a structure designed to hold the bolt, firing pin, and trigger mechanism.



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



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



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

(b) *Split or modular frame or receiver.* (1) In the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential internal components (*e.g.,* a split frame with upper assembly and lower assembly as in many semiautomatic rifles, upper slide assembly and lower grip module as in many semiautomatic handguns, or multiple silencer modular pieces), the Director may determine whether a specific part or parts of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. In making this determination, the Director will consider the following factors, with no single factor being controlling:

(i) Which component the manufacturer intended to be the frame or receiver;

(ii) Which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms;

(iii) How the component fits within the overall design of the firearm when assembled;

(iv) The design and function of the fire control components to be housed or integrated;

(v) Whether the component may 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;

(vi) Whether classifying the particular component is consistent with the legislative intent of the Act and this part; and

(vii) Whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.

(2) Frames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration.

(3) The Director has previously determined that a specific part is the frame or receiver with respect to certain weapons with split or modular frames or receivers. The following is a nonexclusive list of such weapons and the specific part identified as the frame or receiver as they existed on [date of publication of the final rule]:

(i) *Colt 1911-type, Beretta/Browning/FN Herstal/Heckler & Koch/Ruger/Sig Sauer/Smith & Wesson/Taurus hammer fired semiautomatic pistols:* The lower portion of the pistol, or grip, that provides housing for the trigger mechanism and hammer, and a structure designed to integrate the slide rails.

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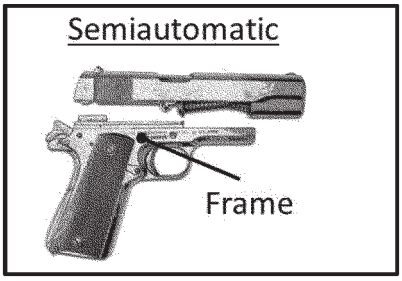
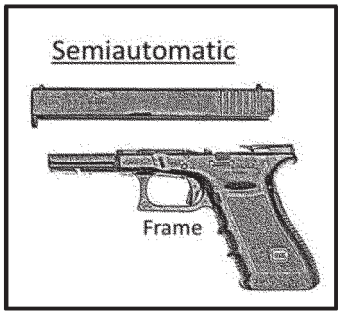
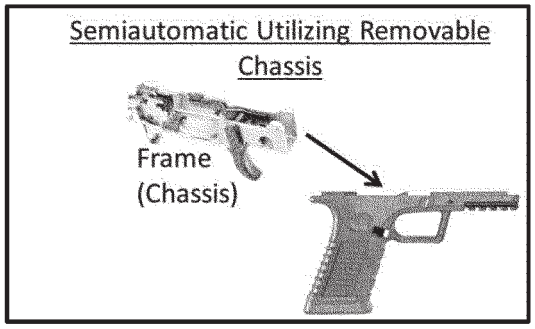


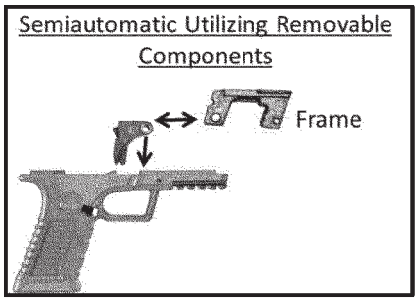
(ii) *Glock-type striker-fired semiautomatic pistols:* the lower portion of the pistol, or grip, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



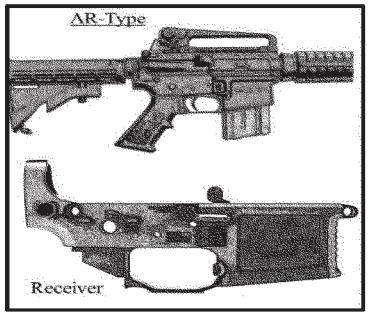
(iii) *Sig Sauer P320-type semiautomatic pistols:* the internal removable chassis of the pistol, partially exposed to the exterior to allow identification, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



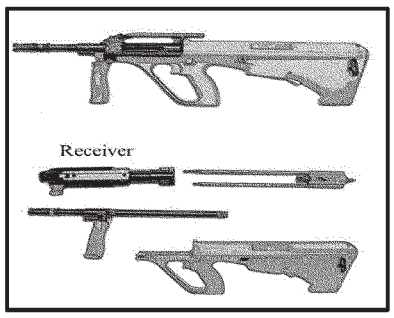
(iv) *Certain locking block rail system semiautomatic pistols:* the internal removable frame of the pistol that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails, provided a portion is partially exposed to the exterior to allow identification.



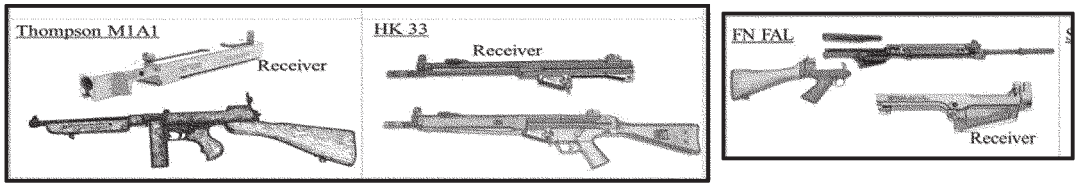
(v) *AR-15-type, and Beretta AR-70-type firearms:* the lower part of the weapon that provides housing for the trigger mechanism and hammer.



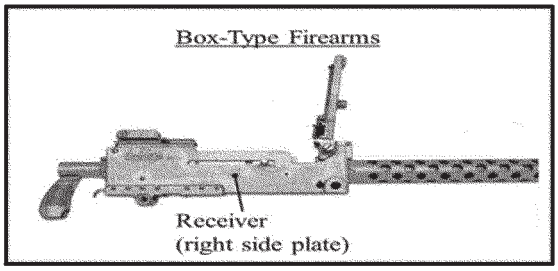
(vi) *Steyr AUG-type firearms:* the central part of the weapon that provides housing for the rods in the bolt carrier sub-assembly and a structure designed to attach the barrel.



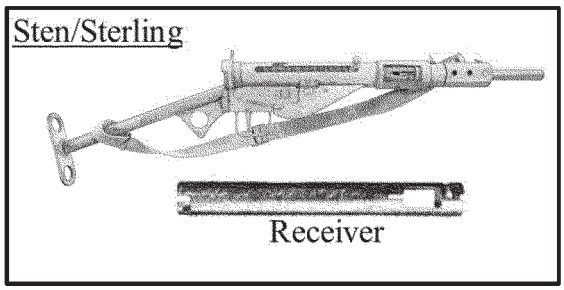
(vii) *Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP 40, and SIG 550-type firearms, and HK-type machineguns and semiautomatic variants:* the upper part of the weapon that provides housing for the bolt and firing pin.



(viii) *Vickers/Maxim, Browning 1919, and M2-type machineguns, and box-type machineguns and semiautomatic variants thereof:* the side plate of the weapon that provides a structure designed to hold the charging handle.



(ix) *Sten, Sterling, and Kel-Tec SUB-2000-type firearms:* the central part of the weapon, or tube, that provides housing for the bolt and firing pin.



BILLING CODE 4410–FY–C

(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 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.

(d) *Destroyed frame or receiver.* The term ''frame or receiver'' shall not include a frame or receiver that is destroyed. For purposes of this definition, the term ''destroyed'' means that the frame or receiver has been permanently altered not to provide housing or a structure that may hold or integrate any fire control or essential internal component, and may not readily be assembled, completed, converted, or restored to a functional state. Acceptable methods of destruction include completely melting, crushing, or shredding the frame or receiver, or by completely severing at least three critical areas of the frame or receiver using a cutting torch having a tip of sufficient size to displace at least ¼ inch of material at each location.

* * * * *

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. When used in this part, the term ''serial number'' shall mean the ''importer's or manufacturer's serial number.''

* * * * *

Privately made firearm (PMF). A firearm, including a frame or receiver, assembled or otherwise produced by a person other than a licensed manufacturer, and without a serial number or other identifying markings

placed by a licensed manufacturer at the time the firearm was produced. The term shall not include a firearm identified and registered in the National Firearms Registration and Transfer Record pursuant to chapter 53, title 26, United States Code, or any firearm made before October 22, 1968 (unless remanufactured after that date).

* * * * *

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:

(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.

* * * * *

§ 478.50 [Amended]

■ 6. In § 478.50(a), add the phrase ''or as otherwise provided in § 478.129'' after ''at the licensed premises served by such warehouse''.

■ 7. Revise § 478.92 to read as follows:

§ 478.92 Identification of firearms and armor piercing ammunition.

(a)(1) *Firearms manufactured or imported by licensees.* Licensed manufacturers and licensed importers of firearms must legibly identify each firearm they manufacture or import as follows:

(i) *Serial number, name, place of business.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or otherwise placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver thereof, a serial number, in a manner not susceptible of being readily obliterated, altered, or removed. The serial number identified on each part of a weapon defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee on any other firearm. Except as provided in paragraph (a)(4)(v) of this section, each frame or receiver thereof must also be marked with either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.,* ''12345678–[number]''; and

(ii) *Model, caliber or gauge, foreign manufacturer, country of manufacture.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver, or barrel or pistol slide (if applicable) thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. Except as provided in paragraph (a)(4)(v) of this section, the additional information shall include:

(A) The model, if such designation has been made;

(B) The caliber or gauge;

(C) When applicable, the name of the foreign manufacturer; and

(D) In the case of an imported firearm, the name of the country in which it was manufactured. For additional requirements relating to imported firearms, see Customs regulations at 19 CFR part 134.

(iii) *Frame or receiver, machinegun conversion part, or muffler or silencer part disposed of separately.* Except as provided in paragraph (a)(4)(iv) of this section, each part defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of by the licensee must be identified as required by this section with a serial number not duplicated on any other firearm and all additional identifying information, except that the model designation and caliber or gauge may be omitted if that information is unknown at the time the part is identified.

(iv) *Size and depth of markings.* 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. The size of serial numbers required by this section is measured as the distance between the latitudinal ends of the character impression bottoms (bases). The depth of all markings required by this section is measured from the flat surface of the metal and not the peaks or ridges.

(v) *Period of time to identify firearms.* 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. Except as provided in paragraph (a)(4)(iv) of this section, licensed manufacturers must identify each part, including a replacement part, defined as a frame or receiver, machinegun, or firearm muffler or firearm silencer that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of no later than seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. For purposes of this paragraph, firearms actively awaiting materials, parts, or equipment repair to be completed are actively in the manufacturing process. Licensed importers must identify imported firearms within the period prescribed in § 478.112.

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

(3) *Meaning of marking terms.* For purposes of this section, the terms ''legible'' and ''legibly'' mean that the identification markings use exclusively

Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen, and the terms ''conspicuous'' and ''conspicuously'' mean that the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.

(4) *Exceptions*—(i) *Alternate means or period of identification.* The Director may authorize other means of identification or period of time to identify firearms upon receipt of a letter application or Form 3311.4 from the licensee showing that such other identification or period is reasonable and will not hinder the effective administration of this part.

(ii) *Destructive devices.* In the case of a destructive device, the Director may authorize other means of identification or period of time to identify that weapon upon receipt of a letter application or Form 3311.4 from the licensee. The application shall show that engraving, casting, or stamping (impressing) such a weapon as required by this section would be dangerous or impracticable, or that the requested period is reasonable and will not hinder the effective administration of this part.

(iii) *Adoption of identifying markings.* Licensed manufacturers and licensed importers may adopt the serial number(s) or other identifying markings previously placed on a firearm in accordance with this section provided that, within the period and in the manner herein prescribed, the licensee legibly and conspicuously places, or causes to be placed, on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number, which is the first three and last five digits, followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number]''.

(iv) *Firearm muffler or silencer parts*—(A) *Firearm muffler or silencer parts transferred between qualified manufacturers to complete new devices.* A licensed manufacturer qualified under part 479 may transfer a part defined as a firearm muffler or firearm silencer to another qualified manufacturer without immediately identifying or registering such part provided that, upon receipt, it is actively used to manufacture a complete muffler or silencer device. Once the new device with such part is completed, the manufacturer of the device shall identify and register it in the manner and within the period specified in this part for a complete muffler or silencer device.

(B) *Firearm muffler or silencer replacement parts transferred to qualified manufacturers or dealers to repair existing devices.* A licensed manufacturer qualified under part 479 may transfer a replacement part defined as a firearm muffler or firearm silencer other than a frame or receiver to a qualified manufacturer or dealer without identifying or registering such part provided that, upon receipt, it is actively used to repair a complete muffler or silencer device that was previously identified and registered in accordance with this part.

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

(vi) *Privately made firearms acquired before [EFFECTIVE DATE OF THE FINAL RULE].* Licensees shall identify in the manner prescribed by this section, or cause another licensee to so identify, each privately made firearm received or otherwise acquired (including from a personal collection) by the licensee before [EFFECTIVE DATE OF THE FINAL RULE] within sixty (60) days from that date, or prior to the date of final disposition (including to a personal collection), whichever is sooner.

(b) *Armor piercing ammunition.* (1) Marking of ammunition. Each licensed manufacturer or licensed importer of armor piercing ammunition shall identify such ammunition by means of painting, staining or dying the exterior of the projectile with an opaque black coloring. This coloring must completely cover the point of the projectile and at least 50 percent of that portion of the projectile which is visible when the projectile is loaded into a cartridge case.

(2) *Labeling of packages.* Each licensed manufacturer or licensed importer of armor piercing ammunition shall clearly and conspicuously label each package in which armor piercing ammunition is contained, *e.g.,* each box, carton, case, or other container. The label shall include the words ''ARMOR PIERCING'' in block letters at least ¼ inch in height. The lettering shall be located on the exterior surface of the package which contains information concerning the caliber or gauge of the ammunition. There shall also be placed on the same surface of the package in block lettering at least ⅛ inch in height the words ''FOR GOVERNMENTAL ENTITIES OR EXPORTATION ONLY.'' The statements required by this subparagraph shall be on a contrasting background.

(c) *Voluntary classification of firearms and armor piercing ammunition.* The Director may issue a determination to a person whether an item is a firearm or armor piercing ammunition as defined in this part upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used. Upon completion of the examination, the Director may return the sample to the person who made the request unless a determination is made that return of the sample would be or place the person in violation of law. A determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.

§ 478.112 [Amended]

■ 8. Amend § 478.112 as follows:

■ a. In paragraph (b)(1)(iv)(A), remove ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)''; and

■ b. In paragraph (b)(1)(iv)(G), remove ''serial number'' and add in its place ''serial number(s)''.

§ 478.113 [Amended]

■ 9. Amend § 478.113 as follows:

■ a. In paragraph (b)(1)(iv)(A), remove the word ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)'';

■ b. In paragraph (b)(1)(iv)(G), remove the words ''serial number'' and add in

their place the words ''serial number(s)'';
■ c. In paragraph (c)(2)(ii), remove the word ''manufacturer'' and add in its place the word ''manufacturer(s)'';
■ d. In paragraph (c)(2)(iii), remove ''country of manufacturer'' and add in its place ''country or countries of manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)''; and
■ e. In paragraph (c)(2)(vii), remove the words ''serial number'' and add in their place ''serial number(s)''.

§ 478.114 [Amended]

■ 10. Amend § 478.114 as follows:
■ a. In paragraph (a)(1)(v)(A), remove the word ''manufacturer'' and add in its place ''manufacturer(s) of the firearm or privately made firearm (if privately made in the United States)'';
■ b. In paragraph (a)(1)(v)(G), remove the words ''serial number'' and add in their place ''serial number(s)''; and
■ c. In paragraph (b)(2)(ii), add ''or privately made firearm (if privately made in the United States)'' after ''ammunition''.
■ 11. Revise § 478.122 to read as follows:

§ 478.122 Records maintained by importers.

(a) Each licensed importer shall record the name of the importer(s), manufacturer(s) and/or privately made firearm (if privately made in the United States), type, model, caliber or gauge, country or countries of manufacture (if imported), and serial number(s) of each firearm imported or otherwise acquired (including a frame or receiver to be disposed of separately), the date of such importation or other acquisition, and if otherwise acquired, the name and address, or the name and license number of the person from whom it was received. The information required by this paragraph shall be recorded not later than 15 days following the date of importation or other acquisition in a format with the applicable columns set forth in paragraph (b) of this section.

(b) A record of each firearm disposed of by an importer and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149, shall be maintained by the licensed importer on the licensed premises. The record shall show the date of such sale or other disposition, and the name and license number of the licensee to whom the firearm was transferred, or if disposed to a nonlicensee, the name and address of the person, or the serial number of the firearms transaction record, Form 4473, if the licensee transferring the firearm serially numbers the Forms 4473 and files them numerically. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction. In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. Such information shall be recorded in a format containing the applicable columns below, except that for armor piercing ammunition, the information and format shall also include the quantity of projectiles:

IMPORTER'S OR MANUFACTURER'S FIREARMS ACQUISITION AND DISPOSITION RECORD

Description of firearm						Import/manufacture/acquisition		Disposition		
Importer(s), manufacturer(s), and/or PMF (if privately made in the U.S.)	Type	Model	Caliber or gauge	Country or countries of manufacture (if imported)	Serial number(s)	Date of import, manufacture, or acquisition	Name and address of nonlicensee; or if licensee, name and license No. (if acquired)	Date of disposition	Name	Address of nonlicensee; license No. of licensee; or Form 4473 Serial No. if filed numerically

IMPORTER'S OR MANUFACTURER'S ARMOR PIERCING AMMUNITION DISPOSITION RECORD

Date of disposition	Manufacturer	Caliber or gauge	Quantity of projectiles	Purchaser—name and address

(c) The Director may authorize alternate records to be maintained by a licensed importer to record the acquisition and disposition of firearms and armor piercing ammunition when it is shown by the licensed importer that such alternate records will accurately and readily disclose the information required by this section. A licensed importer who proposes to use alternate records shall submit a letter application to the Director and shall describe the proposed alternate records and the need therefor. Such alternate records shall not be employed by the licensed importer until approval in such regard is received from the Director.

■ 12. Revise § 478.123 to read as follows:

§ 478.123 Records maintained by manufacturers.

(a) 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 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, and if otherwise acquired, the name and address or the name and license number of the person from whom it was received. 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, 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. The information required by this paragraph shall be recorded in a format containing the applicable columns prescribed by § 478.122.

(b) A record of each firearm disposed of by a manufacturer and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149, shall be maintained by the licensed manufacturer on the licensed premises. The record shall show the date of such sale or other disposition, and the name and license number of the licensee to whom the firearms were transferred, or if disposed to a nonlicensee, the name and address of the person, or the serial number of the firearms transaction record, Form 4473, if the licensee transferring the firearm serially numbers the Forms 4473 and files them numerically. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction. In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition. Such information shall be recorded in a format containing the applicable columns prescribed by § 478.122, except that for armor piercing ammunition, the information and format shall also include the quantity of projectiles.

(c) The Director may authorize alternate records to be maintained by a licensed manufacturer to record the acquisition or disposition of firearms and armor piercing ammunition when it is shown by the licensed manufacturer that such alternate records will accurately and readily disclose the information required by this section. A licensed manufacturer who proposes to use alternate records shall submit a letter application to the Director and shall describe the proposed alternate record and the need therefor. Such alternate records shall not be employed by the licensed manufacturer until approval in such regard is received from the Director.

§ 478.124 [Amended]

■ 13. Amend § 478.124 as follows:

■ a. In paragraph (c)(4), remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''serial number'' and add in their place ''serial number(s)''; and

■ b. In the fourth sentence of paragraph (f), remove ''Upon receipt of such Forms 4473, the'' and add in its place ''The'', remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''serial number'' and add in their place ''serial number(s)''.

■ 14. Amend § 478.125 as follows:

■ a. In paragraph (e):

■ i. Remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'', wherever they appear, and add in their place ''serial number(s)'', and remove ''as provided in paragraph (g)'' and add in its place ''as provided in paragraphs (g) and (i)'';

■ ii. Add a sentence after the sixth sentence; and

■ iii. In the table Firearms Acquisition and Disposition Record remove ''Name and address or name and license No.'' and add in its place ''Name and address of nonlicensee; or if licensee, name and License No.'', and remove ''Address or License No. if licensee, or Form 4473 Serial No. if Forms 4473 filed numerically'' and add in its place ''Address of nonlicensee; License No. of licensee; or Form 4473 Serial No. if such forms filed numerically'';

■ b. In paragraph (f)(1):

■ i. Remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'' and add in their place ''serial number(s)''; and

■ ii. Add a sentence after the fifth sentence;

■ c. In paragraph (f)(2) table Firearms Collectors Acquisition and Disposition Record, remove ''Manufacturer'' and add in its place ''Manufacturer(s)'', remove the words ''importer (if any)'' and add in their place ''importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', and remove the words ''Serial No.'' and add in their place ''Serial number(s)''; and

■ d. Add paragraph (j).

The additions read as follows:

§ 478.125 Record of receipt and disposition.

* * * * *

(e) * * * In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition.* * *

* * * * *

(f) * * *

(1) * * * In the event the licensee records a duplicate entry with the same firearm and acquisition information, whether to close out an old record book or for any other reason, the licensee shall record a reference to the date and location of the subsequent entry (*e.g.,* date of new entry, book name/number, page number, and line number) as the disposition.* * *

* * * * *

(j) *Privately made firearms.* Licensees must record each receipt (whether or not kept overnight) or other acquisition (including from a personal collection) and disposition (including to a personal collection) of a privately made firearm as required by this part, except that such information need not be recorded if the firearm is being identified under the direct supervision of another licensee with their information. Once a privately made firearm is identified by the licensee in accordance with section 478.92(a)(2), the licensee shall update the record of acquisition entry with the identifying information.

§ 478.125 [Amended]

■ 15. Amend § 478.125a as follows:

■ a. In the first sentence of paragraph (a)(4), remove ''manufacturer and importer (if any)'' and add in its place ''manufacturer(s) and importer(s) (if any) of the firearm or privately made firearm (if privately made in the United States)'', remove the words ''serial number'' and add in their place ''serial number(s)'', remove ''Manufacturer and importer (if any)'' and add in its place ''Manufacturer(s) and importer(s) (if any)'', and remove the words ''Serial No.'' and add in their place ''serial number(s)''.

■ 16. In § 478.129, revise paragraphs (b), (d), and (e) to read as follows:

§ 478.129 Record retention.

* * * * *

(b) *Firearms Transaction Record.* Licensees shall retain each Form 4473 until business is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the

business premises readily accessible for inspection under this part. Paper forms over 20 years of age may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part. Forms 4473 shall be retained in the licensee's records as provided in § 478.124(b): Provided, that Forms 4473 with respect to which a sale, delivery or transfer did not take place shall be separately retained in alphabetical (by name of transferee) or chronological (by date of transferee's certification) order.

* * * * *

(d) *Records of importation and manufacture.* Licensees shall maintain records of the importation, manufacture, or other acquisition of firearms, including ATF Forms 6 and 6A as required by subpart G of this part, until business is discontinued. Licensed importers' records and licensed manufacturers' records of the sale or other disposition of firearms after December 15, 1968, shall be retained until business is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the business premises readily accessible for inspection under this part. Paper records that do not contain any open disposition entries and with no dispositions recorded within 20 years may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part.

(e) *Records of dealers and collectors.* The records prepared by licensed dealers and licensed collectors of the sale or other disposition of firearms and the corresponding record of receipt of such firearms shall be retained until business or licensed activity is discontinued, either on paper, or in an electronic alternative method approved by the Director, at the business or collection premises readily accessible for inspection under this part. Paper records that do not contain any open disposition entries and with no dispositions recorded within 20 years may be stored at a separate warehouse, which shall be considered part of the business premises for this purpose and subject to inspection under this part.

* * * * *

PART 479—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

■ 17. The authority citation for 27 CFR part 479 continues to read as follows:

Authority: 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

■ 18. In § 479.11:

■ a. Add definitions for ''Complete muffler or silencer device'' and ''Complete weapon'';

■ b. Revise the definition of ''Frame or receiver'';

■ c. Add a definition for ''Readily''; and

■ d. Add a sentence at the end of the definition of ''Transfer''.

The additions and revision read as follows:

§ 479.11 Meaning of terms.

* * * * *

Complete muffler or silencer device. A muffler or silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

Complete weapon. A firearm other than a muffler or silencer that contains all component parts necessary to function as designed whether or not assembled or operable.

* * * * *

Frame or receiver. The term ''frame or receiver'' shall have the same meaning as in 27 CFR 478.11.

* * * * *

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:

(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.

* * * * *

Transfer. * * * For purposes of this part, the term shall not include the temporary conveyance of a lawfully possessed firearm to a manufacturer or dealer qualified under this part for the sole purpose of repair, identification, evaluation, research, testing, or calibration, and return to the same lawful possessor.

* * * * *

§ 479.62 [Amended]

■ 19. In § 479.62(b)(3), remove ''manufacturer'' and add in its place ''manufacturer(s)'' and remove the words ''serial number'' and add in their place ''serial number(s)''.

§ 479.84 [Amended]

■ 20. In § 479.84(b)(8), remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the words ''importer (if known)'' and add in their place ''importer(s) (if known)'', and remove the words ''serial number'', wherever they may be, and add in their place ''serial number(s)''.

§ 479.88 [Amended]

■ 21. In § 479.88(b), remove ''manufacturer'' and add in its place ''manufacturer(s)'', remove the word ''importer'' and add in its place ''importer(s)'', and remove the words ''serial number'' and add in their place ''serial number(s)''.

§ 479.90 [Amended]

■ 22. In § 479.90(b), remove the words ''manufacturer'', wherever they may be, and add in their place ''manufacturer(s)'', remove the word ''importer'' and add in its place ''importer(s)'', and remove the words ''serial number'' and add in their place ''serial number(s)''.

■ 23. Revise § 479.102 to read as follows:

§ 479.102 Identification of firearms.

(a) *Identification required.* You, as a manufacturer, importer, or maker of a firearm, must legibly identify the firearm as follows:

(1) *Serial number, name, place of business.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or otherwise placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver thereof, a serial number, in a manner not susceptible of being readily obliterated, altered, or removed. The serial number identified on each part of a weapon, including a weapon parts kit, defined as a frame or receiver must be the same number, but must not duplicate any serial number(s) placed by the licensee or maker on any other firearm. Except as provided in paragraph (b)(5) of this section, each frame or receiver thereof must also be marked with either: Your name (or recognized abbreviation), and city and State (or recognized abbreviation) where you as a manufacturer or importer maintain your place of business, or in the case of a maker, where you made the

firearm; or if a licensee, your name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, *e.g.,* ''12345678–[number]''; and

(2) *Model, caliber or gauge, foreign manufacturer, country of manufacture.* By engraving, casting, stamping (impressing), or otherwise conspicuously placing or causing to be engraved, cast, stamped (impressed) or placed on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver, or barrel or pistol slide (if applicable) thereof certain additional information. This information must be placed in a manner not susceptible of being readily obliterated, altered, or removed. Except as provided in paragraph (b)(5) of this section, the additional information shall include:

(i) The model, if such designation has been made;

(ii) The caliber or gauge;

(iii) When applicable, the name of the foreign manufacturer or maker; and

(iv) In the case of an imported firearm, the name of the country in which it was manufactured. For additional requirements relating to imported firearms, see Customs regulations at 19 CFR part 134.

(3) *Frame or receiver, machine gun conversion part, or silencer part disposed of separately.* Except as provided in paragraph (b)(4) of this section, each part defined as a frame or receiver, machine gun, or firearm muffler or firearm silencer, that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of by you must be identified as required by this section with a serial number not duplicated on any other firearm and all additional identifying information, except that the model designation and caliber or gauge may be omitted if that information is unknown at the time the part is identified.

(4) *Size and depth of markings.* 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. The size of serial numbers required by this section is measured as the distance between the latitudinal ends of the character impression bottoms (bases). The depth of all markings required by this section is measured from the flat surface of the metal and not the peaks or ridges.

(5) *Period of time to identify firearms.* You 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. Except as provided in paragraph (b)(4) of this section, you must identify each part, including a replacement part, defined as a frame or receiver, machine gun, or firearm muffler or firearm silencer, that is not a component part of a complete weapon or device at the time it is sold, shipped, or otherwise disposed of no later than seven days following the date of completion of the active manufacturing process for the part, or prior to disposition, whichever is sooner. For purposes of this paragraph, firearms actively awaiting materials, parts, or equipment repair to be completed are actively in the manufacturing process. Licensed importers must identify imported firearms within the period prescribed in § 478.112.

(6) *Meaning of marking terms.* For purposes of this section, the terms ''legible'' and ''legibly'' mean that the identification markings use exclusively Roman letters (*e.g.,* A, a, B, b, C, c) and Arabic numerals (*e.g.,* 1, 2, 3), or solely Arabic numerals, and may include a hyphen, and the terms ''conspicuous'' and ''conspicuously'' mean that the identification markings are capable of being easily seen with normal handling of the firearm and unobstructed by other markings when the complete weapon is assembled.

(b) *Exceptions*—(1) *Alternate means or period of identification.* The Director may authorize other means of identification or period of time to identify firearms upon receipt of a letter application or Form 3311.4 from you showing that such other identification or period is reasonable and will not hinder the effective administration of this part.

(2) *Destructive devices.* In the case of a destructive device, the Director may authorize other means of identification or period of time to identify that weapon upon receipt of a letter application or Form 3311.4 from you. The application shall show that engraving, casting, or stamping (impressing) such a weapon as required by this section would be dangerous or impracticable, or that the requested time period is reasonable and will not hinder the effective administration.

(3) *Adoption of identifying markings.* Licensed manufacturers and licensed importers may adopt the serial number(s) or other identifying markings previously placed on a firearm in accordance with this section provided that, within the period and in the manner herein prescribed, the licensee legibly and conspicuously places, or causes to be placed, on each part (or specific part(s) previously determined by the Director) defined as a frame or receiver either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and their abbreviated Federal firearms license number, which is the first three and last five digits, followed by a hyphen, and then followed by the existing serial number (including any other abbreviated FFL prefix) as a suffix, *e.g.,* ''12345678–[serial number]''.

(4) *Firearm muffler or silencer parts*—(i) *Firearm muffler or silencer parts transferred between qualified manufacturers to complete new devices.* A licensed manufacturer qualified under this part may transfer a part defined as a muffler or silencer to another qualified manufacturer without immediately identifying or registering such part provided that, upon receipt, it is actively used to manufacture a new complete muffler or silencer device. Once the new device with such part is completed, the manufacturer of the device shall identify and register it in the manner and within the period specified in this part for a complete muffler or silencer device.

(ii) *Firearm muffler or silencer replacement parts transferred to qualified manufacturers or dealers to repair existing devices.* A licensed manufacturer qualified under this part may transfer a replacement part defined as a muffler or silencer other than a frame or receiver to a qualified manufacturer or dealer without identifying or registering such part provided that, upon receipt, it is actively used to repair a complete muffler or silencer device that was previously identified and registered in accordance with this part.

(5) *Firearms designed and configured before [EFFECTIVE DATE OF THE FINAL RULE].* Licensed manufacturers and licensed importers may continue to identify firearms of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1) and (2) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose.

(c) *Voluntary classification of firearms.* The Director may issue a determination to a person whether an item is a firearm as defined in this part

upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used. Upon completion of the examination, the Director may return the sample to the person who made the request unless a determination is made that return of the sample would be or place the person in violation of law. A determination made by the Director under this paragraph shall not be deemed by any person to be applicable to or authoritative with respect to any other sample, design, model, or configuration.

§ 479.103 [Amended]

■ 24. In § 479.103, at the end of the third sentence, add ‘‘, except as provided in § 479.102(b)(4).’’

§ 479.112 [Amended]

■ 25. In § 479.112(a), second sentence, remove the words ‘‘serial number’’ and add in their place the words ‘‘serial number(s)’’.

§ 479.141 [Amended]

■ 26. In § 479.141, remove the word ‘‘manufacturer’’ and add in its place ‘‘manufacturer(s)’’ and remove the words ‘‘serial number’’ and add in their place ‘‘serial number(s)’’.

Dated: May 7, 2021.

Merrick B. Garland,

Attorney General.

[FR Doc. 2021–10058 Filed 5–20–21; 8:45 am]

BILLING CODE 4410–FY–P

EXHIBIT 7

Corporan v. Wal-Mart Stores East, LP

United States District Court for the District of Kansas

July 18, 2016, Decided; July 18, 2016, Filed

Case No. 16-2305-JWL

Reporter
2016 U.S. Dist. LEXIS 93307 *

Melinda K. Corporan, heir at law of Reat Underwood, and Administratrix and personal representative of the Estate of Reat Underwood, Plaintiff, v. Wal-Mart Stores East, LP and Wal-Mart Stores, Inc., Defendants.

Prior History: *Corporan v. Wal-Mart Stores E., 2016 U.S. Dist. LEXIS 91106 (D. Kan., July 12, 2016)*

Counsel: **[*1]** For Melinda K. Corporon, heir at law and administratrix and personal representative of the Estate of deceased, Reat Underwood, Plaintiff: David R. Morantz, Lynn R. Johnson, LEAD ATTORNEYS, Shamberg, Johnson & Bergman, Chtd. - KCMO, Kansas City, MO; Paige L. McCreary, LEAD ATTORNEY, Shamberg, Johnson & Bergman, Chartered, Kansas City, MO.

For Wal-Mart Stores East, LP, Wal-Mart Stores, Inc., Defendants: J. Andrew L. Richardson, Mary Quinn Cooper, LEAD ATTORNEYS, PRO HAC VICE, McAfee & Taft, PC - Tulsa, Tulsa, OK; Michael E. Brown, William H. Henderson, LEAD ATTORNEYS, Kutak Rock LLP - Kansas City, Kansas City, MO.

Judges: John W. Lungstrum, United States District Judge.

Opinion by: John W. Lungstrum

Opinion

MEMORANDUM & ORDER

Plaintiff Melinda K. Corporon is the mother of Reat Underwood, who was shot and killed by Frazier Glenn Cross, Jr., a/k/a Frazier Glenn Miller ("Miller"). Plaintiff is also the Administratrix of the Estate of Reat Underwood. The shotgun utilized by Miller to kill Dr. Corporan was sold by defendants to John Mark Reidle, who transferred the gun to Miller after he purchased it. Plaintiff filed a state court petition against defendants alleging that defendants negligently sold the shotgun to Reidle, **[*2]** a straw purchaser, with knowledge that Reidle was falsely representing himself as the actual buyer of the firearm. Defendants thereafter removed the case to this court on the basis of diversity jurisdiction under *28 U.S.C. § 1332*. This matter is presently before the court on defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim (doc. 10). As will be explained, the motion is granted in part and denied in part and plaintiff shall file an amended complaint no later than Friday, July 29, 2016.

Standard

In analyzing defendants' Rule 12(b)(6) motion, the court accepts as true "all well-pleaded factual allegations in the complaint and view[s] them in the light most favorable to the plaintiff." *Burnett v. Mortgage Elec. Registration Sys., Inc., 706 F.3d 1231, 1235 (10th Cir. 013)* (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868, (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929, (2007))*). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Lebahn v. National Farmers Union Uniform Pension Plan, 828 F.3d 1180, 2016 U.S. App. LEXIS 12708, 2016 WL 3670007, at *2 (10th Cir. July 11, 2016)* (quoting *Iqbal, 556 U.S. at 678*). It is not enough for the plaintiff to plead "labels and conclusions" or to provide "a formulaic recitation of the elements of a **[*3]** cause of action." *Id.* (citations omitted).

Background

Consistent with the applicable standard, the following facts are taken from the complaint and accepted as true

for purposes of this motion.[1] On April 9, 2014, Miller and Reidle entered a Wal-Mart Supercenter in Republic, Missouri. Miller is a convicted felon who is prohibited by law from purchasing firearms. In the presence of at least one Wal-Mart salesperson, Miller selected a Remington shotgun and initiated its purchase. Miller then claimed that he did not have any identification with him and "offered that Reidle would complete the purchase." Reidle, in the presence of Miller and at least one Wal-Mart employee, completed the requisite Form 4473 in which he falsely identified himself as the actual buyer of the firearm.[2] According to plaintiffs, defendants assisted Reidle in completing Form 4473 and then sold the firearm to Reidle, who thereafter transferred it to Miller. On April 13, 2014, Miller used the Remington shotgun to shoot and kill Reat Underwood and his grandfather in the parking lot of the Jewish Community Center in Overland Park, Kansas. Based on these facts, plaintiff has sued defendants for negligence, negligent entrustment, **[*4]** negligence per se and aiding and abetting a straw purchase of a firearm.

PLCAA Immunity

Defendants move to dismiss the entirety of plaintiff's complaint based on the immunity provided by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. ("PLCAA"). The PLCAA was enacted in 2005 and **[*5]** generally prohibits claims against firearms and ammunition manufacturers, distributors, dealers, and importers for damages and injunctive relief arising from the criminal or unlawful misuse of firearms and ammunition, unless the suit falls within one of six enumerated exceptions. 15 U.S.C. §§ 7901-7903. The PLCAA requires that federal courts "immediately dismiss[ ]" a "qualified civil liability action." 15 U.S.C. § 7902(b).

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions.]

Id. § 7903(5)(A). The parties do not dispute that this case meets all the elements of that general definition as applied to defendants—it is a "civil action" brought by a "person" for damages and other relief to redress harm "resulting from the criminal . . . misuse of a qualified product by . . . a third party." *Id.* Additionally, **[*6]** defendants are "seller[s] of a qualified product," *id.*, because they distributed the firearm used in the shooting, *see id.* § 7903(6) (defining "seller").

The PLCAA therefore requires dismissal of plaintiff's complaint if none of the specified exceptions applies. *See* Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009). Stated another way, plaintiff's state law negligence claims must fall into one the exceptions enumerated in the PLCAA before plaintiff will be permitted to proceed with her claims. Plaintiffs argue that the third exception, § 7903(5)(A)(iii), applies. Under that exception, the PLCAA does not preempt

> an action in which a manufacturer or seller of a qualified product *knowingly violated a State or Federal statute applicable to the sale or marketing of the product*, and the violation was a proximate cause of the harm for which relief is sought, including—
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition **[*7]** of a qualified product; or
>
> (II) any case in which the manufacturer or seller

---

[1] As noted earlier, plaintiff initially filed her claims in a state court petition. Nonetheless, the court uses the term "complaint" as defendants have removed the case to federal court and the federal rules and relevant case law use the term "complaint" rather than "petition."

[2] The Bureau of Alcohol, Tobacco, Firearms, and Explosives requires that buyers complete Form 4473 accurately and truthfully before purchasing a firearm from a federal firearms licensee. United States v. Reed, 599 Fed. Appx. 827, 829 n.3 (10th Cir. 2014). Among other things, Form 4473 seeks to prevent straw purchases of firearms and, toward that end, requires a prospective purchaser to certify that he is the actual buyer and that he is not acquiring the firearm on behalf of another person. United States v. Reese, 745 F.3d 1075, 1078 (10th Cir. 2014). Form 4473 also requires the dealer to certify that the dealer believes, based on the information disclosed in the form, that it is not unlawful for the dealer to transfer the firearm to the prospective purchaser. *See* Shawano Gun & Loan, LLC v. Hughes, 650 F.3d 1070, 1073 (7th Cir. 2011).

> aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of *section 922* of Title 18[.]

Id. *§ 7903(5)(A)(iii)* (emphasis added). This exception has come to be known as the "predicate exception," because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a "predicate statute." *Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009)* (citing cases). That is, a plaintiff must allege a knowing violation of "a State or Federal statute applicable to the sale or marketing of the product." *15 U.S.C. § 7903(5)(A)(iii)*. In her complaint, plaintiff alleges that defendants knowingly violated certain specific provisions of the Gun Control Act of 1968, *18 U.S.C. §§ 921-931*: making a false statement "material to the lawfulness of the sale" in violation of *§ 922(a)(6)*; making a false statement "with respect to information required by [the Act] to be kept" by the dealer in violation of *§ 924(a)(1)(A)*; making a false entry in or failing to make an appropriate entry in any record which the dealer is required to keep **[*8]** under the Act in violation of *§ 922(m)*; and selling or disposing of a firearm to a person who he knows or has reasonable cause to believe has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year in violation of *§ 922(d)(1)*.[3]

The allegations in the complaint do not plausibly support a claim that defendants violated *§ 922(d)(1)*. There are no allegations in the complaint that defendant knew or should have known that Miller was a convicted felon and plaintiff does not suggest otherwise in her submissions. The remaining statutes identified by plaintiff, as they relate to this case, involve defendants' role in completing and maintaining Form 4473. The Bureau of Alcohol, Tobacco, Firearms, and Explosives requires that buyers complete Form 4473 accurately and truthfully before purchasing a firearm from a federal firearms licensee. *United States v. Reed, 599 Fed. Appx. 827, 829 n.3 (10th Cir. 2014)*. Federal firearms licensees must maintain these records. *Id.* Among other things, Form 4473 seeks to prevent straw purchases **[*9]** of firearms and, toward that end, requires a prospective purchaser to certify that he is the actual buyer and that he is not acquiring the firearm on behalf of another person. *United States v. Reese, 745 F.3d 1075, 1078 (10th Cir. 2014)*. Form 4473 also requires the dealer to certify that the dealer believes, based on the information disclosed in the form, that it is not unlawful for the dealer to transfer the firearm to the prospective purchaser. *See Shawano Gun & Loan, LLC v. Hughes, 650 F.3d 1070, 1073 (7th Cir. 2011)*. A dealer violates the Gun Control Act—and the specific provisions highlighted by plaintiff—if the dealer transfers a firearm based upon information in Form 4473 that he knows or has reason to believe is false. *Id.* (citing *18 U.S.C. §§ 922(m)* and *924(a)(1)(A)*).

Defendants highlight in their submissions that the complaint is devoid of any allegations that defendants made any false entries or false statements in connection with the Form 4473—only that Reidle did so. This is an accurate characterization of the complaint. As noted above, however, Form 4473 requires the dealer to certify in writing that the dealer believes, based on the information disclosed in the form, that it is not unlawful for the dealer to transfer the firearm to the prospective purchaser. The blank Form 4473 submitted by plaintiff confirms that the seller's **[*10]** signature and certification is required. Assuming, then, that plaintiff could amend her complaint to include the allegation that Form 4473 was signed by a salesperson with knowledge of the transaction (an allegation that plaintiff makes in her submissions), then plaintiff will have alleged sufficient facts, together with other facts alleged in the complaint, to support a plausible claim that defendants certified to their belief that the sale was lawful when, in fact, they had knowledge that Reidle was not the actual buyer of the firearm. Those other allegations include the fact that Miller, in the presence of a Wal-Mart salesperson, selected the firearm and initiated the purchase of the firearm, but offered up Reidle to complete the purchase after claiming that he did not have identification with him. The court, then, will permit plaintiff an opportunity to amend her complaint to include allegations concerning the certification provided by defendants on Form 4473.

Assuming that plaintiff amends her complaint as described here, her claims are sufficient to survive the PLCAA filter. *See Chiapperini v. Gander Mountain Co., 48 Misc. 3d 865, 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014)* (denying in large part defendant's motion to dismiss based on PLCAA immunity where plaintiffs alleged **[*11]** that straw purchaser and actual buyer visited store together but straw purchaser made no

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[3] While plaintiff generally alleges in her petition that defendants also violated "various . . . state laws," she does not identify in her petition or in her submissions any specific state statutes allegedly violated by defendants.

inquiries about guns and paid with cash provided by actual buyer); *see also* Shawano Gun & Loan, LLC v. Hughes, 650 F.3d 1070 (7th Cir. 2011) (affirming district court's decision that defendant had reason to believe that purchaser was not actual buyer of firearm where purchaser had the same last name and/or address as a person whose application to purchase the firearms was denied either that day or the previous day).

The cases relied upon by defendants in their motion do not persuade the court otherwise. In *Ileto*, the Ninth Circuit held that the plaintiffs had not alleged the violation of any separate federal or state statute and, accordingly, could not satisfy the requirements of the predicate exception of the PLCAA in connection with their claims against a gun manufacturer. 565 F.3d at 1133. Here, of course, plaintiffs have alleged violations of the federal Gun Control Act. In Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216 (D. Colo. 2015), the district court also held that the plaintiffs, who sued a firearm dealer, could not satisfy the predicate exception because the purchaser of the firearm admittedly had "no human contact" with the dealer and all sales were made online. *Id. at 1224*. The dealer, then, had no reason to know, as alleged by plaintiffs, **[*12]** that the purchaser was addicted to a controlled substance or was patently dangerous. By contrast, plaintiffs here allege that defendants had direct contact with Reidle and Miller and, based on the circumstances, knew that Reidle was not the actual buyer of the firearm. In the third case cited by defendants, *Jefferies v. District of Columbia, 916 F. Supp. 2d 42, 46 (D.D.C. 2013)*, a teenager was killed in a random shooting by an AK-47 assault rifle and her estate sued the manufacturer of the gun for negligence. The district court sua sponte dismissed the case under the PLCAA on the grounds that the PLCAA barred suits against gun manufacturers for injuries caused by the private, criminal use of their guns and that no exception plausibly applied to the facts alleged. *Id. at 45-46*. *Jefferies*, then, is readily distinguishable from the case presented here. Finally, in the last case cited by defendants, *Estate of Kim ex rel. Alexander v. Coxe, 295 P.3d 380, 386 (Alaska 2013)*, the court held that the plaintiff could not establish a "knowing violation" of a federal or state statute if the evidence undisputedly showed that the firearm was stolen from the dealer. *Id. at 394*. The court, however, recognized that if a factual dispute existed as to whether the dealer sold the rifle or otherwise transferred the rifle, then summary judgment was not appropriate. **[*13]** *See id.*

For the foregoing reasons, the court concludes that plaintiff's complaint, with the anticipated amendments described herein, sufficiently alleges conduct that falls within the predicate exception to PLCAA. Defendants, then, have not shown that dismissal of the complaint under the PLCAA is appropriate.[4]

Negligence Per se

Defendants also move to dismiss plaintiff's negligence per se theory on the grounds that plaintiff has failed to allege facts sufficient to establish the violation of a statute. The court has already rejected this argument in connection with the PLCAA discussion above and does so again here. Defendants next contend that plaintiff's negligence per se theory would still fail under both Missouri and Kansas law. Under Missouri law, a plaintiff asserting negligence per se must plead that the defendant violated a specific statute or regulation and that the injury complained of was the kind the statute or regulation was designed to prevent. *See* Parr v. Breeden, 489 S.W.3d 774, 2016 Mo. LEXIS 188, 2016 WL 3180249, at *4 (Mo. June 7, 2016). Plaintiff has specifically pleaded that the federal Gun Control Act was intended to protect the public from violent crimes committed by felons with firearms and that Reat Underwood is a member of the class of persons meant to be protected by the Gun Control **[*15]** Act.

In summary fashion, defendants contend that plaintiff cannot state a claim under Missouri law because the

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[4] In their motion to dismiss, defendants attack plaintiff's complaint in piecemeal fashion, arguing that plaintiff must show that each "claim" set forth in her complaint satisfies one of the enumerated exceptions. Plaintiff contends that if her allegations satisfy one exception, she need not separately establish, for example, that her negligent entrustment theory or her negligence per se theory also fit within one of the exceptions. Defendants do not reply to plaintiff's position. Thus, because the court finds the predicate exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants. *See* Chiapperini v. Gander Mountain Co., 48 Misc. 3d 865, 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014) ("as long as one PLCAA exception applies to one claim, the entire action moves forward"); Williams v. Beemiller, Inc., 100 A.D.3d 143, 952 N.Y.S.2d 333 (N.Y. App. Div. 2012) (finding one applicable PLCAA exception and permitting entire case to go forward without addressing other exceptions as to remaining claims). This approach **[*14]** is consistent with the language of the statute itself, which does not apply to "actions" in which a knowingly violation is alleged. *See* 15 U.S.C. § 7903(5)(A) (a "qualified civil liability action" . . . "shall not include" . . . "an action" in which a seller knowingly violated state or federal statutes).

Gun Control Act was not intended to prevent injuries to the public at large. Missouri courts have not considered whether a shooting victim such as Reat Underwood is within the class of persons intended to be protected by the federal Gun Control Act. In the only Missouri case cited by defendant, however, the Missouri Court of Appeals reversed a trial court's dismissal of a negligence per se claim where the plaintiff pleaded that a nursing home resident was intended to be protected by federal and state nursing home regulations and the legislative history indicated that the laws were intended to prevent physical and emotional abuse in nursing homes. *See* Dibrill v. Normandy Assocs., Inc., 383 S.W.3d 77, 84-85 (Mo. Ct. App. 2012). In the absence of any Missouri case law indicating that the Missouri Supreme Court would hold otherwise, the court is comfortable predicting that Missouri courts would conclude that the Gun Control Act was designed to protect the public by keeping "guns out of the hands of criminals and others who should not have them, and to assist law enforcement authorities in investigating serious crimes." Abramski v. United States, 134 S. Ct. 2259, 2267, 189 L. Ed. 2d 262 (2014); Huddleston v. United States, 415 U.S. 814, 824, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974) (principal purpose of Gun Control **[*16]** Act is to "curb crime"); King v. Story's, Inc., 54 F.3d 696, 697 (11th Cir.1995) (vacating district court's award of summary judgment in favor of defendant who allegedly sold the rifle used to kill the plaintiff to a convicted felon in violation of *section 922(d)(1)*, and confirming that "[t]he trial court [properly] recognized that this plaintiff . . . is a member of the class of persons Congress intended to protect by enacting the Gun Control Act; that the injuries were of the type contemplated by the Act; and that the sale was made in violation of the Act"). Defendants, then, have not shown that dismissal of plaintiff's negligence per se theory is warranted under Missouri law.

With respect to the doctrine of negligence per se under Kansas law, defendants urge that plaintiff must establish that an individual right of action for injury arising out of the statute was intended by the legislature, as stated by the Kansas Supreme Court in Pullen v. West, 278 Kan. 183, 92 P.3d 584, 593 (Kan. 2004). Recently, however, the Kansas Supreme Court acknowledged that its rules regarding negligence per se "are difficult to reconcile and equally difficult to apply." Shirley v. Glass, 297 Kan. 888, 308 P.3d 1, 5-6 (Kan. 2013). In that case, the plaintiff filed a petition against a gun seller alleging negligence based on the seller's act of selling a firearm while knowing that the purchaser **[*17]** of the firearm intended to have another individual take possession of the firearm. Id. at 5. Both the district court and the Kansas Court of Appeals held that the plaintiff could not maintain a negligence per se claim based on a violation of the Gun Control Act because that statute did not create a private right of action. *See* Shirley v. Glass, 44 Kan. App. 2d 688, 241 P.3d 134, 149-52 (Kan. Ct. App. 2010). In a concurring opinion, Judge Malone of the Kansas Court of Appeals acknowledged that the decision was correct under the current Kansas law, but urged the Kansas Supreme Court to revisit this "additional" requirement for recovery under the theory of negligence per se. As explained by Judge Malone, Kansas courts have not always required an individual to establish that the legislature intended to create an individual right of action arising from the violation of a statute and the test currently utilized in Kansas "appears to differ from the negligence per se doctrine recognized in every other state." Id. at 158-59. In great detail, Judge Malone challenged the requirement as "difficult to apply" and one that has led to "inconsistent and curious" results. Id. at 159-60.

The plaintiff in *Shirley* sought review of the appellate court's decision on negligence per se, but the Kansas Supreme Court did **[*18]** not address the concerns raised by Judge Malone (except to the extent it agreed that much confusion exists in Kansas concerning the doctrine of negligence per se) because it determined that plaintiff was not presenting negligence per se as a separate cause of action created by statute but that she was asserting only a claim of "simple negligence" that looked to the federal statute to define the standard of care. Shirley, 308 P.3d at 5-6. The Court, then, found it "irrelevant" as to whether the federal Gun Control Act gave rise to a private cause of action because the statutory violation was not the grounds for her claim. Id. at 5. Rather, she appropriately sought to utilize the federal statutes to establish a duty of care in her negligence claim. Id. at 6.

As plaintiff highlights in her response, *Shirley* at the very least authorizes plaintiff's reliance on the federal Gun Control Act to establish the duty of care and a violation of that statute may be used by plaintiff to establish a breach of a duty. Id. at 7. To the extent, of course, that plaintiff is attempting to plead negligence per se as a separate "statutorily created private cause of action," Kansas law would preclude that approach. Id. at 5. But to the extent that plaintiff references **[*19]** the federal statute to define the standard of care—and references a violation of that statute as evidence of breach—*Shirley* permits that approach. *See* id. at 5-6. Defendant's motion to dismiss, then, is granted under Kansas law to

the extent plaintiff seeks to assert a separate claim based solely on a violation of the statute, but is denied to the extent that plaintiff is using the statute to establish duty and breach.

Negligent Entrustment

In her complaint, plaintiff asserts a claim for negligent entrustment under state law. Defendants move to dismiss this claim on the grounds that plaintiff has failed to set forth facts sufficient to plead a claim of negligent entrustment under either Kansas or Missouri law. Under the laws of both states, plaintiff, to prove this claim, must show that defendants entrusted the firearm to someone "incompetent" and that defendants had knowledge of the person's incompetence. *See* *Shirley v. Glass, 297 Kan. 888, 308 P.3d 1, 6 (Kan. 2013)*; *State ex rel. Stinson v. House, 316 S.W.3d 915, 919 & n.3 (Mo. 2010)*. Defendant contends that plaintiff has not sufficiently pleaded facts suggesting that Reidle was incompetent or that defendants knew that Reidle was incompetent. In her complaint, plaintiff alleges that defendants negligently entrusted the firearm to both Reidle and Miller and that Miller **[*20]** was incompetent. In her submissions, however, plaintiff clarifies that her negligent entrustment theory focuses on the entrustment of the firearm to Reidle who, according to plaintiff, was "incompetent" based solely on his status as a straw purchaser. Plaintiff further clarifies in her submissions that defendants, under the circumstances described, knew that Reidle was not the actual buyer of the firearm and, thus, knew of his status as a straw purchaser.

While defendants are correct that these allegations are not included in the complaint, the court concludes that plaintiff should be permitted to amend her complaint to include these allegations. Significantly, defendants in their reply brief focus only on the language of the negligent entrustment exception to the PLCAA and do not address plaintiff's argument that she has otherwise stated a claim for negligent entrustment under Kansas and Missouri law. The motion to dismiss, then, is denied.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to dismiss for failure to state a claim (doc. 10) is granted in part and denied in part.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiff shall file an amended complaint as described herein **[*21]** no later than **Friday, July 29, 2016**.

IT IS SO ORDERED.

Dated this 18th day of July, 2016, at Kansas City, Kansas.

/s/ John W. Lungstrum

John W. Lungstrum

United States District Judge

EXHIBIT 8

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 109th CONGRESS, FIRST SESSION

Vol. 151 WASHINGTON, WEDNESDAY, JULY 27, 2005 No. 104

Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. STEVENS].

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal God, You have challenged us to become like children in order to enter Your kingdom. Today give us a child's trust, that we may find joy in Your guidance. Give us a child's wonder, that we may never take for granted the Earth's beauty and the sky's glory. Give us a child's love, that we may find our greatest joy in being close to You. Give us a child's humility, that we will trust Your wisdom to order our steps.

Guide our Senators and those who support them through the challenges of this day. As they look to You for wisdom, supply their needs according to Your infinite riches.

We pray in Your righteous Name. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT—MOTION TO PROCEED

The PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of the motion to proceed to S. 397, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 397) to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

The PRESIDENT pro tempore. Under the previous order, the time from 10 to 2 p.m. shall be equally divided, with the majority in control of the first hour and the Democrats in control of the second hour, rotating in that fashion until 2 p.m.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, this morning we are returning to the motion to proceed to the Protection of Lawful Commerce in Arms Act, otherwise known as the gun manufacturers liability legislation. Yesterday we invoked cloture on the motion to proceed. We now have an order to begin the bill at 2 p.m. today. The debate will be equally divided until 2 o'clock today. I understand a rollcall vote will not be necessary, and we will have a voice vote at 2 p.m. and then be on the bill.

Senators can expect a cloture vote on the underlying bill to occur on Friday, unless we change that time by consent. As I stated repeatedly over the last several days, we are going to have a very busy session as we address a range of issues, including energy and highways and the Interior funding bill, the gun manufacturers liability bill, veterans funding, nominations, and other issues.

Just a quick update on several of these. In terms of the Energy bill, after 5 years of hard work, the energy conferees are now done. I expect that that legislation will be filed shortly. This is a major accomplishment that will cause serious and dramatic changes in how we produce, deliver, and consume energy. We simply would not be at this point without the hard work, the perseverance, and the patience of Senator DOMENICI and his partner, Senator BINGAMAN, as well as Congressman BARTON. We will pass that conference report this week. Our country will be all the better for it.

I was talking to the Secretary of Energy earlier this morning. We were discussing the absolute importance of passing this bill to establish a framework of policy from this legislative body. He again referred to the great good this bill will do.

On highways, it has taken this Congress 3 tough years of work to come to this point, but with just a little more work, we will have a bill that the President will sign. Our conferees are working and should complete the writing of it today. I spent time with several of the conferees yesterday and with the Speaker, as we coordinate completion of this highway bill.

The good news for the American people is, as they see what is sometimes confusing on the floor of the Senate as these bills come in, this particular highway bill will make our streets and our highways safer. It will make our economy more productive. It will create many new jobs.

I mentioned veterans funding. Yesterday, the House and Senate majority agreed to ensure that $1.5 billion of needed funding will be given to the Department of Veterans Affairs this fiscal year. Veterans can be assured that their health care will remain funded. I know it is confusing what you hear on the floor, but that action is being taken.

I mentioned Interior funding. Yesterday both Houses agreed to fund many of the programs that affect many of our public lands held in trust for Americans throughout the country. We intend to complete action on this conference report this week as well.

Late last night, the conferees completed work on the Legislative Branch appropriations bill, and we will be attempting to clear that legislation as well this week.

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

doing heart transplants, using the best of lasers to resect tumors out of the trachea or windpipe, and with developing ventricular assist devices. I was in Tanzania some weeks ago working at a small clinic out in the bush, and when you look back at America, we have the most advanced health care in the world, with new treatments and techniques, improving millions of lives every day.

Through this bill, we are putting that same sort of American ingenuity to work in improving patient safety in hospitals and clinics and thus getting rid of waste and improving the overall quality of care. This bill is a major step forward to making health care safer and less costly, driving up the quality, driving down costs, and getting out the waste.

I can tell you, this is the first major health bill in this Congress. But I hope in the very near future we will pass other important legislation we are working on in a similarly bipartisan way—namely, information technology to have privacy-protected, electronic medical records available to everybody who wants it. It is a bipartisan effort. We have come a long way, and I am hopeful that we can do that in the near future.

We are establishing interoperability standards—working with the private sector to establish interoperability standards which will allow the 6,000 hospitals and 900,000 physicians out there to be able to communicate in a seamless way, with privacy-protected information. Again, it is another bill that would get rid of waste, drive down the cost of health care, and improve quality.

I am excited about these health initiatives. I thank my colleagues who have specifically been involved in this bill, including Chairman MIKE ENZI, Senator JUDD GREGG, Senator JIM JEFFORDS, who has been at it as long as anybody—this particular bill on patient safety—and, of course, Senator TED KENNEDY. On the House side, Chairman JOE BARTON and ranking member JOHN DINGELL have done a tremendous job as well shepherding through, the Patient Safety and Quality Improvement Act. We are saving lives and moving American medicine forward.

Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. CRAIG. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. CRAIG. Mr. President, I understand that the Republican side has from 10 until 11, is that correct, under the unanimous consent agreement?

The PRESIDENT pro tempore. That is correct. The first hour is under the control of the majority, the second hour is under the control of the minority, and it reverts back to the majority and then the minority.

Mr. CRAIG. Mr. President, I send to the desk a list of 61 cosponsors of S. 397, the Protection of Lawful Commerce in Arms Act that is currently pending before the Senate, and I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COSPONSORS, BY DATE

Sen. Baucus, Max [D-MT]—2/16/2005*, Sen. Bunning, Jim [R-KY]—2/16/2005*, Sen. Chambliss, Saxby [R-GA]—2/16/2005*, Sen. Collins, Susan M. [R-ME]—2/16/2005*, Sen. Craig, Larry [R-ID], Sen. Crapo, Mike [R-ID]—2/16/2005*, Sen. Ensign, John [R-NV]—2/16/2005*, Sen. Hutchison, Kay Bailey [R-TX]—2/16/2005*, Sen. Isakson, Johnny [R-GA]—2/16/2005*, Sen. Kyl, Jon [R-AZ]—2/16/2005*, Sen. Murkowski, Lisa [R-AK]—2/16/2005*, Sen. Santorum, Rick [R-PA]—2/16/2005*, Sen. Snowe, Olympia J. [R-ME]—2/16/2005*, Sen. Thomas, Craig [R-WY]—2/16/2005*, Sen. Sununu, John E. [R-NH]—2/16/2005*, Sen. Vitter, David [R-LA]—2/17/2005, Sen. DeMint, Jim [R-SC]—3/1/2005.

Sen. Dorgan, Byron L. [D-ND]—3/1/2005, Sen. Gregg, Judd [R-NH]—3/1/2005, Sen. Hatch, Orrin G. [R-UT]—3/1/2005, Sen. Frist, William H. [R-TN]—3/3/2005, Sen. Graham, Lindsey [R-SC]—3/4/2005, Sen. Cochran, Thad [R-MS]—3/9/2005, Sen. Shelby, Richard C. [R-AL]—3/9/2005, Sen. Burr, Richard [R-NC]—3/10/2005, Sen. Specter, Arlen [R-PA]—3/14/2005, Sen. Pryor, Mark L. [D-AR]—3/16/2005, Sen. Roberts, Pat [R-KS]—3/17/2005, Sen. Bennett, Robert F. [R-UT]—4/12/2005, Sen. McCain, John [R-AZ]—7/21/2005, Sen. Byrd, Robert C. [D-WV]—7/25/2005, Sen. Alexander, Lamar [R-TN]1—2/16/2005*, Sen. Burns, Conrad R. [R-MT]—2/16/2005*, Sen. Coburn, Tom [R-OK]—2/16/2005*.

Sen. Cornyn, John [R-TX]—2/16/2005*, Sen. Domenici, Pete V. [R-NM]—2/16/2005*, Sen. Enzi, Michael B. [R-WY]—2/16/2005*, Sen. Inhofe, James M. [R-OK]—2/16/2005*, Sen. Johnson, Tim [D-SD]—2/16/2005*, Sen. Lincoln, Blanche L. [D-AR]—2/16/2005*, Sen. Nelson, E. Benjamin [D-NE]—2/16/2005*, Sen. Sessions, Jeff [R-AL]—2/16/2005*, Sen. Stevens, Ted [R-AK]—2/16/2005*, Sen. Thune, John [R-SD]—2/16/2005*, Sen. Allen, George [R-VA]—2/17/2005, Sen. Landrieu, Mary L. [D-LA]—2/17/2005, Sen. Dole, Elizabeth [R-NC]—3/1/2005, Sen. Grassley, Chuck [R-IA]—3/1/2005, Sen. Hagel, Chuck [R-NE]—3/1/2005.

Sen. Lott, Trent [R-MS]—3/2/2005, Sen. Talent, Jim [R-MO]—3/3/2005, Sen. Allard, Wayne [R-CO]—3/7/2005, Sen. Martinez, Mel [R-FL]—3/9/2005, Sen. Brownback, Sam [R-KS]—3/10/2005, Sen. Bond, Christopher S. [R-MO]—3/14/2005, Sen. McConnell, Mitch [R-KY]—3/15/2005, Sen. Coleman, Norm [R-MN]—3/16/2005, Sen. Voinovich, George V. [R-OH]—4/12/2005, Sen. Smith, Gordon H. [R-OR]—4/27/2005, Sen. Salazar, Ken [D-CO]—7/21/2005, Sen. Rockefeller, John D. [D-WV]—7/26/2005.

Mr. CRAIG. Mr. President, the reason I sent that list of cosponsors to the desk is to demonstrate to all of our colleagues that 61 Senators—60 plus myself—are now in support of the legislation that is pending before the Senate that we will move to active consideration of this afternoon at 2 o'clock. I think it demonstrates to all of us the broad, bipartisan support this legislation has and a clear recognition that the time for S. 397 has arrived.

This legislation prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party.

It is very important for everybody to understand that it is that and nothing more. These predatory lawsuits are aimed at bankrupting the firearms industry. The courts of our Nation are supposed to be a forum for resolving controversies between citizens and providing relief where it is warranted, not a mechanism for achieving political ends that are rejected by the people's representatives, the Congress of the United States.

Time and time again down through history, that rejection has occurred on this floor and the floor of the other body.

Interest groups, knowing that clear well, have now chosen the court route to attempt to destroy this very valuable industry in our country.

Over two dozen suits have been filed on a variety of theories, but all seek the same goal of forcing law-abiding businesses selling a legal product to pay for damages from the criminal misuse of that product. I must say, if the trial bar wins here, the next step could be another industry and another product.

While half of these lawsuits have already been fully and finally dismissed, other cases are still on appeal and pending. Hundreds of millions of dollars are still being spent. The bill would require the dismissal of existing suits, as well as future suits that fit this very narrow category of description. It is not a gun industry immunity bill because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct.

This bill gives specific examples of lawsuits not prohibited—product liability, negligence or negligent entrustment, breach of contract, lawsuits based on violations of States and Federal law. And yet, we already heard the arguments on the floor yesterday, and I am quite confident we will hear them again and tomorrow, that this is a sweeping approach toward creating immunity for the firearms industry.

I repeat for those who question it, read the bill and read it thoroughly. It is not a long bill. It is very clear and very specific.

The trend of abusive litigation targeting the firearms industry not only defies common sense and concepts of fundamental fairness, but it would do nothing to curb criminal gun violence. Furthermore, it threatens a domestic industry that is critical to our national defense, jeopardizes hundreds of thousands of good-paying jobs, and puts at risk access Americans have to a legal product used for hundreds of years across this Nation for lawful purposes, such as recreation and self-defense.

Thirty-three States enacted similar gun lawsuit bans or civil liability protection. In other words, already 33

important to recognize because it does put in context something that can very easily be taken out of context.

Michael Golden, president and CEO of Smith & Wesson, put it this way. He speaks to a letter in response to the Brady Center's wire story, obviously trying to knock down the claims of gun manufacturers in their support of the Protection of Lawful Commerce in Arms Act. He stated:

In the article, the Brady Center attempts to minimize the financial implications that the numerous "junk" lawsuits have had on the firearms industries. To support their position, they cite, among other things, Smith & Wesson's most recent 10-Q, filed with the Securities and Exchange Commission. They quote Smith & Wesson's filing, stating, "In the nine months ended January 31, 2005, we incurred $4,535 in defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation."

As stated in our filing, the figure report reflects fees incurred over a 9-month period, and is exclusive of settlement amounts received from our insurers. Smith & Wesson entered into settlement agreements with two of its insurance carriers following years of coverage disputes. The settlement amounts equal a fraction of the total fees incurred by Smith & Wesson in defending against frivolous lawsuits. In fact, over the past 10 years, Smith & Wesson has spent millions of dollars defending itself against precisely the type of "junk" lawsuits that the legislation—

Referencing the legislation that is before us today—

is designed to prevent.

So they do openly support passage of the Protection of Lawful Commerce in Arms Act. They feel it is critical to not only the survival of Smith & Wesson but to the firearms industry of America.

I ask unanimous consent that the letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SMITH & WESSON,
Springfield, MA, July 26, 2005.

Hon. BILL FRIST,
Majority Leader, U.S. Senate, U.S. Capitol Building, Washington, DC.

DEAR SENATOR FRIST: This letter is in response to the Brady Center's newswire released yesterday regarding the Protection of Lawful Commerce in Arms Act. The newswire was entitled "The Biggest Lie Yet: Hoping to Ram Bill Through Senate, NRA Supporters Use Phony Scare Tactics, Says Brady Campaign.

In the article, the Brady Center attempts to minimize the financial implications that the numerous "junk" lawsuits have had on the firearms industry. To support their position, they cite, among other things, Smith & Wesson's most recent 10-Q, filed with the Securities and Exchange Commission. They quote Smith & Wesson's filing stating, "In the nine months ended January 31, 2005, we incurred $4,535 in defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation."

As stated in our filing, the figure reported reflects fees incurred over a nine-month period, and is exclusive of settlement amounts received from our insurers. Smith & Wesson entered into settlement agreements with two of its insurance carriers following years of coverage disputes. The settlement amounts equal a fraction of the total fees incurred by Smith & Wesson in defending against frivolous lawsuits. In fact, over the past 10 years, Smith & Wesson has spent millions of dollars defending itself against precisely the type of "junk" lawsuits that the legislation is designed to prevent.

Passage of Protection of Lawful Commerce in Arms Act is obviously critical to Smith & Wesson, the firearm industry, our nation's economy and America's hunting traditions and firearm freedoms. Thank you for your sponsorship of this very important piece of legislation.

Very truly yours,

MICHAEL F. GOLDEN,
President and CEO.

Mr. CRAIG. I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas is recognized.

Mrs. LINCOLN. I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mrs. LINCOLN are printed in today's RECORD under "Morning Business.")

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, as most of our colleagues know, we are now on S. 397, the Protection of Lawful Commerce in Firearms Act. There is an amendment on the Senate floor for consideration at this moment. Cloture on the bill has been filed.

What I thought I might do is take a few moments to discuss some of the differences between S. 397, the one currently on the Senate floor, and S. 1805, the previous version of the Protection of Lawful Commerce in Firearms Act, which was considered in the Senate in the 108th Congress. Language has been added in this version to address developing issues or concerns expressed last Congress, garnering more support and adding more cosponsors on both sides.

As I announced this morning and submitted for the RECORD, we now have 61 cosponsors including myself. In some cases, the changes are just technical in their character.

But before I get to the changes, let me assure my colleagues that these changes do not alter the essential purpose and effect of the bill. As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry. Well recognized causes of action are protected by the bill. Plaintiffs can still argue their cases for violations of law, breach of warranty, and knowing transfers to dangerous persons. Specific language has been added to make it clear that the bill is not intended to prevent suits for damage caused by defective firearms or ammunition. The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle.

This bill places blame where blame is due. If manufacturers or dealers break the law or commit negligence, they are still liable. However, if the cause of harm is the criminal act of a third person, this bill will prevent lawsuits targeting companies that have "deep pockets" but no control over those third persons.

The first change we made in this bill was to add the words "injunctive or other relief' in the title of the bill. This is to make sure S. 397 will prevent all qualified suits and respond to concerns that the 108th version would only have prevented suits for damages. The version of the bill before us today will prevent suits that seek injunctive or other relief besides those seeking only money damages. Without adding this language, law-abiding firearms businesses could still be crippled by being prevented from manufacturing or selling firearms. Any court decision that incorrectly finds dealers or manufacturers liable for criminal acts of others will destroy an industry whether there is an award of money damages or not.

In the "findings" section of the bill, we have made a couple of changes that do not alter but strengthen and clarify the second amendment principles that are reviewed there.

That same section contains a new paragraph responding to questions about the bill's Commerce Clause implications. That new section expresses the reality that the bill actually strengthens federalism and protects interstate commerce. Thirty-three states have already forbidden lawsuits like the ones this bill seeks to eliminate. Advocates of gun control are trying to usurp State power by circumventing the legislative process through judgments and judicial decrees. Allowing activist judges to legislate from the bench will destroy state sovereignty. This bill will protect it.

A new paragraph in the "purposes" section of the bill echoes this change.

In the "definitions" section of the bill spelling out what we mean by a "qualified civil liability action," we have added the words "or administrative proceeding . . .". This change responds to the experience of some in the industry, who have found themselves not only the target of junk lawsuits filed by a municipality but also the target of administrative proceedings, such as those to change zoning restrictions, also aimed at putting a law-abiding manufacturer or seller out of business just because it made or sold a firearm that was later used in a crime. However, it must be remembered that not all administrative proceedings involving someone in the firearms industry would be covered by this addition—only those that were "resulting from the criminal or unlawful misuse of a qualified product by the person [bringing the action] or a third party . . .". Let me emphasize: this change is not intended to, and would not, have the effect of preventing ATF or any other Federal, State, or local agency from using administrative proceedings to enforce Federal or State regulations that control the firearms business. So we are not trying to circumvent the Justice Department in any sense of the

EXHIBIT 9

Calendar No. 363

108TH CONGRESS
1ST SESSION

S. 1805

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

IN THE SENATE OF THE UNITED STATES

OCTOBER 31, 2003

Mr. CRAIG introduced the following bill; which was read the first time

NOVEMBER 3, 2003

Read the second time and placed on the calendar

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or

ammunition products that function as designed and intended.

(5) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(6) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would con-

stitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers,

distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought.

SEC. 4. DEFINITIONS.

In this Act, the following definitions shall apply:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade asso-

ciation, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law;

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(III) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the

product, when used as intended or in a manner that is reasonably foreseeable.

(B) NEGLIGENT ENTRUSTMENT.—As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) REASONABLY FORESEEABLE.—As used in subparagraph (A)(v), the term "reasonably foreseeable" does not include any criminal or unlawful misuse of a qualified product, other than possessory offenses.

(D) RULE OF CONSTRUCTION.—The exceptions described in subparagraph (A) shall be construed so as not to be in conflict and no provision of this Act shall be construed to create a Federal private cause of action or remedy.

(6) SELLER.—The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who

is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, who is in compliance with all applicable Federal, State, and local laws.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United

States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means any association or business organization (whether or not incorporated under Federal or State law)—

(A) that is not operated for profit;

(B) of which 2 or more members are manufacturers or sellers of a qualified product; and

(C) that is involved in promoting the business interests of its members, including organizing, advising, or representing its members with respect to their business, legislative or legal activities in relation to the manufacture, importation, or sale of a qualified product.

(9) UNLAWFUL MISUSE.—The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

Calendar No. 363

108TH CONGRESS
1ST SESSION

S. 1805

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

NOVEMBER 3, 2003

Read the second time and placed on the calendar

EXHIBIT 10

Public Law 109–92
109th Congress

An Act

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

Oct. 26, 2005
[S. 397]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

Protection of Lawful Commerce in Arms Act.
15 USC 7901 note.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC. 2. FINDINGS; PURPOSES.

15 USC 7901.

(a) FINDINGS.—Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing

in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

15 USC 7902.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS. 15 USC 7903.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required

to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, United States Code.

(B) NEGLIGENT ENTRUSTMENT.—As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) RULE OF CONSTRUCTION.—The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

(D) MINOR CHILD EXCEPTION.—Nothing in this Act shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) SELLER.—The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and

who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE.—The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

SEC. 5. CHILD SAFETY LOCKS.

Child Safety Lock Act of 2005.
18 USC 921 note.

(a) SHORT TITLE.—This section may be cited as the "Child Safety Lock Act of 2005".

18 USC 922 note.

(b) PURPOSES.—The purposes of this section are—

(1) to promote the safe storage and use of handguns by consumers;

(2) to prevent unauthorized persons from gaining access to or use of a handgun, including children who may not be in possession of a handgun; and

(3) to avoid hindering industry from supplying firearms to law abiding citizens for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(c) FIREARMS SAFETY.—

(1) MANDATORY TRANSFER OF SECURE GUN STORAGE OR SAFETY DEVICE.—Section 922 of title 18, United States Code, is amended by inserting at the end the following:

"(z) SECURE GUN STORAGE OR SAFETY DEVICE.—

"(1) IN GENERAL.—Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

"(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

"(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United

States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

"(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

"(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

"(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

"(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

"(3) LIABILITY FOR USE.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

"(B) PROSPECTIVE ACTIONS.—A qualified civil liability action may not be brought in any Federal or State court.

"(C) DEFINED TERM.—As used in this paragraph, the term 'qualified civil liability action'—

"(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—

"(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

"(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

"(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.".

(2) CIVIL PENALTIES.—Section 924 of title 18, United States Code, is amended—

(A) in subsection (a)(1), by striking "or (f)" and inserting "(f), or (p)"; and

(B) by adding at the end the following:

"(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

"(1) IN GENERAL.—

"(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

"(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

"(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

"(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

"(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.".

(3) LIABILITY; EVIDENCE.— 18 USC 922 note.

(A) LIABILITY.—Nothing in this section shall be construed to—

(i) create a cause of action against any Federal firearms licensee or any other person for any civil liability; or

(ii) establish any standard of care.

(B) EVIDENCE.—Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with the amendments made by this section shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action relating to section 922(z) of title 18, United States Code, as added by this subsection.

(C) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to bar a governmental action to impose a penalty under section 924(p) of title 18, United States Code, for a failure to comply with section 922(z) of that title.

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect 180 days after the date of enactment of this Act. 18 USC 922 note.

SEC. 6. ARMOR PIERCING AMMUNITION.

(a) UNLAWFUL ACTS.—Section 922(a) of title 18, United States Code, is amended by striking paragraphs (7) and (8) and inserting the following:

"(7) for any person to manufacture or import armor piercing ammunition, unless—

"(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

"(B) the manufacture of such ammunition is for the purpose of exportation; or

"(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

"(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

"(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

"(B) is for the purpose of exportation; or

"(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;".

(b) PENALTIES.—Section 924(c) of title 18, United States Code, is amended by adding at the end the following:

"(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

"(A) be sentenced to a term of imprisonment of not less than 15 years; and

"(B) if death results from the use of such ammunition—

"(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

"(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.".

(c) STUDY AND REPORT.—

(1) STUDY.—The Attorney General shall conduct a study to determine whether a uniform standard for the testing of projectiles against Body Armor is feasible.

(2) ISSUES TO BE STUDIED.—The study conducted under paragraph (1) shall include—

(A) variations in performance that are related to the length of the barrel of the handgun or center-fire rifle from which the projectile is fired; and

(B) the amount of powder used to propel the projectile.

(3) REPORT.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit a report containing the results of the study conducted under this subsection to—

(A) the chairman and ranking member of the Committee on the Judiciary of the Senate; and

(B) the chairman and ranking member of the Committee on the Judiciary of the House of Representatives.

Approved October 26, 2005.

LEGISLATIVE HISTORY—S. 397:

CONGRESSIONAL RECORD, Vol. 151 (2005):
July 27–29, considered and passed Senate.
Oct. 20, considered and passed House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 41 (2005):
Oct. 26, Presidential statement.

○

EXHIBIT 11

Gustafson v. Springfield, Inc.

Superior Court of Pennsylvania

September 17, 2019, Argued; September 28, 2020, Decided; September 28, 2020, Filed

No. 207 WDA 2019

Reporter
2020 Pa. Super. LEXIS 843 *; 2020 PA Super 239; CCH Prod. Liab. Rep. P20,986; 2020 WL 5755493

MARK AND LEAH GUSTAFSON, INDIVIDUALLY AND AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON, Appellants v. SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE; Appellees. THE UNITED STATES OF AMERICA, Intervenor

Notice: THIS OPINION WAS WITHDRAWN BY THE COURT.

Subsequent History: [*1] The Opinion Previously Reported at this Citation has been Removed from the Lexis Service at the Request of the Court.

Opinion withdrawn by, Rehearing granted by, En banc *Gustafson v. Springfield, Inc., 2020 Pa. Super. LEXIS 957 (Pa. Super. Ct., Dec. 3, 2020)*

Rehearing granted by *Gustafson v. Springfield, Inc., 2020 Pa. Super. LEXIS 956 (Pa. Super. Ct., Dec. 3, 2020)*

Prior History: Appeal from the Order Entered January 15, 2019. In the Court of Common Pleas of Westmoreland County. Civil Division at No(s): 1126 of 2018. Before HARRY F. SMAIL, J.

Gustafson v. Springfield, Inc., 2019 Pa. Dist. & Cnty. Dec. LEXIS 4462 (Jan. 15, 2019)

Gustafson v. Springfield, Inc.

Superior Court of Pennsylvania

December 3, 2020, Filed

No. 207 WDA 2019

Reporter
2020 Pa. Super. LEXIS 957 *

MARK AND LEAH GUSTAFSON, INDIVIDUALLY AND AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON, Appellants v. SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE, Appellees THE UNITED STATES OF AMERICA, Intervenor

Prior History: *Gustafson v. Springfield, Inc., 2020 PA Super 239, 2020 Pa. Super. LEXIS 843, 2020 WL 5755493 (Pa. Super. Ct., Sept. 28, 2020)*

Core Terms

supplemental brief, substituted, copies, en banc, reargument

Opinion

[*1] ORDER

Upon consideration of the October 13, 2020 applications for reargument, filed by Appellees Springfield, Inc. D/B/A Springfield Armory and Saloom Department Store and Saloom Dept. Store, LLC D/B/A Saloom Department Store and Intervenor, the United States of America, IT IS HEREBY ORDERED:

THAT this Court's Prothonotary shall amend the caption in the above-captioned case to reflect the United States of America as Intervenor;

THAT *en banc* reargument is GRANTED;
THAT the decision of this COURT filed September 28, 2020, is withdrawn;

THAT the case be listed before the next available *en banc* panel;
THAT Appellants, Mark and Leah Gustafson, Individually and as Administrators and Personal Representatives of the Estate of James Robert (Jr.) Gustafson, shall file an original and ten (10) copies of either the brief previously filed, the brief previously filed together with a supplemental brief, or a substituted Brief for Appellant by December 14, 2020, along with an original and ten (10) copies of the reproduced record;

THAT Appellees, Springfield, Inc. D/B/A Springfield Armory and Saloom Department Store and Saloom Dept. Store, LLC D/B/A Saloom Department Store, and Intervenor, the United States **[*2]** of America, shall thereafter have twenty-one (21) days after service to file an original and ten (10) copies of the brief previously filed, the brief previously filed together with a supplemental brief, or a substituted Brief for Appellees or Intervenor;
THAT Appellants shall thereafter have fourteen (14) days after service of the Brief for Appellees or the Brief for Intervenor, whichever is served later, to file an original and ten (10) copies of one (1) reply brief in accordance with *Pa.R.A.P. 2113(a)* if desired. No other briefs may be filed by the parties without leave of this Court; AND
THAT any substituted or supplemental brief shall clearly indicate on the cover page that it is a substituted or supplemental brief.

PER CURIAM

End of Document

EXHIBIT 12

PUBLIC LAW 107–42—SEPT. 22, 2001

AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT

Public Law 107–42
107th Congress

An Act

Sept. 22, 2001
[H.R. 2926]

To preserve the continued viability of the United States air transportation system.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Air Transportation Safety and System Stabilization Act. 49 USC 40101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Air Transportation Safety and System Stabilization Act".

TITLE I—AIRLINE STABILIZATION

49 USC 40101 note. President. Terrorism.

SEC. 101. AVIATION DISASTER RELIEF.

(a) IN GENERAL.—Notwithstanding any other provision of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001:

(1) Subject to such terms and conditions as the President deems necessary, issue Federal credit instruments to air carriers that do not, in the aggregate, exceed $10,000,000,000 and provide the subsidy amounts necessary for such instruments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(2) Compensate air carriers in an aggregate amount equal to $5,000,000,000 for—

(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and

(B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.

(b) EMERGENCY DESIGNATION.—Congress designates the amount of new budget authority and outlays in all fiscal years resulting from this title as an emergency requirement pursuant to section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901(e)). Such amount shall be available only to the extent that a request, that includes designation of such amount as an emergency requirement as defined in such Act, is transmitted by the President to Congress.

SEC. 102. AIR TRANSPORTATION STABILIZATION BOARD.

49 USC 40101 note.

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) BOARD.—The term "Board" means the Air Transportation Stabilization Board established under subsection (b).

(2) FINANCIAL OBLIGATION.—The term "financial obligation" means any note, bond, debenture, or other debt obligation issued by an obligor in connection with financing under this section and section 101(a)(1).

(3) LENDER.—The term "lender" means any non-Federal qualified institutional buyer (as defined by section 230.144A(a) of title 17, Code of Federal Regulations (or any successor regulation) known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Security Act of 1933, including—

(A) a qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986 (26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(B) a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986 (26 U.S.C. 414(d)) that is a qualified institutional buyer.

(4) OBLIGOR.—The term "obligor" means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation, partnership, joint venture, trust, or governmental entity, agency, or instrumentality.

(b) AIR TRANSPORTATION STABILIZATION BOARD.—

(1) ESTABLISHMENT.—There is established a board (to be known as the "Air Transportation Stabilization Board") to review and decide on applications for Federal credit instruments under section 101(a)(1).

(2) COMPOSITION.—The Board shall consist of—

(A) the Secretary of Transportation or the designee of the Secretary;

(B) the Chairman of the Board of Governors of the Federal Reserve System, or the designee of the Chairman, who shall be the Chair of the Board;

(C) the Secretary of the Treasury or the designee of the Secretary; and

(D) the Comptroller General of the United States, or the designee of the Comptroller General, as a nonvoting member of the Board.

(c) FEDERAL CREDIT INSTRUMENTS.—

(1) IN GENERAL.—The Board may enter into agreements with 1 or more obligors to issue Federal credit instruments under section 101(a)(1) if the Board determines, in its discretion, that—

(A) the obligor is an air carrier for which credit is not reasonably available at the time of the transaction;

(B) the intended obligation by the obligor is prudently incurred; and

(C) such agreement is a necessary part of maintaining a safe, efficient, and viable commercial aviation system in the United States.

(2) TERMS AND LIMITATIONS.—

(A) FORMS; TERMS AND CONDITIONS.—A Federal credit instrument shall be issued under section 101(a)(1) in such

form and on such terms and conditions and contain such covenants, representatives, warranties, and requirements (including requirements for audits) as the Board determines appropriate.

Deadline. Regulations.

(B) PROCEDURES.—Not later than 14 days after the date of enactment of this Act, the Director of the Office of Management and Budget shall issue regulations setting forth procedures for application and minimum requirements, which may be supplemented by the Board in its discretion, for the issuance of Federal credit instruments under section 101(a)(1).

(d) FINANCIAL PROTECTION OF GOVERNMENT.—

(1) IN GENERAL.—To the extent feasible and practicable, the Board shall ensure that the Government is compensated for the risk assumed in making guarantees under this title.

(2) GOVERNMENT PARTICIPATION IN GAINS.—To the extent to which any participating corporation accepts financial assistance, in the form of accepting the proceeds of any loans guaranteed by the Government under this title, the Board is authorized to enter into contracts under which the Government, contingent on the financial success of the participating corporation, would participate in the gains of the participating corporation or its security holders through the use of such instruments as warrants, stock options, common or preferred stock, or other appropriate equity instruments.

(3) DEPOSIT IN TREASURY.—All amounts collected by the Secretary of the Treasury under this subsection shall be deposited in the Treasury as miscellaneous receipts.

49 USC 40101 note.

SEC. 103. SPECIAL RULES FOR COMPENSATION.

(a) DOCUMENTATION.—Subject to subsection (b), the amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the amount of losses described in section 101(a)(2) that the air carrier demonstrates to the satisfaction of the President, using sworn financial statements or other appropriate data, that the air carrier incurred. The Secretary of Transportation and the Comptroller General of the United States may audit such statements and may request any information that the Secretary and the Comptroller General deems necessary to conduct such audit.

(b) MAXIMUM AMOUNT OF COMPENSATION PAYABLE PER AIR CARRIER.—The maximum total amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the lesser of—

(1) the amount of such air carrier's direct and incremental losses described in section 101(a)(2); or

(2) in the case of—

(A) flights involving passenger-only or combined passenger and cargo transportation, the product of—

(i) $4,500,000,000; and

(ii) the ratio of—

(I) the available seat miles of the air carrier for the month of August 2001 as reported to the Secretary; to

(II) the total available seat miles of all such air carriers for such month as reported to the Secretary; and

(B) flights involving cargo-only transportation, the product of—

(i) $500,000,000; and

(ii) the ratio of—

(I) the revenue ton miles or other auditable measure of the air carrier for cargo for the latest quarter for which data is available as reported to the Secretary; to

(II) the total revenue ton miles or other auditable measure of all such air carriers for cargo for such quarter as reported to the Secretary.

(c) PAYMENTS.—The President may provide compensation to air carriers under section 101(a)(2) in 1 or more payments up to the amount authorized by this title.

SEC. 104. LIMITATION ON CERTAIN EMPLOYEE COMPENSATION.

49 USC 40101 note.

(a) IN GENERAL.—The President may only issue a Federal credit instrument under section 101(a)(1) to an air carrier after the air carrier enters into a legally binding agreement with the President that, during the 2-year period beginning September 11, 2001, and ending September 11, 2003, no officer or employee of the air carrier whose total compensation exceeded $300,000 in calendar year 2000 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to September 11, 2001)—

(1) will receive from the air carrier total compensation which exceeds, during any 12 consecutive months of such 2-year period, the total compensation received by the officer or employee from the air carrier in calendar year 2000; and

(2) will receive from the air carrier severance pay or other benefits upon termination of employment with the air carrier which exceeds twice the maximum total compensation received by the officer or employee from the air carrier in calendar year 2000.

(b) TOTAL COMPENSATION DEFINED.—In this section, the term "total compensation" includes salary, bonuses, awards of stock, and other financial benefits provided by an air carrier to an officer or employee of the air carrier.

SEC. 105. CONTINUATION OF CERTAIN AIR SERVICE.

49 USC 40101 note.

(a) ACTION OF SECRETARY.—The Secretary of Transportation should take appropriate action to ensure that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service and that essential air service to small communities continues without interruption.

Appropriation authorization.

(b) ESSENTIAL AIR SERVICE.—There is authorized to be appropriated to the Secretary to carry out the essential air service program under subchapter II of chapter 417 of title 49, United States Code, $120,000,000 for fiscal year 2002.

(c) SECRETARIAL OVERSIGHT.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary is authorized to require an air carrier receiving direct financial assistance under this Act to maintain scheduled air service to any point served by that carrier before September 11, 2001.

(2) AGREEMENTS.—In applying paragraph (1), the Secretary may require air carriers receiving direct financial assistance under this Act to enter into agreements which will ensure,

to the maximum extent practicable, that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service.

Deadlines. President. 49 USC 40101 note.

SEC. 106. REPORTS.

(a) REPORT.—Not later than February 1, 2001, the President shall transmit to the Committee on Transportation and Infrastructure, the Committee on Appropriations, and the Committee on the Budget of the House of Representatives and the Committee on Commerce, Science, and Transportation, the Committee on Appropriations, and the Committee on the Budget of the Senate a report on the financial status of the air carrier industry and the amounts of assistance provided under this title to each air carrier.

(b) UPDATE.—Not later than the last day of the 7-month period following the date of enactment of this Act, the President shall update and transmit the report to the Committees.

SEC. 107. DEFINITIONS.

In this title, the following definitions apply:

(1) AIR CARRIER.—The term "air carrier" has the meaning such term has under section 40102 of title 49, United States Code.

(2) FEDERAL CREDIT INSTRUMENT.—The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all or part of any of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

(3) INCREMENTAL LOSS.—The term "incremental loss" does not include any loss that the President determines would have been incurred if the terrorist attacks on the United States that occurred on September 11, 2001, had not occurred.

TITLE II—AVIATION INSURANCE

SEC. 201. DOMESTIC INSURANCE AND REIMBURSEMENT OF INSURANCE COSTS.

(a) IN GENERAL.—Section 44302 of title 49, United States Code, is amended—

(1) in subsection (a)(1)—

(A) by striking "subsection (b)" and inserting "subsection (c)"; and

(B) by striking "foreign-flag aircraft—" and all that follows through the period at the end of subparagraph (B) and inserting "foreign-flag aircraft.";

(2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively;

(3) by inserting after subsection (a) the following:

"(b) REIMBURSEMENT OF INSURANCE COST INCREASES.—

"(1) IN GENERAL.—The Secretary may reimburse an air carrier for the increase in the cost of insurance, with respect to a premium for coverage ending before October 1, 2002, against loss or damage arising out of any risk from the operation of an American aircraft over the insurance premium that was in effect for a comparable operation during the period beginning September 4, 2001, and ending September 10, 2001,

as the Secretary may determine. Such reimbursement is subject to subsections (a)(2), (c), and (d) of this section and to section 44303.

"(2) PAYMENT FROM REVOLVING FUND.—A reimbursement under this subsection shall be paid from the revolving fund established by section 44307.

"(3) FURTHER CONDITIONS.—The Secretary may impose such further conditions on insurance for which the increase in premium is subject to reimbursement under this subsection as the Secretary may deem appropriate in the interest of air commerce.

"(4) TERMINATION OF AUTHORITY.—The authority to reimburse air carriers under this subsection shall expire 180 days after the date of enactment of this paragraph.";

(4) in subsection (c) (as so redesignated)—

(A) in the first sentence by inserting ", or reimburse an air carrier under subsection (b) of this section," before "only with the approval"; and

(B) in the second sentence—

(i) by inserting "or the reimbursement" before "only after deciding"; and

(ii) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy"; and

(5) in subsection (d) (as so redesignated) by inserting "or reimbursing an air carrier" before "under this chapter".

(b) COVERAGE.—

(1) IN GENERAL.—Section 44303 of such title is amended—

(A) in the matter preceding paragraph (1) by inserting ", or reimburse insurance costs, as" after "insurance and reinsurance"; and

(B) in paragraph (1) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy".

(2) DISCRETION OF THE SECRETARY.—For acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this Act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism and in the Secretary's judgment, based on the Secretary's analysis and conclusions regarding the facts and circumstances of each case, shall not be responsible for losses suffered by third parties (as referred to in section 205.5(b)(1) of title 14, Code of Federal Regulations) that exceed $100,000,000, in the aggregate, for all claims by such parties arising out of such act. If the Secretary so certifies, the air carrier shall not be liable for an amount that exceeds $100,000,000, in the aggregate, for all claims by such parties arising out of such act, and the Government shall be responsible for any liability above such amount. No punitive damages may be awarded against an air carrier (or the Government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act.

(c) REINSURANCE.—Section 44304 of such title is amended—

(1) by striking "(a) GENERAL AUTHORITY.—"; and

(2) by striking subsection (b).

(d) PREMIUMS.—Section 44306 of such title is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) ALLOWANCES IN SETTING PREMIUM RATES FOR REINSURANCE.—In setting premium rates for reinsurance, the Secretary may make allowances to the insurance carrier for expenses incurred in providing services and facilities that the Secretary considers good business practices, except for payments by the air carrier for the stimulation or solicitation of insurance business.".

(e) CONFORMING AMENDMENT.—Section 44305(b) of such title is amended by striking "44302(b)" and inserting "44302(c)".

49 USC 40101 note.

SEC. 202. EXTENSION OF PROVISIONS TO VENDORS, AGENTS, AND SUBCONTRACTORS OF AIR CARRIERS.

Notwithstanding any other provision of this title, the Secretary may extend any provision of chapter 443 of title 49, United States Code, as amended by this title, and the provisions of this title, to vendors, agents, and subcontractors of air carriers. For the 180-day period beginning on the date of enactment of this Act, the Secretary may extend or amend any such provisions so as to ensure that the entities referred to in the preceding sentence are not responsible in cases of acts of terrorism for losses suffered by third parties that exceed the amount of such entities' liability coverage, as determined by the Secretary.

TITLE III—TAX PROVISIONS

49 USC 40101 note.

SEC. 301. EXTENSION OF DUE DATE FOR EXCISE TAX DEPOSITS; TREATMENT OF LOSS COMPENSATION.

(a) EXTENSION OF DUE DATE FOR EXCISE TAX DEPOSITS.—

(1) IN GENERAL.—In the case of an eligible air carrier, any airline-related deposit required under section 6302 of the Internal Revenue Code of 1986 to be made after September 10, 2001, and before November 15, 2001, shall be treated for purposes of such Code as timely made if such deposit is made on or before November 15, 2001. If the Secretary of the Treasury so prescribes, the preceding sentence shall be applied by substituting for "November 15, 2001" each place it appears—

(A) "January 15, 2002"; or

(B) such earlier date after November 15, 2001, as such Secretary may prescribe.

(2) ELIGIBLE AIR CARRIER.—For purposes of this subsection, the term "eligible air carrier" means any domestic corporation engaged in the trade or business of transporting (for hire) persons by air if such transportation is available to the general public.

(3) AIRLINE-RELATED DEPOSIT.—For purposes of this subsection, the term "airline-related deposit" means any deposit of—

(A) taxes imposed by subchapter C of chapter 33 of such Code (relating to transportation by air); and

(B) taxes imposed by chapters 21, 22, and 24 with respect to employees engaged in a trade or business referred to in paragraph (2).

(b) TREATMENT OF LOSS COMPENSATION.—Nothing in any provision of law shall be construed to exclude from gross income under

the Internal Revenue Code of 1986 any compensation received under section 101(a)(2) of this Act.

TITLE IV—VICTIM COMPENSATION

September 11th Victim Compensation Fund of 2001. Terrorism. 49 USC 40101 note.

SEC. 401. SHORT TITLE.

This title may be cited as the "September 11th Victim Compensation Fund of 2001".

SEC. 402. DEFINITIONS.

49 USC 40101 note.

In this title, the following definitions apply:

(1) AIR CARRIER.—The term "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen.

(2) AIR TRANSPORTATION.—The term "air transportation" means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

(3) CLAIMANT.—The term "claimant" means an individual filing a claim for compensation under section 405(a)(1).

(4) COLLATERAL SOURCE.—The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

(5) ECONOMIC LOSS.—The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(6) ELIGIBLE INDIVIDUAL.—The term "eligible individual" means an individual determined to be eligible for compensation under section 405(c).

(7) NONECONOMIC LOSSES.—The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(8) SPECIAL MASTER.—The term "Special Master" means the Special Master appointed under section 404(a).

SEC. 403. PURPOSE.

49 USC 40101 note.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.

SEC. 404. ADMINISTRATION.

49 USC 40101 note.

(a) IN GENERAL.—The Attorney General, acting through a Special Master appointed by the Attorney General, shall—

(1) administer the compensation program established under this title;

(2) promulgate all procedural and substantive rules for the administration of this title; and

(3) employ and supervise hearing officers and other administrative personnel to perform the duties of the Special Master under this title.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.

49 USC 40101 note.

SEC. 405. DETERMINATION OF ELIGIBILITY FOR COMPENSATION.

(a) FILING OF CLAIM.—

(1) IN GENERAL.—A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) CLAIM FORM.—

(A) IN GENERAL.—The Special Master shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

Electronic document.

(B) CONTENTS.—The form developed under subparagraph (A) shall request—

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the terrorist-related aircraft crashes of September 11, 2001;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such crashes; and

(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

(3) LIMITATION.—No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 407.

(b) REVIEW AND DETERMINATION.—

(1) REVIEW.—The Special Master shall review a claim submitted under subsection (a) and determine—

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual—

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) NEGLIGENCE.—With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) DETERMINATION.—Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review. Deadline. Notification.

(4) RIGHTS OF CLAIMANT.—A claimant in a review under paragraph (1) shall have—

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) NO PUNITIVE DAMAGES.—The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) COLLATERAL COMPENSATION.—The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

(c) ELIGIBILITY.—

(1) IN GENERAL.—A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant—

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) INDIVIDUALS.—A claimant is an individual described in this paragraph if the claimant is—

(A) an individual who—

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) REQUIREMENTS.—

(A) SINGLE CLAIM.—Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) LIMITATION ON CIVIL ACTION.—

(i) IN GENERAL.—Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) PENDING ACTIONS.—In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

49 USC 40101 note.

SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.

Deadline.

(a) IN GENERAL.—Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under this title, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

(b) PAYMENT AUTHORITY.—This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.

(c) ADDITIONAL FUNDING.—

(1) IN GENERAL.—The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this title, under such terms and conditions as the Attorney General may impose.

(2) USE OF SEPARATE ACCOUNT.—In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

49 USC 40101 note.

SEC. 407. REGULATIONS.

Deadline.

Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this title, including regulations with respect to—

(1) forms to be used in submitting claims under this title;

(2) the information to be included in such forms;

(3) procedures for hearing and the presentation of evidence;

(4) procedures to assist an individual in filing and pursuing claims under this title; and

(5) other matters determined appropriate by the Attorney General.

49 USC 40101 note.

SEC. 408. LIMITATION ON AIR CARRIER LIABILITY.

(a) IN GENERAL.—Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.

(b) FEDERAL CAUSE OF ACTION.—

(1) AVAILABILITY OF ACTION.—There shall exist a Federal cause of action for damages arising out of the hijacking and

subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) SUBSTANTIVE LAW.—The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) JURISDICTION.—The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

(c) EXCLUSION.—Nothing in this section shall in any way limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

SEC. 409. RIGHT OF SUBROGATION. 49 USC 40101 note.

The United States shall have the right of subrogation with respect to any claim paid by the United States under this title.

TITLE V—AIR TRANSPORTATION SAFETY

SEC. 501. INCREASED AIR TRANSPORTATION SAFETY. 49 USC 40101 note.

Congress affirms the President's decision to spend $3,000,000,000 on airline safety and security in conjunction with this Act in order to restore public confidence in the airline industry.

SEC. 502. CONGRESSIONAL COMMITMENT. 49 USC 40101 note.

Congress is committed to act expeditiously, in consultation with the Secretary of Transportation, to strengthen airport security and take further measures to enhance the security of air travel.

TITLE VI—SEPARABILITY

SEC. 601. SEPARABILITY. 49 USC 40101 note.

If any provision of this Act (including any amendment made by this Act) or the application thereof to any person or circumstance is held invalid, the remainder of this Act (including any amendment

made by this Act) and the application thereof to other persons or circumstances shall not be affected thereby.

Approved September 22, 2001.

LEGISLATIVE HISTORY—H.R. 2926 (S. 1450):

CONGRESSIONAL RECORD, Vol. 147 (2001):
Sept. 21, considered and passed House and Senate.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 37 (2001):
Sept. 22, Presidential statement.

○

EXHIBIT 13

STATE OF INDIANA	)	LAKE SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM FIVE
COUNTY OF LAKE	)	HAMMOND, INDIANA

CITY OF GARY, INDIANA, by its Mayor, SCOTT L. KING, Plaintiff,	)	CAUSE NO. 45D05-0005-CT-00243
vs.	)	
SMITH & WESSON CORP., et al., Defendants.	)	

ORDER OF OCTOBER 23, 2006

INTRODUCTION

This matter came before the Court upon the Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings, filed by the following Defendant Manufacturers: SMITH & WESSON CORP., BERETTA U.S.A. CORP., COLT'S MANUFACTURING COMPANY, INC., BROWNING ARMS COMPANY, B.L. JENNINGS, INC., BRYCO ARMS CORPORATION, GLOCK INC., BEEMILLER, INC., d/b/a HI-POINT FIREARMS i/s/h/a HI-POINT FIREARMS CORP., PHOENIX ARMS, STURM, RUGER & COMPANY, INC., and TAURUS INTERNATIONAL MANUFACTURING, INC. (hereinafter, "Manufacturers").

The basis for Manufacturers' motion is the Protection of Lawful Commerce in Arms Act (hereinafter, "PLCAA"). The PLCAA, codified at 15 U.S.C. § 7901 *et seq.*, became law on October 26, 2005. Manufacturers contend that the PLCAA applies to this case and that the PLCAA provides for the immediate dismissal of this matter.

The Plaintiff, City of Gary, (hereinafter, "City") has filed a Memorandum in Opposition to the Manufacturer's motions and contends that the PLCAA does not apply or is unconstitutional.

FACTS

On August 27, 1999, the City brought this action against the Manufacturers and asserted

various claims, including public nuisance and negligence claims. One of the remedies sought by the City was compensatory damages. The City also requested injunctive relief and punitive damages. The City charged that the Manufacturers engaged in "wilful, deliberate, reckless, and negligent distribution of guns" to criminals and high-risk gun dealers, that the Manufacturers refused to take reasonable steps to control the distribution of their hand guns and the Manufacturers negligently designed unsafe hand guns. The Manufacturers moved to dismiss the original complaint for failure to state a claim. The trial court granted the Manufacturers' motion. The City appealed.

Ultimately, the Indiana Supreme Court held that the City presented valid claims for public nuisance, negligent sales, and negligent design. The case was remanded for further proceedings. See, City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). During the pendency of this case, Congress enacted, and the President signed into law, the PLCAA. The PLCAA became law on October 26, 2005. In a nutshell, the PLCAA provided a bar to the commencement of a "qualified civil liability action" in state or federal court, and required state and federal courts to immediately dismiss any pending actions or those subsequently brought. The Manufacturers claim this case falls within the purview of the PLCAA and moved to dismiss this case pursuant to the mandate of the act. The City challenges the constitutionality of the PLCAA on the following grounds.

I. The PLCAA is unlawful preemption;

II. The PLCAA's retroactive abolition of pending state court cases violates Due Process;

III. The PLCAA violates the Principles of Separation of Powers;

IV. The PLCAA violates the Tenth Amendment and Eleventh Amendments.

ISSUES

I. Whether the PLCCA is Unlawful Preemption

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land ...." U.S. Const. art. VI, cl.2. As such, Congress has the power to trump state legislation in an area where there is federal regulatory authority. Preemption may be expressly provided for in a federal statute or implied. Further, preemption may be complete or partial. In order for the federal action to be a valid exercise of preemption, it must first be a valid exercise in federal power. Thus, the first inquiry is whether Congress had the power to pass the PLCAA. With regard to this threshold inquiry, the Commerce Clause, U.S. Const. art I §8, confers upon congress the power to regulate activities that substantially impact interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195 (2005). Clearly, this case implicates interstate commerce and therefore the Commerce Clause provides Congress with legislative power in this area. Further, the language of the PLCAA is clear that Congress expressly intended to preempt state tort law in the area of gun manufacturers state tort liability. Since the Commerce Clause provides Congress power to enact the PLCAA to preempt state tort law then preemption is of no moment. The inquiry next turns to whether the PLCAA is constitutionally firm on the other challenged grounds.

II. Whether the PLCAA'S Retroactive Abolition of Pending State Court Cases Violates Due Process

Due Process Clauses of the Fifth Amendment guarantee a right to a remedy for injuries to life, liberty, and/or property rights. United States Supreme Court has recognized that laws that eliminate common law causes of action may violate due process. In *Poindexter v Greenhow*, the Court held, "it is not within the powers of the state to deny a person all redress for a deprivation of rights secured by the constitution and that to take away a remedy is to take away the right

itself." *Poindexter v Greenhow*, 114 U.S. 270 (1885). Under the PLCAA gun manufacturers would not have any responsibility for foreseeable harm caused by negligence in producing and distributing weapons and those harmed, past, present, and future would be wholly without a remedy in state and federal court. Under the Fifth Amendment, the City had a substantial, protectable interest in its tort claim. Inherent in the Due Process Clause, is a "separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403 (2002). It is acknowledged that Congress may regulate remedies or even limit state court remedies. Due Process is violated when Congress abolishes an existing remedy and provides no alternative. To deprive the City of its right in interest deprives the City of a vested cause of action without just compensation; thereby, the PLCAA is violative of the Due Process Clause and, therefore, unconstitutional.

Further, our Supreme Court has long recognized laws that are applied retroactively and/or laws that serve as a deprivation of existing rights are particularly unsuited to a democracy such as ours. Our sovereign's distaste for retroactivity was discussed in *Landgraf v USI Film Prods.*, 114 S.Ct. 1483 (1994). In *Landgraf*, the Court stated:

> "The presumption against retroactive legislation is deeply rooted in our jurisprudence, it embodies a legal doctrine centuries older than the Republic."

Our founding fathers were very aware of the pit-falls of retroactive legislation and have safe guarded the Republic with various provisions of the Constitution, including the *Ex-Post Facto* clause, the Fifth Amendment's Takings Clause, prohibitions on Bills of Attainder, and our Due Process clause. In discussing these principles against retroactive statutes, the *Landgraf* Court stated:

> "These provisions demonstrate that retroactive statutes raise particular concerns the legislatures unmatched power allow it to sweep away settled expectations suddenly and without individualized

> consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals...restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Landgraf*, 114 S.Ct. 1483.

While it is recognized that *Landgraf* was a case involving an analysis as to whether or not retroactive application was implied by the statute in question rather than expressly provided for, *Landgraf* nevertheless sets forth sound reasons for close review of statutes with retroactive affect. Additionally, the suspect and unjust nature of retrospective legislation was examined in *Kaiser Aluminum & Chemical Corp. v Bonjorno*, as follows:

> "The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law and prohibits (or requires compensation for) all retroactive laws that destroy vested rights."

Kaiser Aluminum & Chemical Corp. v Bonjorno, 110 S.Ct. 1570, 1587 (1990). (Internal citations omitted). Further, the *Kaiser* Court recognized that retrospective laws are highly injurious, oppressive, and unjust, and that retrospective laws should not be made either for the decision of civil causes or the punishment of offenses.

In the case at bar, the retroactive legislation may not be a means of retribution against unpopular groups or individuals; however, it is clearly an act which was passed in response to pressure from the gun industry. Further, it is clear that the PLCAA destroys the City's cause of action and valid state court remedies. These vested rights may not be destroyed by legislative fiat without violating our Constitution. As such, the retroactive abolition of an existing state cause of action is unconstitutional since its retroactive affect is an unconstitutional deprivation of existing

rights, and is an unconstitutional *Ex-Post Facto* law.

III. **Whether the PLCAA Violates Principles of Separation of Powers**

Further, in *United States v Klein*, 80 U.S. 128 (1872), the United States Supreme Court established an Article III limitation on congressional law making power. The holding in *Klein* was simply that Congress cannot, through legislation, direct the outcome of pending cases since to do so would infringe upon the judiciaries role in deciding cases and violate the Separation of Powers as guaranteed by the Constitution. The scope of the PLCAA clearly and unmistakably directs the outcome of this pending case; and, therefore, is a clear and unmistakable violation of the Separation of Powers as guaranteed by the Constitution; and is, therefore, unconstitutional.

IV. **Whether the PLCAA Violates the Tenth Amendment and Eleventh Amendment**

The Tenth Amendment sets forth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Recent Supreme Court decisions have set forth an increased protection of state sovereignty through restrictions on congressional law making power where congressional acts are deemed "commandeering of state governments." See *Printz v United States*, 117 S.Ct. 2365 (1997). In *Printz*, the Supreme Court held that federal legislation known as the Brady Handgun Violence Prevention Act (hereinafter, "Brady Act") was unconstitutional because it required state law enforcement officers to temporarily work for the federal government. The Brady Act created a national system of instant background checks with regard to gun purchases. The Brady Act required local law enforcement to process identification forms in an attempt to verify the legality of gun purchases. The Supreme Court held that:

"Congress cannot compel the States to enact or enforce a federal

> regulatory program...[or] circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Prinz*, 521 U.S. at 935.

Under the Tenth Amendment, the federal government may not dictate that state court officers take action to enforce a federal program; to do so would be commandeering of state power. The PLCAA, in the instant case, is not commandeering of state judicial power because, amongst other things, it allows the state court judge to determine whether the act applies in first instance. Further, the PLCAA does not implicate any state immunity from suit. As such, the PLCAA does not violate the Tenth or Eleventh Amendments.

CONCLUSION

Upon the points and authorities cited herein, the PLCAA is unconstitutional; and, therefore, the Motion to Dismiss and Motion for Judgment on the Pleadings filed by the Defendant Manufacturers are DENIED

ALL OF WHICH IS ORDERED October 23, 2006.

ROBERT A. PETE, JUDGE

EXHIBIT 14

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 32

JOSE LOPEZ III and ALEJANDRO ARCE,

Plaintiffs,

v. Case No. 10-CV-18530

BADGER GUNS, INC., BADGER OUTDOORS, INC., ADAM ALLAN, WALTER ALLAN, MILTON BEATOVIC, and WEST BEND MUTUAL INSURANCE COMPANY,

Defendants.

MOTION HEARING PROCEEDINGS

March 24, 2014 Honorable Michael D. Guolee
Circuit Court Judge Presiding

A P P E A R A N C E S:

CANNON & DUNPHY, S.C. by Attorney Patrick Dunphy and Attorney Brett Eckstein, 595 North Barker Road, Brookfield, Wisconsin 53008, appear on behalf of the Plaintiffs.

Attorney Jonathan Lowy, Esq., Brady Center to Prevent Gun Violence Legal Action Project, 1225 Eye Street, N.W. Ste. 1100, Washington, D.C. 20005, appears as co-counsel for the Plaintiffs, pro hac vice.

VON BRIESEN & ROPER, S.C. by Attorney Philip Reid, 411 East Wisconsin Avenue, Ste. 700, Milwaukee, Wisconsin 53202, appears on behalf of Defendant West Bend Mutual Insurance Company.

SWANSON, MARTIN & BELL, LLP, by Attorney James Vogts, 330 North Wabash, Ste. 3300, Chicago, Illinois 60611, appears on behalf of the Defendants, pro hac vice.

Phyllis Peoples, Official Court Reporter, RMR, CMR, Br. 32

PROCEEDINGS

THE CLERK: Case No. 10-CV-18530, Jose Lopez III and others versus Badger Guns Inc. and others. State your appearance.

MR. DUNPHY: For the plaintiffs Attorney Pat Dunphy, Jon Lowy, Brett Eckstein, and I also have at my left, Attorney Rob Maxwell (sic). He's not yet been admitted pro hac vice, so he won't enter an appearance. I asked him to sit at counsel table with us.

THE COURT: All right.

MR. REID: Good afternoon, your Honor. Philip Reid of von Briesen & Roper representing West Bend Mutual Insurance Company.

MR. VOGTS: James Vogts on behalf of Badger Guns, Badger Outdoors, Walter Allan, Adam Allan and Milton Beatovic.

THE COURT: Let me catch your name again?

MR. VOGTS: James Vogts, V as in Victor o-g-t-s.

THE COURT: Thank you. All right, I read your materials, and we have the benefit of similar facts of Judge Conen. Is there anything the plaintiff, or defendants are bringing the motion I guess. Defendant, anything you'd like to add to your

materials?

MR. VOGTS: Well, you know --

THE COURT: Use your microphone, please. You are very far away. My reporter has to hear you. Thank you.

MR. VOGTS: Well, as your Honor knows, based on the briefs, the issues before the Court are issues primarily of statutory construction and statutory interpretation which are questions of law for the Court's determination. Those questions involve the Protection of Lawful Commerce in Arms Act, which I am sure you have read and studied. That statute was passed by Congress in 2005 to protect firearms manufacturers and sellers against claims for damages like claims in this case arising from criminal or unlawful misuse of firearms. The operative provision of the PLCAA is section 7902, which very plainly states all qualified civil liability action may not be brought in any federal or state court. The statute then goes on to define what a civil, qualified civil liability action is, and that is an action like this case -- a case for personal injury damages arising from a third party's criminal or unlawful use, misuse of a firearm.

There is really no dispute up to this point on those facts. Where the dispute lies is how to

interpret the six exceptions that Congress created to a qualified civil liability action. Those six exceptions are -- in those six exceptions, Congress first specifically described certain claims by label; for example, breach of contract, breach of warranty, negligent entrustment, negligence per se, then described a couple of them with greater language, understood by label. One of those was marketed a strict liability claim for design or manufacturing defect. Another requires a knowing violation of a law applicable to the sale or marketing firearms provided that violation is a proximate cause of the harm. So in creating the general rule that firearm sellers are immune from suit, with the exception of those six type of claims that they define, that's really where we are right here. And where, where the parties fundamentally differ is whether stating a claim under one of the six exceptions, specifically the third exception, which some courts have called predicate exception, opens the door to any and all claims against the firearm seller.

Whether Congress just intended, you know, each of these six exceptions identify specific claims that you may bring within the contours of how they describe those claims, or how the common law may describe those claims. One of the claims the

plaintiffs bring in this case is an ordinary negligence claim. And it doesn't take much effort to look through the six exceptions and see that there is no exception for an ordinary negligence claim. And, in fact, two federal appellate courts sitting in the 9th Circuit, DC Circuit upheld that there is no exception for an ordinary negligence claim.

State Supreme Court in Alaska also held that Congress did not create an exception for ordinary negligence, so what Congress did was create exceptions for various of ordinary negligence, specifically negligence per se and negligent entrustment. That's how they tried to treat negligence claims. But they did not open the door to ordinary negligence claims. And as your Honor knows, when interpreting a statute, you are to first look at the plain ordinary meaning of the words. You are to look at the purpose of the statute, structure and the context. With those guideposts in mind, you simply can't find room in this statutory provision for ordinary negligence.

Plaintiffs, however, as I have already alluded, believe that provided they can state a claim that the defendants knowingly violated a firearms statute, they are now free to plead negligence claim. Quite frankly any claim whatsoever. I think that's a

fundamentally incorrect way to interpret the statute, and no published decision has even addressed that argument, much less accepted that argument. So the ordinary negligence claim against Badger Guns and Adam Allan should be dismissed because there is simply not an exception for that kind of claim.

Another claim the plaintiffs make is a public nuisance claim. The public nuisance claim like ordinary negligence is not found in the six exceptions. The plain language doesn't allow for public nuisance. The plaintiffs argue again that, well, they can plea a knowing violation of federal firearm statutes, so the doors are blown off, and they can allege public nuisance. Again there is no published decision allowing for that interpretation of this statute. And any attempt to shoehorn a statutory public nuisance claim into the third exception, knowing violation of a statute applicable to the sale, marketing of a firearm should also fail, because the Wisconsin Nuisance Statute is not on its face applicable to the sale and marketing of firearms. In fact, there is no language in that statute whatsoever that could be construed to be applicable to sale or marketing of firearms. So those two claims clearly should be dismissed. There is simply no place for them

under this statute.

With regard to plaintiff's negligence per se claim, plaintiffs allege that defendants violated numerous federal firearms laws, all found in under the Gun Control Act, 18 U.S.C. 922, 923, 924. But the law in Wisconsin is that there is no civil liability under those criminal statutes. The Olson v. Ratzel case speaks to that directly.

THE COURT: Spell that, please. Go ahead.

MR. REID: Olson v. Ratzel speaks to that directly. In Wisconsin, in order to find a civil cause of action under criminal statute, three requirements have to be met. One, the harm inflicted has to be the type of harm that the statute was intended to protect against. The injured person has to be within the class of persons that the statute was intended to protect. Most importantly, there has to be very clear expression of legislative intent in the statute to create a civil cause of action.

THE COURT: Counsel, much of this has been in your briefs and so on. I'd really like you to highlight anything different you want to bring out. I do read these materials. So just to recite it again into the record takes up the reporter's time, the Court's time, and so on. Is there anything specific

above and beyond your briefing that you'd like the Court to note?

MR. VOGTS: As you know, the parties briefed these issues exhaustively. I don't believe there is anything that I haven't touched on already in our briefs. I certainly would be willing to answer any questions you have regarding the defendant's position on any of these issues.

THE COURT: Let me ask you. Were you the attorney before Judge Conen also?

MR. VOGTS: Yes, sir.

THE COURT: What's the status of that case?

MR. VOGTS: Well, the status of that case, we have a trial date on September 2nd.

THE COURT: So it's been scheduled.

MR. VOGTS: It's been scheduled. Yes, sir.

THE COURT: Thank you. Anything else?

MR. VOGTS: No, sir.

THE COURT: All right, Mr. Reid.

MR. REID: Judge, Phil Reid for West Bend. I just want to put on the record we join in Mr. Vogts' arguments. If the Court will indulge me for one minute, I have a little bit to add that's not in

the briefs.

As Mr. Vogts correctly pointed out, the defense in this case does not believe that the negligence action is permitted. The plaintiffs cite three cases for the proposition it is. I read those cases in the last week because we are briefing a similar issue right now in front of Judge Conen. None of those cases support the proposition of plaintiff's, say it supports. One is called the City of Gary ex rel. King. That's a 2003 Indiana case. The fact is that was decided two years before the PLCAA even existed, so it simply did not address the issue whether post that act a negligence claim is permitted.

A second case they cite is City of New York v. A-1 Jewelry & Pawn Inc. I don't know, I don't want the Court to take my words for it, so I will read from that decision. One of the headnotes says, "The city was entitled to leave to amend the Complaint against the firearms retailer where amended Complaint was identical to the original Complaint, except that the three negligence claims had been deleted." So the negligence was not even in that case any longer.

The third case they cite to that proposition is one called Williams v. Beemiller. The important point for the Court's purposes in deciding

our motion is the fact that that case was decided at the Motion to Dismiss stage. And again, for reading from the case, the Court there said, the defendant's remedy was to serve a demand for a Bill of Particulars under New York law, not to move for dismissal of the Complaint. That was decided on procedural grounds. It didn't touch on this question at all. So for those specific reasons, plus all those reasons Mr. Vogts put in his brief, we join in his motion.

THE COURT: Let me ask you. Are you familiar with Judge Cooper's decision in this case, in the Norberg case?

MR. REID: I am not. I have not read that recently. I was not at that hearing.

THE COURT: All right. Thank you. All right. Plaintiff.

MR. LOWY: Your Honor, Jon Lowy for the plaintiffs.

THE COURT: Pull the microphone close to you again, please. Thank you.

MR. LOWY: And I will try to be very brief. A number of courts across the country have considered issues very similar to this, actually have addressed the central argument of Badger Guns. That is, the argument of whether if a gun dealer engages in

unlawful commerce, whether they have special immunity under the Protection of Lawful Commerce in Arms Act. Every single court in the country that has considered this issue has considered, has held that the gun dealer engages in unlawful commerce. If they knowingly violate a gun law, they have absolutely no special protection from the law.

THE COURT: And in this case, what was the violation?

MR. LOWY: In this case, well first of all, there is no dispute for purposes of this motion that there was a violation. I am not asking for purposes of this motion they are. There were a number of violations. One was the sale of a firearm to a prohibited person, in this case a person who was an unlawful user of controlled substance, and Badger knew or had reasonable cause to believe that that person was a user of unlawful substances. Also essentially a straw purchase, that is the person Badger sold the gun to was someone who was not the intended buyer; therefore, Badger accepted false information in the documentation. And we cite the statutory provisions in our brief.

But as your Honor noted, or intimated in this very courthouse, these identical arguments have

been raised and rejected three times already before judge -- most notably by Judge Conen's decision. Norberg's case provides a perfect road map for this case. But also Judge Cooper in the Motion to Dismiss stage, and Judge Dugan in the Motion to Dismiss stage here. Even though this is not a Motion to Dismiss, it essentially actually is because of the way Badger has formed this Summary Judgment argument as Badger notes its totally legal arguments. So actually from their perspective, nothing has changed. They decided not to rely on the facts.

THE COURT: But Judge Cooper did eliminate some of the claims, right?

MR. LOWY: That's exactly correct. I would like to address those. But just briefly, because I think that the description of the case law is with all due respect was incorrect. City of Gary case, there was a decision after the Protection of Lawful Commerce in Arms Act. The Court of Appeals counsel cited to a different decision which is not the only one that we rely on. The Court of Appeals in Indiana held after the Protection of Lawful Commerce in Arms Act was enacted that the case could go forward because the court held that the defendant's violation of Indiana's public nuisance statute constituted a knowing violation

of applicable law which came under the predicate exception. And that decision was, the Supreme Court of Indiana denied review of that decision. And that appellate decision allowed negligence claims to go forward as well. They weren't discussed in the opinion except to say they remained in the case. So negligence cases were allowed.

The Williams case, that was a Motion to Dismiss. The Williams case, as Judge Conen noted, is the most similar to this. There is another appellate court in New York, New York Appellate Division, 4th Department. In there, the Court held that where there was an allegation of a known violation of law, there is therefore no special immunity for gun dealers. That shouldn't be so controversial. That isn't saying that gun dealers are necessarily liable. It is just that if they knowingly violate the law, they are treated like every other litigant, and they don't get a get-out-of-court free card, which PLCAA, the Protection of Lawful Commerce in Arms Act gives them.

THE COURT: Say that again, please?

MR. LOWY: The Protection of Lawful Commerce in Arms Act. In the Shirley v. Glass case, which was decided both by the Kansas Court of Appeals and the Supreme Court of Kansas, the court did not

discuss the Protection of Lawful Commerce in Arms Act specifically; however, it was a post-Protection of Lawful Commerce in Arms Act case, and the court allowed negligence claims to go forward. So we have at least six decisions going the way of saying you get no special immunity, and zero. The entire country zero cases holding that if you knowingly violate gun laws, you still get special immunity of some form. Every single case that Badger relies on, as Judge Conen points out in his decision, every single one of those cases do not involve a knowing violation of gun laws. So the most those cases say is that if a gun company does not violate the law, then they get immunity from basic negligence claims. None of them say that if you do violate the law, you get protection from special negligence claims.

THE COURT: Let me ask you. Are you still attacking the constitutionality of this law?

MR. LOWY: Well we are, but, your Honor, that's an argument that would not be addressed unless you decide in Badger's favor.

THE COURT: It's an alternative argument.

MR. LOWY: It is an alternative. In fact, the doctrine of constitutional voidance, if you can avoid that constitutional ruling, you should. The only

way you would do that is to deny the Motion for Summary Judgment.

THE COURT: Thank you.

MR. LOWY: So because there is known violation of law, there is no special protection for the negligence claim, and for the public nuisance claim. And we also come under the negligence per se, negligent entrustment exceptions, and those are dealt with at length in the briefs and also in Judge Conen's decision.

Now to address the two points that were, the two cause of actions that were dismissed by --

THE COURT: Judge Cooper.

MR. LOWY: Judge Cooper, yeah. With all due respect, I think those were incorrect. And, in fact, in the transcript of that hearing, there is not really a clear reasoning set forth as to why those two causes of action were dismissed.

Negligence per se, Badger relies almost entirely on this Olson case. And that case is distinguishable for a number of reasons. One, what Olson deals with is a plaintiff who in the court's words were seeking to impose a duty beyond that imposed by the common law. That is not the case here in our negligence per se count.

THE COURT: Doesn't it imply a private right of action? Doesn't the statute, the federal statute want to do away with that type of thing in general?

MR. LOWY: Your Honor, I think there is in, that is, I think another point because there is a distinction between negligence per se and private rights of action. The Olson case is much more similar to a private right of action. We are not claiming a private right of action. Private right of action would be if we were saying we don't have a negligence claim; however, we are, our cause of action derives from simply from this violation of the statute. That would be a right of implied right of action. What we are seeking is negligence per se, which is a negligence cause of action.

THE COURT: Excuse me. Did Judge Conen address that, that issue once Cooper, Judge Cooper put it out there?

MR. LOWY: We did not, we did not appeal or seek reconsideration of that decision. Essentially we won on most counts, and we decided rather than delay the case, we would live with it, even though we didn't agree with it. And so, I think Olson, another reason that Olson is distinguishable is the court in Olson

noted that that case involved an accidental shooting by a minor. And the court basically looked at the purposes of the Gun Control Act and said that really wasn't what the Gun Control Act was about. That wasn't the intended purpose of the act. The intended purpose was, I am paraphrasing, to prevent criminals from getting guns. And that is, that wasn't that case. That is this case. This, the evidence is that this was a buyer for the Latin Kings, the notorious Latin Kings street gang who was buying guns from Badger, actually putting back into what is essentially a lending library for guns in that, in a gang house. That's actually what the shooter says that's how he got the guns from this. I am using the term "lending library." That's the way he describes it. So that goes at the heart what that criminal act is all about.

Finally, and this is a key point, if the Court looks at the intent of the Olson case was I believe 1979 I think.

THE COURT: Yes, it was.

MR. LOWY: The length of intent to allow negligence per se actions is now crystal clear. In fact, undeniable because of PLCAA itself. PLCAA does not create cause of action. I am not suggesting that it does. However, PLCAA creates, it says there is an

express exception for negligence per se actions, and it also in other exceptions specifies cause of action available for other violations of the Gun Control Act. Well clearly Congress is perfectly fine with causes of action for negligence per se and for other violations of the Gun Control Act. Congress could not be saying, PLCAA, we allow for, we specifically allow the negligence per se actions and other actions based on violations of gun laws, except that we don't intend for there to be cause of action, those exact causes of action.

THE COURT: Move on to some other issue if you want to. Keep it as short as you can.

MR. LOWY: Okay. Well, your Honor, I, I think that addresses the negligence per se claim. I would note that the Williams' decision, which is a New York appellate decision, allowed the negligence per se claim to go forward. In Shirley, the Kansas Supreme Court, this is another straw purchase case against gun dealer. Very similar. And that is more current, post-Protection of Lawful Commerce in Arms Act law. Thank you, your Honor.

THE COURT: Any reply, short reply?

MR. VOGTS: Yes, your Honor. Just briefly. I hope it doesn't get lost in the morass of

briefing that you read and the argument here, but Mr. Lowy did acknowledge that the PLCAA does not create causes of action through these exceptions. They are merely saying claims falling within these exceptions are not preempted by federal law. If you are within the exception, we then have to look to state law to see whether there is such a claim under state law. And the Olson case speaks for itself. There is no negligence per se claim under the Gun Control Act or under the Wisconsin Firearms Statutes that were at issue in this case under the same statutes essentially that the plaintiffs raise here.

There is no question that under the third exception, a knowing violation, knowing is important violation of a law applicable to the sale and marketing of firearms. It is not subject to preemption. Again, you have to look to the state law to see whether that claim can be pled. And the defendant's argument is that the statutes, the plaintiffs attempt to plead under that exception are not statute that you can plead in a civil court as a basis for damages.

Lastly, your Honor, the point that we didn't brief, but I want to raise now because I know the plaintiffs make this argument. There are individuals in this case that were named defendants.

And the named defendants, not in any sort of shareholder capacity or vicarious capacity, but as direct defendants who are alleged to have negligently sold the gun to Jose Fernandez. The plaintiffs have argued both here and in Judge Conen's courtroom that those individuals are not entitled to protection under the PLCAA, that the statute only protects federal licensees, the gun store. Well, actually individuals who work at the gun stores have the same protections afforded to the licensee, a seller.

THE COURT: Isn't that the issue about piercing the corporate veil, getting after the actual people who did the, or really running this company?

MR. VOGTS: I think that's a separate issue. The plaintiffs do seek to pierce the corporate veil. They also seek to hold these individuals directly responsible in the first instance, not for the corporate act, but for their own act. The plaintiffs allege that, that those people are not protected under the PLCAA because they are not sellers. Only sellers have protection. But the statute defines a seller as a dealer. It refers the reader to the section of the Gun Control Act defining a dealer. A dealer is defined as any person who's engaged in the business of selling firearms at wholesale or retail for a livelihood and

for profit. So the people who are selling guns, the people who own gun stores are entitled to the same protection under the PLCAA as their employer, the licensee itself.

THE COURT: Mr. Reid.

MR. REID: Nothing further, your Honor.

THE COURT: All right. It's interesting, the comment brought up, "the lending library." I have been around long enough that I remember when there were not a lot of guns here in Milwaukee available to street criminals, and I prosecuted people who would lend guns for robbers. They would bring them back when they were done. It was interesting. So we had kind of a lending situation, because this guy had guns and other people wanted to commit crimes didn't. Anyway, interesting sidelight. I guess there are enough guns around. You don't have to worry about that, or they are available.

Well, it's interesting. I think the Court has to take cognizant of Judge Conen's decision. We must be mindful it's in the same district. We should try to have some continuity in this particular district. If, in fact, the matter is appealed at some point, there should be some continuity. I am not saying I wouldn't make my own decision, but I have read his decision. I have read the materials in the other

case and the arguments, the briefing and so on. I think I am in position to, in fact, stay pretty much in accord with Judge Conen on many of the issues. So I ask the plaintiff to draft an order consistent with this Court's decision. And I am telling you, I don't want a long decision trying to say what I said. You might say something like the motion is denied. On these parts of the motion are denied based on the statements made by the Court in his oral decision, which is there, will be there. My reporter I am sure at some point will type it up.

Now there are a lot of parallels in this case with the facts of the other case. Apparently two officers were shot in that case also. Two officers were shot here. So we have two police officers who were shot, Jose Lopez III, and Alejandro Arce, I guess it is A-r-c-e, were police officers, were shot by Victor, last name V-e-l-o-z with a gun purchased by Jose Fernandez. And they seek to hold Badger Guns and others legally liable for the shooting under various series. They claim that Badger Guns sale of the firearm to Fernandez was the cause of their injuries. And they allege various grounds and various claims; negligence, negligent entrustment, et cetera, and we will deal with each one of those.

The defendant seeks Summary Judgment on all these claims and these cases are so similar in many ways to the facts in the Norberg v. Badger Guns, the case decided by Judge Conen. And it is interesting. He had an opportunity to decide it before I decided it, so I can in fact look at his reasoning and in many ways parallel it.

Apparently the public nuisance and negligence per se claim were dismissed on the pleadings, and they were not part of that argument and apparently were not, that issue was not appealed as Mr. Lowy has indicated. And I believe Judge Cooper was the one who did that.

This case is not about the individual's right to keep or bear arms. It is about a gun retailer's obligation to follow federal and state law applicable to sales and marketing of firearms. At issue is the scope of the Protection of Lawful Commerce in Arms Act. Later we will talk about PLCAA, which was enacted by Congress to protect federally licensed manufacturers and sellers from civil liability asserted by victims of crime and so on. And it's very clear why that was done, and it is the law that is dealt with. And I will indicate that I am not going to get involved in the constitutionality except to say as far as I can

see, it is in fact constitutional. That would be the Court's ruling if in fact we went beyond. I really don't have to make that ruling at this point.

Now this act, the real question is in this case is undisputed that the matter falls within the PLCAA's general definition of qualified civil liability actions. At issue is whether one or more of the statutory exceptions apply. And relevant to this case, the PLCAA, does not preclude claims for negligent entrustment or negligence per se, nor does the PLCAA preclude an action in which a manufacturer or seller of qualified products knowingly violates state or federal statute. So that's really the important issue here.

It has been talked about as a predicate exception, which is a very interesting way of stating it, but I think it is. We look for that predicate in the facts here when we are deciding whether to grant Summary Judgment and grant the defendant's immunity. You see, immunity is a very strong bar for a plaintiff if it in fact has no exceptions, or no discretion left to parties reviewing the record to give someone, as someone said, "a free pass." No matter what they do, it would be improper. I don't think any act should in fact, could in fact allow that. And if it did, I would find it unconstitutional. Because I don't think that

is proper to bar people from coming to court because something has been lobbied by some groups to persuade Congress to do something. So that's a little editorial comment, but. So the question is do they, the plaintiffs fall, their claim fall within the safe harbor of the PLCAA. So let's go on.

The Gun Control Act makes it unlawful for dealers to transfer firearms based upon information in that act and knowingly that they know is as reason to believe is false. The act also makes it unlawful for dealers to sell or transfer firearms if they know the purchaser is an unlawful user of controlled substances. In this case, the plaintiff has provided evidence that Fernandez was a dealer of illegal drugs. A jury could reasonably find Fernandez was under the influence of illegal drugs each time he went to Badger Guns. His drug use was evident from his behavior, appearance and smell. Therefore, there is reasonable inference could be made that the defendants knew that Fernandez was an illegal drug user, and that he lied when he filled out the Form 4473. In other words, a reasonable inference could be made that the defendant knowingly violated the Gun Control Act when he sold, when they sold him firearms. So the plaintiff's claim for negligent entrustment meets the definition of

negligent entrustment under PLCAA.

Defendants argue that the negligent entrustment claim does not meet that definition, but the Court will find it does. Judge Conen considered and rejected this argument. Judge Conen concluded that the use of the word "use" is broader than "discharge," especially since Congress used the word "discharge" in a different subsection. I am persuaded by Judge Conen's conclusion, and I agree with it. I think it's well reasoned. Accordingly, Summary Judgment will be denied on the negligent entrustment claim.

Then we look at the negligence per se. I have already dealt with that. Judge Conen dismissed that. The Court's not going to consider that in this particular case. Again, it's a judge in the same district. So negligence per se will not be considered by this Court, and if I were requested a Motion to Dismiss, I would in fact do so.

Now Summary Judgment will also be denied in the civil conspiracy claim. Judge Conen again found material issues of fact, and I think in this particular case, we can do so to state a claim for civil conspiracy the Complaint must allege certain things, and we have talked about that, or you have argued those things. And I think 79 Wis. 2d 241 allows for that

particular type of claim under, if there are violations, or it is shown that these, number one, that the formation, operation of a conspiracy, the wrongful act or acts done pursuant thereto, and the damages resulted from such act.

Now it is interesting when we look at what happened here, you know, I don't know how this is going to sell to a jury, but it is very damning I think. And the defendants argue that it can't be a basis for civil conspiracy. And there is no evidence of conspiracy to sell. Judge Conen considered that and rejected similar arguments, found material issues of fact. Whether the defendant formed or operated a conspiracy to maintain the unlawful sales practice at Badger Guns after ATF threatened to revoke their license; whether the lawful sale was a civil wrong; and three, whether the plaintiff's injury was a foreseeable result. I am persuaded by his reasoning. And accordingly, Summary Judgment shall be denied under the civil conspiracy claim.

You know, we will get into more of this piercing the corporate veil, but it is an interesting phenomena what happened here with the transfer of this property, or this licensing and so on. It smacks of really maybe even underhand activity.

So did they aid and abet? In light of Judge Conen's ruling on similar facts, Summary Judgment will be denied on that also. They transferred Badger Outdoors Inventory to Adam Allan for no money down; facilitating the operation of Badger Guns; three, continuing Badger Guns with the same employees and utilizing the same unlawful sales practices. It is interesting that there was this, as I indicated earlier, potential conspiracy or aiding and abetting. Let's just keep doing what we were doing before. We will just change the owner, the name.

And that dovetails right into the piercing the corporate veil. Judge Conen ruled under similar facts. It may be unclear at this stage of the proceedings whether fraud was committed in order to sell guns illegally. In this case, the plaintiff submitted evidence that Allan Adam or Adam Allan had complete domination over Badger Guns as the sole shareholder. And it's interesting. So we will in fact allow the issue of piercing the corporate veil, and it'll be interesting jury instructions and verdicts on that. But I can tell you right now some other judge will have to worry about that I think because I am leaving here July 31st, retiring after 38 years. And Judge DiMotto will be the judge who will probably take

up this issue, or this trial and how it's going to be tried.

In light of Judge Conen's ruling, Summary Judgment is denied with respect to plaintiff's claim against Allan Adam, or Adam Allan individually. And he declined to dismiss the plaintiff's claim against him as an individual. And the Court will rule the same. Thus, the defendant's Motion for Summary Judgment is granted in part on the negligence per se claim, and it is not granted, or it is granted, I'm sorry, and denied in part under all the other claims I have indicated. So I guess the next thing should be is that you should get together with my clerk and find a date that's convenient for all of you. I will schedule this case, get you moving. But I can tell you, with my vacation time and things coming up, I am not going to be trying this case. I am sure you will do a lot of discovery anyway.

MR. VOGTS: Your Honor, if I may, your Honor, I don't believe you addressed the public nuisance claim that Judge Cooper dismissed.

THE COURT: I guess I didn't. Yeah. Well, it was dismissed by Judge Cooper. I will in fact do the same here. That hasn't really been argued that greatly here.

Okay. All right, plaintiff is to draft an order consistent with the Court's decision under the five-day rule. And you sit with my clerk and your calendars, find a good date for a -- that can fit my calendar for scheduling. We will get you all together. Those that are out of town may be able to appear by phone, but I would like to have most of the main parties here so we can fully discuss the time, timing you need. Okay, so we will go off the record now and get together with my clerk.

MR. DUNPHY: Judge, we can stay off the record for this.

(Discussion held off the record).

THE COURT: Let's do this. Set it for pretrial with Judge DiMotto after the trial before Judge Conen. Hopefully that trial will go on and won't be adjourned.

We are going to do a scheduling order right now off the record.

(Whereupon further proceedings were held off the record and the proceedings concluded).

CERTIFICATE PAGE

STATE OF WISCONSIN)
)
MILWAUKEE COUNTY)

I, Phyllis Peoples, Court Reporter, do hereby certify that I am a shorthand reporter; that I was present at the taking of the foregoing proceedings, and that I recorded the said proceedings on the Stenograph machine; that the above and foregoing proceedings is a full, true and correct copy, in typewritten longhand, of my original machine shorthand notes taken at said hearing.

Dated this 27th day of March, 2014, Milwaukee, Wisconsin.

Phyllis Peoples (Digital Signature Permitted)
Phyllis Peoples, RPR, CMR
Circuit Court Reporter
Branch 32