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7 Attorneys for Plaintiffs  
Francisco Gudino Cardenas and Troy McFadyen, et al.  
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF ORANGE  
11

12 GHOST GUNNER FIREARMS CASES

13 Included actions:

14  
15 30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost*  
16 *Gunner, Inc. dba GhostGunner.net, et al.*

17 CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner,*  
18 *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

**NOTICE OF CONSTITUTIONAL  
CHALLENGE OF STATUTE**

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

1 Plaintiffs Cardenas and McFadyen, et al. ("Plaintiffs"), by and through counsel,  
2 respectfully file this Notice of Constitutional Challenge with the Court. In support thereof  
3 Plaintiffs show as follows:

- 4 1. The individual actions were each instituted by Plaintiffs on November 14, 2019.
- 5 2. The actions were combined on May 7, 2021.
- 6 3. By certified letter dated March 9, 2022, Plaintiffs provided the Attorney General  
7 of the United States with a copy of each of the Summons and Complaints in this action, along  
8 with Plaintiffs' oppositions to the demurrer of defendants Polymer80, Inc. and James Tromblee,  
9 d/b/a USPATRIOTARMORY.COM, LLC, and notified him that this action challenged the  
10 constitutionality of the Protections of Lawful Commerce in Arms Act, 15 U.S.C. §§17901, *et seq.*  
11 A true and correct copy of that notice is attached hereto as **Exhibit A**. In that letter, Plaintiffs  
12 communicated that they were serving a copy of each of the Summons and Complaints and  
13 demurrer opposition on the Attorney General and the demurrer opposition challenges the  
14 constitutionality of a federal statute. The letter also communicated that the Complaints were filed  
15 against Polymer80, Inc. and James Tromblee, d/b/a USPATRIOTARMORY.COM, and other  
16 defendants, but neither the United States, nor one of its agencies, officers or employees had been  
17 named as a defendant.

18  
19 Dated: March 9, 2022

ORRICK HERRINGTON & SUTCLIFFE LLP  
AMY K. VAN ZANT  
RIC T. FUKUSHIMA  
SHAYAN SAID

20  
21  
22  
23 By: /s/ Amy K. Van Zant

24 AMY K. VAN ZANT  
Attorneys for Plaintiffs  
25 Francisco Gudino Cardenas and  
26 Troy McFadyen, et al.  
27  
28

# **EXHIBIT A**



March 9, 2022

**Orrick, Herrington & Sutcliffe LLP**

1000 Marsh Road  
Menlo Park, CA 94025-1015

+1 650 614 7400

**orrick.com**

**VIA CERTIFIED MAIL**

The Honorable Merrick Garland  
Attorney General, United States of America  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530-0001

**Amy K. Van Zant**

E [avanzant@orrick.com](mailto:avanzant@orrick.com)

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Re: Ghost Gun Firearms Cases  
Superior Court of the State of California, Orange County JCCP No. 5167  
Notice of Constitutional Challenge

Dear Attorney General Garland:

By writing this letter, we are providing notice to the United States of America that Plaintiffs in the Ghost Gun Firearms Cases, now pending before the Superior Court of the State of California, Orange County, are challenging the constitutionality of the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901, et seq. Enclosed, please find a copy of the Summons and Complaint for each of the combined cases, each filed on November 14, 2019, along with our opposition to the demurrer of Polymer80, Inc. and James Tromblee, d/b/a USPATRIOTARMORY.COM, two of the defendants in the above-mentioned matter. The Complaints were filed against Polymer80, Inc. and James Tromblee, d/b/a USPATRIOTARMORY.COM, and other defendants, but neither the United States, nor one of its agencies, officers or employees had been named as a defendant.

Very truly yours,

*Amy K. Van Zant*

Amy K. Van Zant  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
Attorney for Plaintiffs

Enclosures

**SUMMONS**  
**(CITACION JUDICIAL)**

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**NOTICE TO DEFENDANT:**  
**(AVISO AL DEMANDADO):**

GHOST GUNNER INC., d/b/a GHOSTGUNNER.NET  
(Additional Parties Attachment form is attached.)

**YOU ARE BEING SUED BY PLAINTIFF:**  
**(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

FRANCISCO GUDINO CARDENAS

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. ¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:

(El nombre y dirección de la corte es): Orange County Superior Court, Central Justice Center, 700 W. Civic Center Drive, Santa Ana, CA 92702

CASE NUMBER: (Número del Caso):

30-2019-01111797-CU-PO-CJC

Judge Gregory H. Lewis

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: (El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Attorney Ben Rosenfeld, 115 1/2 Bartlett Street, San Francisco, CA 94110 (415-285-8091)

DATE: 08/21/2020 DAVID H. YAMASAKI, Clerk of the Court  
(Fecha)

Clerk, by  
(Secretario)

Katie Trent, Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010).)

Katie Trent



**NOTICE TO THE PERSON SERVED: You are served**

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☐ on behalf of (specify):  
under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)  
☐ other (specify):
4. ☐ by personal delivery on (date)

## SHORT TITLE:

Cardenas v. Ghost Gunner Inc., et al.

## CASE NUMBER:

30-2019-0111797-CU-PO-CJC

**INSTRUCTIONS FOR USE**

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.
- If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

**List additional parties** (Check only one box. Use a separate page for each type of party.):

☐ Plaintiff    ☒ Defendant    ☐ Cross-Complainant    ☐ Cross-Defendant

DEFENSE DISTRIBUTED d/b/a GHOSTGUNNER.NET; CODY WILSON d/b/a GHOSTGUNNER.NET; BLACKHAWK MANUFACTURING GROUP INC., d/b/a 80PERCENTARMS.COM; RYAN BEEZLEY and BOB BEEZLEY, d/b/a RBTACTICALTOOLING.COM; GHOST AMERICA LLC, d/b/a GHOSTGUNS.COM; GHOST FIREARMS LLC, d/b/a GRID DEFENSE and GHOSTRIFLES.COM; JUGGERNAUT TACTICAL INC., d/b/a JTACTICAL.COM; MFY TECHNICAL SOLUTIONS LLC, d/b/a 5DTACTICAL.COM; TACTICAL GEAR HEADS LLC, d/b/a 80- LOWER.COM; AR-15LOWERRECEIVERS.COM and 80LOWERJIG.COM; JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM; INDUSTRY ARMAMENT INC., d/b/a AMERICANWEAPONSCOMPONENTS.COM; THUNDER GUNS LLC, d/b/a THUNDERTACTICAL.COM, and DOES 1-100, Inclusive

Page \_\_\_\_\_ of \_\_\_\_\_

Page 1 of 1

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Attorneys for Plaintiff  
Francisco Gudino Cardenas

IN THE SUPERIOR COURT OF CALIFORNIA  
FOR THE COUNTY OF ORANGE

FRANCISCO GUDINO CARDENAS, an  
individual

Plaintiff,

vs.

GHOST GUNNER INC., d/b/a  
GHOSTGUNNER.NET;

DEFENSE DISTRIBUTED d/b/a  
GHOSTGUNNER.NET

CODY WILSON d/b/a GHOSTGUNNER.NET

BLACKHAWK MANUFACTURING GROUP  
INC., d/b/a 80PERCENTARMS.COM;

RYAN BEEZLEY and BOB BEEZLEY, d/b/a  
RBTACTICALTOOLING.COM;

GHOST AMERICA LLC, d/b/a  
GHOSTGUNS.COM;

GHOST FIREARMS LLC, d/b/a GRID

No. 30-2019-01111797-CU-PO-CJC

Judge Derek W. Hunt

COMPLAINT FOR DAMAGES

(DEMAND FOR JURY TRIAL)

(Personal Injury/Wrongful Death)

CAUSES OF ACTION:

1. NEGLIGENCE
2. NEGLIGENCE PER SE
3. NEGLIGENT ENTRUSTMENT
4. PUBLIC NUISANCE
5. VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 (UNFAIR AND UNLAWFUL SALES PRACTICES)
6. VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200

DEFENSE and GHOSTRIFLES.COM;

(UNFAIR MARKETING TACTICS)

JUGGERNAUT TACTICAL INC., d/b/a  
JTACTICAL.COM;

MFY TECHNICAL SOLUTIONS LLC, d/b/a  
5DTACTICAL.COM;

TACTICAL GEAR HEADS LLC, d/b/a 80-  
LOWER.COM; AR-  
15LOWERRECEIVERS.COM; and  
80LOWERJIG.COM;

JAMES TROMBLEE, JR., d/b/a  
USPATRIOTARMORY.COM;

INDUSTRY ARMAMENT INC., d/b/a  
AMERICANWEAPONSCOMPONENTS.COM;

THUNDER GUNS LLC, d/b/a  
THUNDERTACTICAL.COM;

DOES 1-100, Inclusive,

Defendants.

### **COMPLAINT AND DEMAND FOR JURY TRIAL**

1. COMES NOW PLAINTIFF FRANCISCO GUDINO CARDENAS, in his Individual Capacity ( "PLAINTIFF"), by and through his attorneys of record, and alleges the following against DEFENDANTS GHOST GUNNER INC., d/b/a GHOSTGUNNER.NET; BLACKHAWK MANUFACTURING GROUP INC., d/b/a 80PERCENTARMS.COM; RYAN BEEZLEY and BOB BEEZLEY, d/b/a RBTACTICALTOOLING.COM; GHOST AMERICA LLC, d/b/a GHOSTGUNS.COM; GHOST FIREARMS LLC, d/b/a GRID DEFENSE and GHOSTRIFLES.COM; JUGGERNAUT TACTICAL INC., d/b/a JTACTICAL.COM; MFY TECHNICAL SOLUTIONS LLC, d/b/a 5DTACTICAL.COM; TACTICAL GEAR HEADS LLC, d/b/a 80- LOWER.COM; AR-15LOWERRECEIVERS.COM; and 80LOWERJIG.COM; JAMES

1 TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM; INDUSTRY ARMAMENT INC.,  
2 d/b/a AMERICANWEAPONSCOMPONENTS.COM; THUNDER GUNS LLC, d/b/a  
3 THUNDERTACTICAL.COM; and DOES 1-50 (collectively “DEFENDANTS”). Further,  
4 PLAINTIFF demand a jury trial.

## 5 **INTRODUCTION**

6 2. DEFENDANTS are companies that have chosen to intentionally undermine  
7 federal and state firearms laws by designing, manufacturing, marketing, distributing and/or  
8 selling kits and firearms parts that are easily assembled by the purchaser into fully functional  
9 weapons, including AR-15 style assault weapons to consumers across the nation, including  
10 within the State of California. DEFENDANTS have chosen to engage in this business  
11 primarily by utilizing online sales that enable purchasers to acquire such weapons without a  
12 background check or any interaction with a Federal Firearms Licensee (“FFL,” an authorized  
13 gun dealer) and in violation of state law restrictions governing assault weapons, including  
14 restrictions in the State of California.

15 3. The weapons assembled from DEFENDANTS’ kits and firearms parts are  
16 termed “ghost guns.” This name reflects the fact that such weapons lack a serial number  
17 unless specifically required by state law and are difficult, if not impossible, for law  
18 enforcement to trace back to their manufacturer/seller when recovered from a crime scene.

19 4. DEFENDANTS knew when they entered this business that they would  
20 foreseeably be supplying criminals, killers, and others whose possession of firearms pose an  
21 unacceptably high threat of injury or death to others.

22 5. DEFENDANTS further knew that selling these kits and firearm parts violated  
23 state and federal statutes applicable to the registration, ownership, sale, and marking of  
24 firearms.  
25  
26  
27  
28

1           6.       DEFENDANTS refused to use reasonable safety measures that could have  
2 limited the risk of their products falling into the hands of such dangerous individuals.

3           7.       Instead, DEFENDANTS targeted their business at precisely such individuals  
4 by intentionally emphasizing features of their products that make them particularly attractive  
5 to such dangerous parties as major selling points. For example, DEFENDANTS intentionally  
6 emphasized that 1) their products can be used to assemble untraceable weapons and 2) enable  
7 the purchaser to evade background checks and interaction with an FFL.

8           8.       DEFENDANTS chose profits over people and public safety, and launched and  
9 maintained their business in the unreasonably dangerous manner described herein.

10          9.       Since DEFENDANTS have launched their “ghost guns” business they have  
11 learned with certainty that their business is a massive and growing source of crime guns that  
12 are claiming innocent lives in California and elsewhere.

13          10.      DEFENDANTS could have changed their business practices to institute  
14 reasonable safety measures to minimize the damage done by the problem they created.  
15 Instead DEFENDANTS have continued to choose profits over people and public safety and  
16 have doubled down on their dangerous and irresponsible practices. By doing so,  
17 DEFENDANTS have and are acting with a reckless disregard, conscious disregard or  
18 deliberate indifference to a known and obvious risk that threatens the life and safety of  
19 others.  
20

21          11.      Upon information and belief, all DEFENDANTS designed, advertised,  
22 marketed, sold, distributed and/or offered, one or more “ghost gun” kits/parts that could be  
23 easily assembled into un-serialized AR-15 style “ghost gun” rifles that are prohibited under  
24 California’s assault weapons ban to California residents leading up to and/or during  
25 November 2017.  
26

27          12.      PLAINTIFF brings this suit because he was shot and injured as a direct,  
28

foreseeable, and proximate result of DEFENDANTS' negligent, reckless, and intentionally unlawful actions.

13. Specifically, PLAINTIFF was shot and injured by a dangerous, mentally disturbed California resident named KEVIN NEAL, who was barred from firearms possession by one or more state court orders. NEAL would not have been able to legally acquire a firearm in the State of California. NEAL purchased parts/kits from one or more of the DEFENDANTS leading up to and/or during November 2017 and used these parts/kits to assemble at least two AR-15 style "ghost gun" rifles barred under California's prohibition on assault weapons. NEAL used these "ghost guns" in a rampage shooting that killed or injured PLAINTIFF or their loved ones on November 13-14, 2017.

14. DEFENDANTS, upon information and belief, continue to offer these products to California residents using marketing strategies and business practices that are identical or essentially the same as those used during and before November 2017.

### **JURISDICTION**

15. This is a civil action for negligence and violations of the California Unfair Competition Law (Cal. Bus. & Prof. Code § § 17200 et seq). This Court has subject matter jurisdiction over this action as the amount of the claims exceeds \$25,000.00

16. Venue is proper in this court because several of the DEFENDANTS, RYAN BEEZLEY and BOB BEEZLEY d/b/a RBTACTIALTOOLING.COM, and DEFENDANT JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM are California residents and/or California Corporations who at all relevant times reside in and/or have their principal place of business in the City of Apple Valley, County of San Bernardino, State of California.

17. PLAINTIFF seeks an award of compensatory damages, punitive damages pursuant to Cal. Civil Code § 3294, statutory damages pursuant to Cal. Bus. And Prof. Code

1 § 17200, injunctive and declaratory relief, costs and expenses, and reasonable attorney's  
2 fees.

3 **NOTICE OF RELATED CASE**

4 18. This case is related to *McFadyen, et al. v. Ghost Gunner Inc., et al.*, Case No.  
5 \_\_\_\_\_, filed in this San Bernadino County Court on November 13, 2019, in that  
6 it is bath on the same nucleus of operative facts, the same incident, and is brought against  
7 the same defendants.  
8

9 **THE PARTIES**

10 19. Plaintiff FRANCISCO GUDINO CARDENAS is a natural person of  
11 majority age who resided at the time of this incident in Tehama County, CA and presently  
12 resides in San Diego County, CA.

13 20. At all times pertinent hereto, DEFENDANT GHOST GUNNER INC.  
14 ("GHOST GUNNER"), d/b/a GHOSTGUNNER.NET, was a Texas corporation with its  
15 principal place of business in Austin, County of Travis, State of Texas. At all times pertinent  
16 hereto, GHOST GUNNER was engaged in the business of designing, marketing,  
17 distributing, manufacturing and selling parts/kits used to assemble "ghost guns," including  
18 AR-15 style "ghost gun" rifles to consumers across the nation, including to consumers  
19 within the State of California. GHOST GUNNER's registered agent is a Texas company  
20 named DEFENSE DISTRIBUTED. DEFENSE DISTRIBUTED and GHOST GUNNER  
21 ("DEFENSE DISTRIBUTED/GHOST GUNNER") should be viewed as interchangeable  
22 and inextricably linked for purposes of this Complaint for Damages; upon information and  
23 belief, the same individual, Cody Wilson, was involved with running both entities.  
24 DEFENSE DISTRIBUTED's website still links to GHOST GUNNER. See  
25 <https://defdist.org>.  
26

27 21. At all times pertinent hereto, DEFENDANT BLACKHAWK  
28

1 MANUFACTURING GROUP INC. (“BLACKHAWK”), d/b/a 80PERCENTARMS.COM,  
2 was a California domestic corporation, with its principal place of business in the Garden  
3 Grove, County of Orange, State of California. At all times pertinent hereto, BLACKHAWK  
4 was engaged in the business of designing, marketing, distributing, manufacturing and/or  
5 selling parts/kits used to assemble “ghost guns,” including AR-15 style “ghost gun” rifles to  
6 consumers across the nation, including to consumers within the State of California.

7  
8 22. At all times pertinent hereto, DEFENDANTS RYAN BEEZLEY and BOB  
9 BEEZLEY have maintained addresses in Apple Valley, County of San Bernardino, State of  
10 California and were doing business as RBTACTICALTOOLING.COM. At all times  
11 pertinent hereto, RBTACTICALTOOLING.COM has maintained a business address in  
12 Apple Valley, County of San Bernardino, State of California. At all times pertinent hereto,  
13 RBTACTICALTOOLING.COM was engaged in the business of designing, marketing,  
14 distributing, manufacturing and selling parts/kits used to assemble “ghost guns,” including  
15 AR-15 style “ghost gun” rifles to consumers across the nation, including to consumers  
16 within the State of California.

17  
18 23. At all times pertinent hereto, DEFENDANT GHOST AMERICA LLC  
19 (“GHOST AMERICA”), d/b/a GHOSTGUNS.COM, was a California limited liability  
20 company with its principal place of business in Yorba Linda, County of Orange, State of  
21 California. At all times pertinent hereto, GHOST AMERICA was engaged in the business  
22 of designing, marketing, distributing, manufacturing and selling parts/kits used to assemble  
23 “ghost guns,” including AR-15 style “ghost gun” rifles to consumers across the nation,  
24 including to consumers within the State of California.

25  
26 24. At all times pertinent hereto, GHOST FIREARMS LLC (“GHOST  
27 FIREARMS”), d/b/a GRID DEFENSE and GHOSTRIFLES.COM, was a limited liability  
28 company registered in Florida with its principal place of business in Daytona Beach, County

1 of Volusia, State of Florida. At all times pertinent hereto, GHOST FIREARMS was  
2 engaged in the business of designing, marketing, distributing, manufacturing and selling  
3 parts/kits used to assemble “ghost guns,” including AR-15 style “ghost gun” rifles to  
4 consumers across the nation, including to consumers within the State of California.

5 25. At all times pertinent hereto, DEFENDANT JUGGERNAUT TACTICAL  
6 INC. (“JUGGERNAUT”), d/b/a JTACTICAL.COM, was a California corporation with its  
7 principal place of business in Orange, County of Orange, State of California. At all times  
8 pertinent hereto, JUGGERNAUT was engaged in the business of designing, marketing,  
9 distributing, manufacturing and selling parts/kits used to assemble “ghost guns,” including  
10 AR-15 style “ghost gun” rifles to consumers across the nation, including to consumers  
11 within the State of California.  
12

13 26. At all times pertinent hereto, DEFENDANT MFY TECHNICAL  
14 SOLUTIONS LLC (“MFY TECHNICAL”), d/b/a 5DTACTICAL.COM, was a  
15 Massachusetts limited liability company with its principal place of business in  
16 Westborough, County of Worcester, State of Massachusetts. At all times pertinent hereto,  
17 MFY TECHNICAL was engaged in the business of designing, marketing, distributing,  
18 manufacturing and selling parts/kits used to assemble “ghost guns,” including AR-15 style  
19 “ghost gun” rifles to consumers across the nation, including to consumers within the State of  
20 California.  
21

22 27. At all times pertinent hereto, DEFENDANT TACTICAL GEAR HEADS  
23 LLC (“TACTICAL GEAR HEADS”), d/b/a 80-LOWER.COM; AR-  
24 15LOWERRECEIVERS.COM; and 80LOWERJIG.COM, was an Indiana limited liability  
25 company with its principle of business in Indianapolis, County of Marion, State of Indiana  
26 and/or in Fishers, County of Hamilton, State of Indiana. At all times pertinent hereto,  
27 TACTICAL GEAR HEADS, via its various retail websites, was engaged in the business of  
28

1 designing, marketing, distributing, manufacturing and selling parts/kits used to assemble  
2 “ghost guns,” including AR-15 style “ghost gun” rifles to consumers across the nation,  
3 including to consumers within the State of California.

4 28. At all times pertinent hereto, DEFENDANT JAMES TROMBLEE, JR., has  
5 maintained a mailing address in Apple Valley, County of San Bernardino, State of  
6 California. Upon information and belief, TROMBLEE began doing business as  
7 USPATRIOTARMORY.COM on April 25, 2014. USPATRIOTARMORY.COM has  
8 maintained a business and mailing address in Apple Valley, County of San Bernardino,  
9 State of California. At all times pertinent hereto, USPATRIOTARMORY.COM was engaged in  
10 the business of designing, marketing, distributing, manufacturing and selling parts/kits used  
11 to assemble “ghost guns,” including AR-15 style “ghost gun” rifles to consumers across the  
12 nation, including to consumers within the State of California.

14 29. At all times pertinent hereto, DEFENDANT INDUSTRY ARMAMENT  
15 INC. (“INDUSTRY ARMAMENT”), d/b/a  
16 AMERICANWEAPONSCOMPONENTS.COM, was a Delaware corporation with a  
17 principal place of business in Mesa, County of Maricopa, State of Arizona. At all times  
18 pertinent hereto, INDUSTRY ARMAMENT was engaged in the business of designing,  
19 marketing, distributing, manufacturing and selling parts/kits used to assemble “ghost guns,”  
20 including AR-15 style “ghost gun” rifles to consumers across the nation, including to  
21 consumers within the State of California.

23 30. At all times pertinent hereto, DEFENDANT THUNDER GUNS LLC  
24 (“THUNDER GUNS”), d/b/a THUNDERTACTICAL.COM, was a limited liability  
25 company registered in Florida with its principal place of business in Daytona Beach, County  
26 of Volusia, State of Florida. At all times pertinent hereto, THUNDER TACTICAL was  
27 engaged in the business of designing, marketing, distributing, manufacturing and selling  
28

1 parts/kits used to assemble “ghost guns,” including AR-15 style “ghost gun” rifles to  
2 consumers across the nation, including to consumers within the State of California.

3 31. DEFENDANTS DOE ONE through DOE ONE HUNDRED (“DOE  
4 DEFENDANTS”) are sued herein under fictitious names. PLAINTIFF assert that DOE  
5 DEFENDANTS are engaged in the business of designing, marketing, distributing,  
6 manufacturing and/or selling parts/kits used to assemble “ghost guns,” including AR-15 style  
7 “ghost gun” rifles, to consumers across the nation, including to consumers within the State of  
8 California. PLAINTIFF do not at this time know the true names or capacities of said DOE  
9 DEFENDANTS, but pray that the same may be alleged herein should that information be  
10 ascertained.  
11

12 32. The true names or capacities, whether individual, corporate, associate or  
13 otherwise, of DEFENDANT DOES ONE through ONE HUNDRED, inclusive, are  
14 unknown to PLAINTIFF, who, therefore sue said DEFENDANTS by such fictitious names.  
15 PLAINTIFF are informed and believe and thereon allege that each of the DEFENDANTS  
16 designated herein as a DOE is negligently, intentionally, or in some other manner,  
17 responsible for the events and happenings herein referred to and negligently, intentionally,  
18 or in some other manner, caused injury and damages proximately thereby to the PLAINTIFFS  
19 as herein alleged.  
20

21 33. DEFENDANTS were all actively engaged in the business of designing,  
22 marketing, distributing, manufacturing and/or selling these products to California residents  
23 leading up to and during November of 2017, while emphasizing features of their products that  
24 made them particularly attractive to dangerous actors like NEAL.

25 34. All herein complained actions of DEFENDANTS, and each of them, were  
26 done in a conscious disregard and deliberate disregard for the rights and safety of others,  
27 and in a willful and reckless manner making the infliction of grievous bodily injury and/or  
28

1 death highly probable. DEFENDANTS' conduct was despicable, willful, wanton and  
2 malicious within the meaning of California Civil Code §§ 3294, so as to warrant the  
3 imposition of punitive and exemplary damages against them in the fullest extent allowed by  
4 law. DEFENDANTS and each of them acted in a conscious disregard for the rights and  
5 safety of others, in a manner that shocks the conscience, and in a despicable manner  
6 sufficient to warrant the imposition of punitive damages against each and every  
7 DEFENDANT sued herein.  
8

### 9 **CASE SPECIFIC ALLEGATIONS**

10 35. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
11 though set out in full herein.

#### 12 **A. The "Ghost Gun" Industry Negligently and Knowingly Arms Criminals and** 13 **Other Dangerous People Like Neal and Intentionally Circumvents California** **and Federal Firearms Laws**

14 36. Every year in America, firearms are used to commit over 500,000 crimes, and  
15 over 100,000 people are shot – close to 40,000 fatally.

16 37. Federal and state laws recognize the grave risk posed by firearms in the wrong  
17 hands, and as a result, regulate and restrict their sale and possession in numerous ways.

18 38. Only FFLs may engage in the business of selling firearms. Felons, domestic  
19 abusers, the dangerously mentally ill, and certain other categories of people are deemed to  
20 pose too great a danger to themselves or others are prohibited from possessing guns as a  
21 matter of federal and/or state law. FFLs are required to conduct background checks on gun  
22 buyers to prevent sales to such prohibited purchasers. Firearms sold by FFLs must include  
23 stamped serial numbers, to enable accurate record keeping and aid law enforcement in  
24 tracing the gun to its initial retail seller if it is later misused in a crime. Such tracing can help  
25 identify the chain of possession and ultimate user of such a crime gun.  
26  
27  
28

1           39. FFLs are also required to exercise common sense in protecting the public by  
2 refusing firearms sales, even where a buyer passes a background check, if the buyer is  
3 displaying disturbing or erratic behavior suggesting a significant psychological disturbance.  
4 A FFL always retains discretion to refuse a firearms sale for any reason.

5           40. A FFL must carefully learn and comply with all federal laws, as well as the  
6 laws of the state in which it resides and, for certain sales to residents of other states, the laws  
7 of those states. Some states, like California, prohibit sales of military-style assault weapons  
8 like AR-15 style rifles.  
9

10           41. DEFENDANTS sought – and continue to seek -- to undermine and  
11 circumvent these federal and state public safety laws.

12           42. DEFENDANTS are not FFLs. At all times pertinent hereto, DEFENDANTS  
13 knew, and they continue to know, that law-abiding persons who desire firearms can and do  
14 obtain manufactured firearms through FFLs.

15           43. DEFENDANTS are companies and entities who chose, at all times pertinent  
16 hereto, to manufacture and/or sold unserialized, unfinished firearms parts (such as frames  
17 and receivers) or firearms assembly kits that can be used to produce “ghost guns,” including  
18 AR-15 style “ghost gun rifles.”  
19

20           44. Much of DEFENDANTS’ business involves online sales, and  
21 DEFENDANTS, at all times pertinent hereto, marketed, advertised, targeted and/or sold their  
22 products to individuals across the country, including in California.

23           45. DEFENDANTS, at all times pertinent hereto, manufactured and/or sold  
24 “ghost gun” parts that require very limited additional milling before they can be easily  
25 combined with other largely unregulated gun parts – which are often included in  
26 DEFENDANTS’ assembly kits— to form a fully functioning “ghost gun.”  
27  
28

1           46. One common “ghost gun” part sold by DEFENDANTS is an 80% receiver,  
2 which is designed to fall just outside of the federal definition of a “firearm” so as to evade  
3 federally required background checks and other regulations applicable to “firearms.”

4           47. The process of converting such parts into a “ghost gun,” whether it be a semi-  
5 automatic handgun or an AR-15 style assault rifle, involves just a few steps.  
6 DEFENDANTS’ parts/kits can be used to create a fully functional “ghost gun” in as little as  
7 a few minutes without the consumer possessing any specialized skill or abilities.  
8

9           48. DEFENDANTS thus enabled anyone, including individuals prohibited from  
10 possessing any firearms or individuals prohibited from possessing assault weapons by virtue  
11 of state law, to build “ghost guns,” including but not limited to assault weapons.

12           49. Once assembled, “ghost guns” are just as deadly and dangerous as traditional  
13 firearms.

14           50. DEFENDANTS purposefully chose – and continue to choose-- not to stamp  
15 serial numbers on these parts or other parts included in their firearms assembly kits. This  
16 means that the “ghost guns” produced from DEFENDANTS’ products cannot be traced back  
17 to the initial manufacturer or seller, making it harder to identify the chain of possession and  
18 ultimate user of a gun recovered from a crime scene. This makes the parts/kits used to  
19 assemble these weapons highly attractive to criminals and illegal gun traffickers.  
20

21           51. Because DEFENDANTS’ products were – and continue to be – readily  
22 available online for purchase with no background check, they are also very attractive to  
23 criminals, prohibited domestic abusers, and other dangerous individuals who would  
24 otherwise be prevented from purchasing a gun due to the inability to pass a background  
25 check.

26           52. Similarly, because DEFENDANTS’ products were – and continue to be –  
27 capable of purchase without the buyer having any interaction with an FFL, these products are  
28

1 also attractive and accessible to individuals with psychological or behavioral issues who fear  
2 they may not be able to pass muster at a responsible FFL.

3 53. DEFENDANTS were, and still are, well aware that, as a special agent in  
4 charge of the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") Los Angeles  
5 field division recently told reporters, "Criminals are making their own weapons because they  
6 cannot buy them legally ... or they are paying other people to make those guns for them to  
7 get around the gun laws."

8  
9 54. DEFENDANTS intentionally targeted and continue to target precisely the  
10 criminals and other dangerous parties described above.

11 55. In their marketing and advertising, DEFENDANTS purposefully emphasize  
12 the untraceable nature of "ghost guns" due the absence of a serial number as a major selling  
13 point.

14 56. In their marketing and advertising, DEFENDANTS purposefully emphasize  
15 the fact that their products can be purchased without a background check or interaction with  
16 an FFL as major selling points.

17 57. DEFENDANTS' marketing to the criminal market includes but is not limited  
18 to the following examples:

- 19  
20 a. RBTACTICALTOOLING.COM emphasizes that its products allow the  
21 production of unserialized weapons. *See*  
22 <https://www.rbttacticaltooling.com/about/>. One of its AR-15 receivers  
23 includes a stamp of an individual giving the middle finger to law enforcement  
24 personnel who would be looking for a serial number to trace a "ghost gun"  
25 recovered from a crime scene *See*  
26 <https://www.rbttacticaltooling.com/product/magpul-lower-receiver-ar-15/>:  
27  
28



- b. A Q & A section on one of TACTICAL GEAR HEAD's retail websites includes this disclosure: "An AR-15 built using an 80% lower [receiver] will have no serialization or paperwork attached to it by default. Therefore, it is typically impossible to determine the firearm's origin or history." *See* <https://www.80-lower.com/faqs/>. The site further emphasizes that a purchaser need not interact with an FFL to acquire its parts/kits and make a "ghost gun" AR-15 style rifle. *See* <https://www.80-lower.com/products/ar-15-build-kit-5-56mm-nato-16-melonite-barrel-classic-a2-handguard-w-80-lower-1-7-twist/>:



- c. INDUSTRY ARMAMENT's website states, on a page listing an AR-15 receiver for sale, that "[t]he purchase of this component does not constitute the purchase of a firearm and as such does not require a FFL for transfer." *See* <https://americanweaponscomponents.com/product/80-ar-15-forged-anodized-lower-receiver>.
- d. THUNDER GUNS' website states, on a page offering a pack of 5 AR-15 lower receivers, that "[t]hese products are not FFL items." *See* <https://thundertactical.com/product/80-ar-lower-receiver-5-pack/>.

58. The above examples are illustrative rather than exhaustive. Upon information and belief, they are also identical to or essentially the same as DEFENDANTS' marketing

tactics for “ghost gun” parts/kits that can be assembled into AR-15 style “ghost gun” rifles during the relevant time period.

59. Sales of “ghost gun” parts/kits have increased significantly in recent years. Not surprisingly, the use of “ghost guns” in crimes has also increased exponentially.

60. According to ATF, 30 percent of all guns recovered at California crime scenes are now untraceable “ghost guns.”

61. “Ghost guns” – and, in particular, AR-15 style “ghost gun” rifles—have been used in many incidents of violence in California. For example:

- a. In June 2013, John Zawahri went on a shooting spree with a “ghost gun” and killed five people in Santa Monica, California. Zawahri, who had a documented history of mental illness, was a prohibited purchaser and the “ghost gun” he used was an AR-15 style rifle.
- b. In July 2015, Scott Bertics shot and killed a woman with whom he was involved in a romantic relationship and he then used a second gun to kill himself in Walnut Creek, California. Both of the guns used were “ghost guns.”
- c. In July 2015, in Stockton, California, gunmen used an AK-47-style “ghost gun” in an attempted bank robbery, and held three people hostage.
- d. In June 2019, 26-year-old Sacramento Police Officer Tara O’Sullivan was shot and killed with an AR-15 style “ghost gun” rifle while responding to a domestic disturbance call.
- e. In August 2019, a convicted felon used an AR-15 style “ghost gun” rifle to kill California Highway Patrol officer Andre Moye and wound two of his colleagues, during a freeway shootout in Riverside, California.

62. Upon information and belief, DEFENDANTS were aware of one or all of these and other incidents involving the unlawful use of “ghost guns.”

63. AR-15 style rifles are, and were, prohibited assault weapons under California law. *See* Cal. Pen. Code § 30510(a)(5) (assault weapons include semiautomatic rifles within the “Colt AR-15 series”); § 30510(f) (“As used in this section, ‘series’ includes all other models that are only variations, with minor differences, of those models listed in subdivision

1 (a), regardless of the manufacturer.”); § 30605(a) (criminalizing possession of an assault  
2 weapon).

3 64. Federal law requires all FFLs—even those outside of a purchaser’s state—to  
4 comply with the laws of a purchaser’s state when selling long guns like AR-15 style rifles.  
5 *See* 18 U.S.C. § 922(b)(3).

6 65. California’s ban on AR-15 style rifles is a reasonable and responsible reaction  
7 to the grave threat that AR-15 style weapons pose to the health and safety of Californians.  
8 These types of weapons are favored by mass shooters. As illustrative examples, in addition  
9 to this case, the shooters in the Aurora, Colorado movie theater shooting in July 2012, the  
10 Newtown, Connecticut elementary school shooting in December 2012, and the  
11 aforementioned Santa Monica, California shooting in June 2013, all used AR-15 style rifles.  
12

13 66. Upon information and belief, all DEFENDANTS were aware that AR-15 style  
14 rifles are frequently used by mass shooters.

15 67. “Ghost gun” parts/kits enable dangerous people in California like NEAL to  
16 obtain such banned weapons.

17 68. In September 2019, New York Attorney General Letitia James announced that  
18 she had ordered 16 websites to immediately stop selling products enabling the assembly of  
19 “ghost guns” in New York. Attorney General James acknowledged the reality that “ghost  
20 guns” had been providing the means to violate the state’s assault weapons ban, stating:  
21 “There is only one purpose for the products that these companies are selling — to  
22 manufacture illegal and deadly assault weapons.” James went on to note that “[t]he  
23 proliferation of these types of weapons has not only caused indescribable suffering across the  
24 country, but gravely endangers every New Yorker.” DEFENDANTS’ business practices  
25 similarly undermine California’s assault weapons ban and endanger every Californian.  
26  
27  
28

69. DEFENDANTS could have taken steps to avoid supplying individuals in California with prohibited assault weapons and/or violating various federal firearms laws. Below is a non-exhaustive list of feasible steps that a reasonable and law-abiding company would have taken to avoid undermining California law and/or federal law:

- a. DEFENDANTS could have blocked Internet Protocol (“IP”) addresses associated with California from accessing their websites and/or the portions of their websites listing products enabling the assembly of AR-15 style “ghost gun” rifles;
- b. DEFENDANTS could have refused to ship such products to California;
- c. DEFENDANTS could have required that their products only be transferred through a sale carried out by an FFL;
- d. DEFENDANTS could have required that only individuals who could legally purchase and possess firearms could purchase their products; and
- e. DEFENDANTS could have included serial numbers on their products.

70. Upon information and belief, none of the DEFENDANTS took these, or any other reasonable safety precautions, to prevent dangerous California residents from violating California and/or federal law and endangering the safety of others with “ghost guns” produced from DEFENDANTS products.

71. Instead, upon information and belief, all of the DEFENDANTS intentionally targeted California consumers.

72. For example, Cody Wilson of DEFENSE DISTRIBUTED/GHOST GUNNER stated that he aimed to undermine gun violence prevention legislation, and in particular, California’s regulatory regime. Wilson, shortly after the Tehama attack in 2017, confirmed that much of DEFENSE DISTRIBUTED/GHOST GUNNER’s business comes from California.

73. Similarly, on its website, BLACKHAWK specifically emphasizes that “in our home state of California, as well as almost every other state in the U.S., it is legal to build your own firearm for personal use.” *See* <https://www.80percentarms.com/pages/faq.html>.

74. Upon information and belief, these and other DEFENDANTS were all intentionally designing, advertising, manufacturing, marketing and/or selling ghost guns

1 parts/kits designed and intended to be assembled into AR-15 style rifles to California  
2 consumers like NEAL.

3 75. DEFENDANTS also, as noted above, purposefully emphasized features of  
4 their products they knew to be particularly attractive to criminals and dangerous parties like  
5 NEAL— such as their untraceability and the absence of a background check or interaction  
6 with a FFLs.

7 76. DEFENDANTS knew that “ghost guns” are frequently used by criminals and  
8 dangerous individuals and have continued to gain additional knowledge of this reality.

9 77. Upon information and belief, DEFENDANTS have, nevertheless, not changed  
10 their reckless and unlawful business practices.

11 **B. “Ghost Guns” Were Used To Harm PLAINTIFF**

12 78. On November 13-14, 2017, NEAL engaged in a rampage shooting spree  
13 spanning across multiple locations in Tehama County, California which left PLAINTIFF  
14 seriously injured for life, when NEAL pulled up alongside PLAINTIFF’S car in NEAL’s  
15 stolen car on Rancho Tehama Road, in the community of Rancho Tehama Reserve (outside  
16 of the City of Corning, CA), and opened fire on PLAINTIFF, actually shooting PLAINTIFF  
17 through a femoral artery. PLAINTIFF almost bled out before he was evacuated by air  
18 ambulance and barely escaped with his life, arriving at a trauma center in Redding, CA with  
19 almost no pulse.

20 79. Prior to the shooting, NEAL was prohibited from possession firearms by one  
21 or more court orders. The order(s) required authorities to arrest NEAL if he violated these  
22 orders. Multiple PLAINTIFF and/or their loved ones were named as protected parties on one  
23 or more of these orders, including PLAINTIFF BOB STEELE and G.E., as well as decedent  
24 DIANA STEELE.  
25  
26  
27  
28

1           80.     During his rampage, NEAL was in possession of and used at least two AR-15  
2 style semiautomatic rifles. Both of these firearms were “ghost guns.”

3           81.     Upon information and belief, at the time of the shooting, NEAL’s “ghost  
4 guns” lacked any identifying serial numbers.

5           82.     It is unknown how and where NEAL acquired the “ghost gun” parts/kits used  
6 to assemble the weapons used in the attack. Given DEFENDANTS’ actions, it may be  
7 impossible to determine the exact manufacturer(s)/seller(s) of the “ghost gun” parts/kits  
8 NEAL used to assemble the AR-15 style “ghost gun” rifles used in the attack.

9           83.     Upon information and belief, NEAL could not have legally acquired an AR-  
10 15 style rifle like those utilized in the attack from a FFL either inside or outside of California,  
11 because of his status as a California resident and California’s ban on the possession of assault  
12 weapons.

13           84.     Upon information and belief, NEAL also could not have secured an AR-15  
14 style rifle – or, indeed, any firearm – from an FFL because he was displaying erratic and  
15 disturbing behavior for a significant period of time leading up to the shooting due to severe  
16 mental illness.

17           85.     The above discussion is not intended to be an exhaustive listing of the reasons  
18 why NEAL could not have purchased a serialized, fully assembled AR-15 style rifle from an  
19 FFL. Various other California or federal firearms restrictions may also have blocked such a  
20 sale.

21           86.     NEAL was only able to acquire his arsenal of weapons through the negligence  
22 of DEFENDANTS. Had DEFENDANTS complied with the law and relevant standards of  
23 care, NEAL would not have been able to use “ghost guns” to harm PLAINTIFF.

24           **C. The “Ghost Gun” Industry and Defendants’ Role as Substantial Players in A**  
25           **Market Involving Fungible, Dangerous Goods**

1           87. Upon information and belief, DEFENDANTS were all intentionally  
2 making/marketing/selling “ghost guns” parts/kits designed and intended to be assembled into  
3 AR-15 style rifles into California leading up to and at the time of NEAL’s purchase of the  
4 relevant “ghost gun” parts/kits.

5           88. Upon information and belief, DEFENDANTS also all purposefully targeted a  
6 dangerous subclass of California consumers who had no or limited access to these weapons  
7 by virtue of disqualifying records, mental illness, and/or relevant legal restrictions.  
8

9           89. Upon information and belief, DEFENDANTS, in aggregate, were responsible  
10 for manufacturing and/or selling a substantial percentage of all “ghost gun” parts/kits  
11 enabling assembly of AR-15 style “ghost gun” rifles which entered into California leading up  
12 to and during November 2017.

13           90. Upon information and belief, there is a substantial probability that one or  
14 more of the DEFENDANTS sold NEAL one or more “ghost gun” parts/kits used to assemble  
15 the AR-15 style rifles used in the attack, either online or via some other medium, with full  
16 knowledge that (1) NEAL was a resident of California, (2) that California prohibits the  
17 possession of AR-15 style rifles, and (3) AR-15 style rifles have frequently been used in  
18 mass shootings.  
19

20           91. Upon information and belief, there is a substantial probability that one or  
21 more of the DEFENDANTS shipped one or more “ghost gun” parts/kits used to assemble the  
22 weapons used in the attack to NEAL’s California residence.

23           92. “Ghost gun” parts/kits that can be used to assemble unserialized AR-15 style  
24 rifles are fungible products. Such parts/kits share the same core characteristics and present  
25 an equivalent risk of danger to members of the public like PLAINTIFF. These products  
26 provide dangerous parties like NEAL with an identical capability to possess untraceable  
27  
28

1 assault weapons without going through an FFL and in violation of California's assault  
2 weapons ban.

3 93. Had these one or more DEFENDANTS complied with the law and relevant  
4 standards of care, NEAL would never have had access to the relevant products. Any and all  
5 DEFENDANTS named herein could and should have made, sold, distributed and/or  
6 marketed their products with greater precautions to (1) make it more difficult for California  
7 consumers to use their products to produce dangerous weapons that violated California law  
8 and (2) to make it more difficult for dangerous individuals like NEAL to assemble "ghost  
9 guns" from their products.  
10

11 94. Without access to DEFENDANTS' one or more products, NEAL could not  
12 have assembled his "ghost guns" and could not have used them to harm PLAINTIFF.

13 95. NEAL's misuse of these assembled products was particularly foreseeable to  
14 PLAINTIFF because NEAL fell within the dangerous subclass of consumers specifically  
15 targeted by DEFENDANTS.  
16

17 **CAUSE OF ACTION I: NEGLIGENCE (AGAINST ALL DEFENDANTS)**

18 96. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
19 though set out in full herein.

20 97. A seller of "ghost gun" parts/kits – particularly parts/kits intended to be  
21 assembled into highly dangerous AR-15 style weapons commonly used by mass shooters like  
22 NEAL – owes the highest degree of care to the general public when selling such items.

23 98. This standard of care imposes a duty to take all reasonable and practical safety  
24 precautions to prevent dangerous and irresponsible individuals like NEAL from gaining  
25 access to "ghost gun" parts/kits designed and intended for assembly into AR-15 style rifles.

26 99. Such safety precautions would include, but are not limited to, carefully  
27 learning and continually checking relevant state and federal firearms laws regarding assault  
28

1 weapons, never shipping to states where the possession of an AR-15 style weapon created  
2 from one of a defendant's parts/kits would be deemed illegal, and blocking all IP addresses  
3 from such states. Additionally, a responsible seller of such products would take steps to  
4 verify that only individuals legally permitted to possess firearms and not displaying signs of  
5 significant psychological disturbance were buying its products—such as by requiring all  
6 transactions to go through an FFL in the buyer's home state.

7  
8 100. Upon information and belief, none of these DEFENDANTS had, at the time  
9 NEAL purchased the relevant product(s) from the DEFENDANT(s), taken these or other  
10 reasonable safety precautions which would have blocked NEAL's purchase of the relevant  
11 products.

12 101. DEFENDANTS' violation of the above standards of care proximately caused  
13 PLAINTIFF'S harm by granting NEAL access to highly lethal weapons he could not have  
14 legally acquired.

15 102. Had NEAL been denied access to the parts/kits used to make his two AR-15  
16 style "ghost gun" rifles, he could not have used these weapons to harm PLAINTIFF.

17 103. As a direct, proximate, immediate and foreseeable result of the actions and  
18 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and  
19 dangerous weapons, PLAINTIFF was injured and suffered grievous and permanent injuries  
20 to his physical, mental, emotional and nervous systems, all to his detriment in an amount  
21 greatly in excess of the minimum jurisdiction of this Court.

22 104. As a further direct, proximate, immediate and foreseeable result of the actions  
23 and conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and  
24 dangerous weapons, PLAINTIFF had to, and will have to in the future, rely on surgeons and  
25 other physicians, and undergo other and further expense for his medical care, in amounts  
26 which cannot yet be fully ascertained.  
27  
28

1           105. As a further direct, proximate, immediate and foreseeable result of the actions  
2 and conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and  
3 dangerous weapons, PLAINTIFF has lost wages and suffered great reduction in his working  
4 capacity and future wages as a result of his disabling gunshot injury proximately caused by  
5 DEFENDANTS. PLAINTIFF is informed and believes and, on such information and belief  
6 states, that this said reduction in earning capacity will continue into the future in an amount  
7 which cannot yet be ascertained.  
8

9           106. As a further, direct, proximate and foreseeable result of the aforementioned  
10 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
11 highly lethal, illegal and dangerous weapons, PLAINTIFF has suffer loss of companionship  
12 and consortium with his wife.

13           107. As a further, direct, proximate and foreseeable result of the aforementioned  
14 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
15 highly lethal, illegal and dangerous weapons, PLAINTIFF has suffered, and will continue to  
16 suffer in the future, consequential damages and other incidental damages and out-of-pocket  
17 expenses, all to PLAINTIFF'S general damages in a sum to be determined at the time of  
18 trial.  
19

20           108. As a further, direct, proximate and foreseeable result of the aforementioned  
21 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
22 highly lethal, illegal and dangerous weapons, PLAINTIFF has had to retain legal counsel to  
23 protect and vindicate his rights. Therefore, DEFENDANTS, and each of them, are liable to  
24 PLAINTIFF for attorney's fees incurred by PLAINTIFF in a sum to be determined at the  
25 time of trial.  
26

27           109. DEFENDANTS, and each of their negligence, as set forth above, was a  
28 substantial factor in causing PLAINTIFF'S harm.

1           110. PLAINTIFF is informed and believes and thereon allege that  
2 DEFENDANTS and each of their conduct was done in a conscious disregard and deliberate  
3 disregard for the rights and safety of others, including PLAINTIFF, and in a willful and  
4 reckless manner making the infliction of grievous bodily injury and/or death highly  
5 probable. DEFENDANTS conduct was despicable, willful, wanton and malicious within the  
6 meaning of California Civil Code §§ 3294, so as to warrant the imposition of punitive and  
7 exemplary damages against them in the fullest extent allowed by law.  
8

9           111. PLAINTIFF is informed and believes and thereon allege that DEFENDANTS,  
10 and each of them, are negligent or in some other way responsible for acts of which  
11 PLAINTIFF is unaware.

12           **CAUSE OF ACTION II: NEGLIGENCE PER SE FOR VIOLATION OF**  
13           **CALIFORNIA AND/OR FEDERAL FIREARMS LAWS (AGAINST ALL**  
14           **DEFENDANTS)**

15           112. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
16 though set out in full herein.

17           113. NEAL's purchase of "ghost gun" parts/kits and the use of them to assemble  
18 AR-15 style rifles violated California's assault weapons ban. *See* Cal. Pen. Code §  
19 30510(a)(5) (assault weapons include semiautomatic rifles within the "Colt AR-15 series"); §  
20 30510(f) ("As used in this section, 'series' includes all other models that are only variations,  
21 with minor differences, of those models listed in subdivision (a), regardless of the  
22 manufacturer."); § 30605(a) (criminalizing possession of an assault weapon).

23           114. DEFENDANTS are manufacturer/sellers of "ghost gun" parts/kits who  
24 intentionally targeted – and continue to target -- the California market and ship "ghost gun"  
25 parts/kits designed for assembly into AR-15 style rifles to California consumers like NEAL.  
26 DEFENDANTS did so, and continue to do so, with the knowledge and intention that those  
27 consumers will use these products to assemble weapons prohibited under California law.  
28

1           115. All of the DEFENDANTS are, thus, responsible as knowing accomplices, for  
2 their consumers' direct violations of, at minimum, California's ban on the possession of  
3 assault weapons. *See* Cal. Pen. Code § 31 (anyone who "aid[s] and abet[s]" in the  
4 commission of an offense is a principal); § 971 ("all persons concerned in the commission of  
5 a crime, who by the operation of other provisions of this code are principals therein, shall  
6 hereafter be prosecuted, tried and punished as principals"); § 27(a)(1) (California has  
7 jurisdiction over crimes where at least part of the offense takes place within the state).

8  
9           116. All of the DEFENDANTS may also be responsible, either directly or as an  
10 accomplice, for violation one or more additional state or federal firearms laws, including, but  
11 not limited to, various provisions of the Gun Control Act of 1968 or the National Firearms  
12 Act.

13           117. In addition to these laws explicitly referencing firearms, DEFENDANTS also  
14 violated California statutes prohibiting unfair, immoral and reckless business practices and  
15 the creation and maintenance of public nuisances, as discussed further below. *See* Cal. Bus.  
16 & Prof Code § 17200"; Cal. Civ. Code §§ 3479, 3480.

17  
18           118. Whichever DEFENDANT or DEFENDANTS are responsible, either directly  
19 or as an accomplice, for selling NEAL one or more "ghost gun" parts/kits in violation of one  
20 or more statutes including, at minimum, California's assault weapons ban, breached the  
21 standard of care imposed by statute.

22           119. This violation proximately caused PLAINTIFF'S harm by providing NEAL  
23 access to highly lethal weapons that he could not have legally acquired in California.

24           120. Had NEAL been denied access to the "ghost gun" parts/kits used to make his  
25 two AR-15 style "ghost gun" rifles, he could not have used these weapons to harm  
26 PLAINTIFF.

27           121. As a direct, proximate, immediate and foreseeable result of the actions and  
28

1 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and  
2 dangerous weapons, PLAINTIFF was injured and suffered grievous and permanent injuries  
3 to his physical, mental, emotional and nervous systems, all to his detriment in an amount  
4 greatly in excess of the minimum jurisdiction of this Court.

5 122. As a further direct, proximate, immediate and foreseeable result of the actions  
6 and conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and  
7 dangerous weapons, PLAINTIFF had to, and will have to in the future, rely on surgeons and  
8 other physicians, and undergo other and further expense for his medical care, in amounts  
9 which cannot yet be fully ascertained.  
10

11 123. As a further direct, proximate, immediate and foreseeable result of the actions  
12 and conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and  
13 dangerous weapons, PLAINTIFF has lost wages and suffered great reduction in his working  
14 capacity and future wages as a result of his disabling gunshot injury proximately caused by  
15 DEFENDANTS. PLAINTIFF is informed and believes and, on such information and belief  
16 states, that this said reduction in earning capacity will continue into the future in an amount  
17 which cannot yet be ascertained.  
18

19 124. As a further, direct, proximate and foreseeable result of the aforementioned  
20 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
21 highly lethal, illegal and dangerous weapons, PLAINTIFF has suffer loss of companionship  
22 and consortium with his wife.

23 125. As a further, direct, proximate and foreseeable result of the aforementioned  
24 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
25 highly lethal, illegal and dangerous weapons, PLAINTIFF has suffered, and will continue to  
26 suffer in the future, consequential damages and other incidental damages and out-of-pocket  
27 expenses, all to PLAINTIFF'S general damages in a sum to be determined at the time of  
28

1 trial.

2 126. As a further, direct, proximate and foreseeable result of the aforementioned  
3 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
4 highly lethal, illegal and dangerous weapons, PLAINTIFF has had to retain legal counsel to  
5 protect and vindicate his rights. Therefore, DEFENDANTS, and each of them, are liable to  
6 PLAINTIFF for attorney's fees incurred by PLAINTIFF in a sum to be determined at the  
7 time of trial.

8  
9 127. DEFENDANTS, and each of their negligence, as set forth above, was a  
10 substantial factor in causing PLAINTIFF'S harm.

11 128. PLAINTIFF is informed and believes and thereon allege that  
12 DEFENDANTS and each of their conduct was done in a conscious disregard and deliberate  
13 disregard for the rights and safety of others, including PLAINTIFF, and in a willful and  
14 reckless manner making the infliction of grievous bodily injury and/or death highly  
15 probable. DEFENDANTS conduct was despicable, willful, wanton and malicious within the  
16 meaning of California Civil Code §§ 3294, so as to warrant the imposition of punitive and  
17 exemplary damages against them in the fullest extent allowed by law.

18  
19 129. PLAINTIFF is informed and believes and thereon allege that DEFENDANTS,  
20 and each of them, are negligent or in some other way responsible for acts of which  
21 PLAINTIFF are unaware.

22 **CAUSE OF ACTION III: NEGLIGENT ENTRUSTMENT**  
23 **(AGAINST ALL DEFENDANTS)**

24 130. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
25 though set out in full herein.

26 131. Upon information and belief, DEFENDANTS purposefully targeted residents  
27 of states with strict gun violence prevention regimes, like California, who were seeking to  
28 bypass the laws of their home state.

1           132. By targeting and supplying dangerous individuals already showing contempt  
2 for the rule of law and disrespect towards the safety rules accepted by their communities,  
3 DEFENDANTS were purposefully selling to a class of purchasers who were inherently  
4 showing a high likelihood of misusing their “ghost gun” parts/kits in a dangerous manner that  
5 would cause harm to third parties like PLAINTIFF.

6           133. Whichever DEFENDANT or DEFENDANTS sold or shipped one or more  
7 “ghost gun” parts/kits capable of and intended to be assembled into AR-15 style rifles  
8 prohibited by California law to NEAL, despite knowing that he was a California resident and  
9 that California prohibits such weapons were, thus, negligently entrusting these one or more  
10 items.

11           134. This violation of relevant standards of care proximately caused PLAINTIFF’S  
12 harm by granting NEAL access to highly lethal weapons that he could not have legally  
13 acquired in California.

14           135. Had NEAL been denied access to the “ghost gun” parts/kits he used to  
15 assemble his two AR-15 style “ghost gun” rifles, he could not have used these weapons to  
16 harm PLAINTIFF.

17           136. As a direct, proximate, immediate and foreseeable result of the actions and  
18 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and  
19 dangerous weapons, PLAINTIFF was injured and suffered grievous and permanent injuries  
20 to his physical, mental, emotional and nervous systems, all to his detriment in an amount  
21 greatly in excess of the minimum jurisdiction of this Court.

22           137. As a further direct, proximate, immediate and foreseeable result of the actions  
23 and conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and  
24 dangerous weapons, PLAINTIFF had to, and will have to in the future, rely on surgeons and  
25 other physicians, and undergo other and further expense for his medical care, in amounts  
26  
27  
28

1 which cannot yet be fully ascertained.

2 138. As a further direct, proximate, immediate and foreseeable result of the actions  
3 and conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and  
4 dangerous weapons, PLAINTIFF has lost wages and suffered great reduction in his working  
5 capacity and future wages as a result of his disabling gunshot injury proximately caused by  
6 DEFENDANTS. PLAINTIFF is informed and believes and, on such information and belief  
7 states, that this said reduction in earning capacity will continue into the future in an amount  
8 which cannot yet be ascertained.  
9

10 139. As a further, direct, proximate and foreseeable result of the aforementioned  
11 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
12 highly lethal, illegal and dangerous weapons, PLAINTIFF has suffer loss of companionship  
13 and consortium with his wife.

14 140. As a further, direct, proximate and foreseeable result of the aforementioned  
15 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
16 highly lethal, illegal and dangerous weapons, PLAINTIFF has suffered, and will continue to  
17 suffer in the future, consequential damages and other incidental damages and out-of-pocket  
18 expenses, all to PLAINTIFF'S general damages in a sum to be determined at the time of  
19 trial.  
20

21 141. As a further, direct, proximate and foreseeable result of the aforementioned  
22 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
23 highly lethal, illegal and dangerous weapons, PLAINTIFF has had to retain legal counsel to  
24 protect and vindicate his rights. Therefore, DEFENDANTS, and each of them, are liable to  
25 PLAINTIFF for attorney's fees incurred by PLAINTIFF in a sum to be determined at the  
26 time of trial.  
27

28 142. DEFENDANTS negligent entrustment of the dangerous instrumentalities, as

1 set forth above, was a substantial factor in causing PLAINTIFF'S harm.

2 143. PLAINTIFF is informed and believes and thereon allege that  
3 DEFENDANTS and each of their conduct was done in a conscious disregard and deliberate  
4 disregard for the rights and safety of others, including PLAINTIFF, and in a willful and  
5 reckless manner making the infliction of grievous bodily injury and/or death highly  
6 probable. DEFENDANTS conduct was despicable, willful, wanton and malicious within the  
7 meaning of California Civil Code §§ 3294, so as to warrant the imposition of punitive and  
8 exemplary damages against them in the fullest extent allowed by law.  
9

10 144. PLAINTIFF is informed and believes and thereon allege that defendants, and  
11 each of them, are negligent or in some other way responsible for acts of which PLAINTIFF  
12 are unaware.

13 **CAUSE OF ACTION IV: PUBLIC NUISANCE (AGAINST ALL DEFENDANTS)**

14 145. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
15 though set out in full herein.

16 146. By negligently, recklessly, and/or intentionally selling vast quantities of  
17 "ghost gun" parts/kits enabling the assembly of AR-15 style rifles to buyers in California in  
18 violation of, at a minimum, California law, DEFENDANTS have negligently and/or  
19 knowingly participated in creating and maintaining an unreasonable interference with the  
20 rights held in common by the general public. This constitutes a public nuisance under  
21 California law, including California Civil Code §§ 3479 and 3480.  
22

23 147. Without limitation, the acts of DEFENDANTS as alleged herein caused,  
24 created, and continue to maintain a substantial and unreasonable interference with the  
25 public's health, safety, convenience, comfort, peace, and use of public property and/or  
26 private property. These activities are injurious to health and offensive to the senses so as to  
27 interfere with the comfortable enjoyment of life or property in an entire community or  
28

1 neighborhood. Numerous members of the public are threatened, killed, injured, or are  
2 victims of criminal acts as a result of “ghost gun” parts/kits sold by DEFENDANTS.  
3 DEFENDANTS’ acts and omissions as alleged herein cause a substantial and unreasonable  
4 increase in the number of members of the general public who are threatened, killed, and  
5 injured by “ghost guns.”

6 148. The acts and omissions of DEFENDANTS, as alleged herein, substantially  
7 and unreasonably interfere with the public’s use of public facilities, including the use of  
8 public highways and walkways. Public highways and walkways are made substantially and  
9 unreasonably unsafe because of the presence of ghost guns intentionally, negligently and  
10 unlawfully supplied by DEFENDANTS.  
11

12 149. DEFENDANTS’ acts and omissions as alleged herein substantially and  
13 unreasonably (a) increase the number of “ghost guns” in and on public facilities, including on  
14 public highways and walkways; (b) increase the degree to which unlawful possessors in and  
15 on public facilities, including on highways and walkways, are illegally armed with weapons;  
16 and (c) allow for banned assault weapons to be present in California, including on public  
17 highways and walkways.  
18

19 150. DEFENDANTS’ acts and omissions as alleged herein cause substantial and  
20 unreasonable interferences with the public’s health, safety, convenience, comfort, and peace  
21 in numerous other ways, including: (a) increasing the number of unlawful possessors of  
22 weapons who use these weapons to commit violent crimes against innocent members of the  
23 general public; (b) increasing the number and severity of property crimes committed by those  
24 in possession of “ghost guns” against innocent members of the general public; (c) increasing  
25 the number and severity of incidents in which those in possession of “ghost guns” disturb the  
26 peace by being disorderly; and (d) increasing the amount of society’s resources that are  
27 diverted toward dealing with the problems associated with the possession of “ghost guns.”  
28

1           151. DEFENDANTS know or have reason to know that the acts and omissions  
2 alleged herein caused substantial and unreasonable interferences with the public's health,  
3 safety, convenience, comfort, peace, and use of public facilities. DEFENDANTS' acts and  
4 omissions as alleged herein were undertaken with negligent and/or intentional disregard of  
5 the rights of the general public. DEFENDANTS knew that they could have taken  
6 precautions as outlined above that would have eliminated or minimized the injuries to the  
7 general public. Instead they chose not to take those precautions and, in fact, actively  
8 exacerbated these risks with the irresponsible marketing campaign described herein in order  
9 to maximize their profits.  
10

11           152. DEFENDANTS' interference with the public's health, safety, convenience,  
12 comfort, peace, and use of public facilities is unreasonable, unlawful, substantial, significant,  
13 continuing, and long-lasting. This interference, is annoying, offensive, and disturbing to an  
14 ordinary person. The interference is not insubstantial or fleeting, and involves deaths and  
15 serious injuries suffered by many people and a severe disruption of public health, peace,  
16 order, and safety.  
17

18           153. The manner in which DEFENDANTS make, sell, and market their products  
19 has no social utility. Even if it did, the seriousness of their interference with the rights of the  
20 public and harm they cause far outweighs any social utility associated with DEFENDANTS'  
21 conduct.  
22

23           154. DEFENDANTS' unlawful, negligent and/or intentional creation and  
24 maintenance of the public nuisance directly and proximately caused significant harm,  
25 including serious physical injury and associated harm to PLAINTIFF that is different from  
26 the harm suffered by other members of the public, including loss of enjoyment of life, as well  
27 as those damages set forth in paragraphs 121-131 above, all to their damage in an amount to  
28 be determined at a trial of this matter.

1           155. PLAINTIFF have not, at any time, consented to DEFENDANTS' conduct.

2           156. At all times herein mentioned, DEFENDANTS had notice and knowledge  
3 that their actions created a public nuisance.

4           157. PLAINTIFF are informed and believe and thereon allege that defendants and  
5 each of their, conduct was done in a conscious disregard and deliberate disregard for the  
6 rights and safety of others, including PLAINTIFF, and in a willful and reckless manner  
7 making the infliction of grievous bodily injury and/or death highly probable. Defendants  
8 conduct was despicable, willful, wanton and malicious within the meaning of California  
9 Civil Code §§ 3294, so as to warrant the imposition of punitive and  
10 exemplary damages against them in the fullest extent allowed by law.

11  
12           **CAUSE OF ACTION V: VIOLATION OF BUSINESS AND PROFESSIONS**  
13           **CODE SECTION 17200 (AGAINST ALL DEFENDANTS)**  
14           **(Unfair and Unlawful Competition in Sales Practices)**

15           158. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
16 though set out in full herein.

17           159. DEFENDANTS in the course of their retail business of selling "ghost guns,"  
18 engaged in business acts or practices that were unlawful, unfair, deceptive, or misleading,  
19 and which therefore violated Bus. & Prof Code § 17200.

20           160. By selling to NEAL, a dangerous individual, who was prohibited from  
21 purchasing and possessing firearms, "ghost gun" parts/kits for a prohibited assault-style  
22 weapons, in violation of state and/or federal law, DEFENDANTS engaged in business  
23 practices that were unlawful, immoral, unethical, oppressive, and unscrupulous.

24           161. Also, by supplying to a subclass of purchasers who are inherently showing a  
25 high likelihood of misusing their "ghost gun" parts/kits in a dangerous manner that would  
26 cause harm to third parties like PLAINTIFF, DEFENDANTS engaged in business practices  
27 that were unlawful, immoral, unethical, oppressive, and unscrupulous.  
28

1           162. As a direct and proximate result of the foregoing acts and practices,  
2 DEFENDANTS have received income, profits, and other benefits, which they would not  
3 have received if DEFENDANTS had not engaged in the violations of Bus. & Prof Code  
4 § 17200 as described in this Complaint for Damages.

5           163. Further, upon information and belief, had DEFENDANTS not violated  
6 California's prohibition on such unethical and unlawful marketing and business practices,  
7 NEAL could not have acquired the parts/kits used to assemble his AR-15 style "ghost gun"  
8 rifles or used these items to harm PLAINTIFF.

9           164. PLAINTIFF is informed and believes and thereon allege that  
10 DEFENDANTS and each of their conduct was done in a conscious disregard and deliberate  
11 disregard for the rights and safety of others, including PLAINTIFF, and in a willful and  
12 reckless manner making the infliction of grievous bodily injury and/or death highly  
13 probable. DEFENDANTS conduct was despicable, willful, wanton and malicious within the  
14 meaning of California Civil Code §§ 3294, so as to warrant the imposition of punitive and  
15 exemplary damages against them in the fullest extent allowed by law.

16           165. To prevent their unjust enrichment, DEFENDANTS and each of them,  
17 should be required, pursuant to Business and Professions Code sections 17200, et seq, to  
18 disgorge their ill-gotten gains for the purpose of making full restitution to PLAINTIFF as a  
19 consequence of DEFENDANTS unlawful and unfair activities, injunctive relief, as well as  
20 all attorney's fees and costs.

21           **CAUSE OF ACTION VI: VIOLATION OF BUSINESS AND PROFESSIONS**  
22           **CODE SECTION 17200 (AGAINST ALL DEFENDANTS)**  
23           **(Unfair Marketing Tactics)**

24           166. PLAINTIFF hereby incorporates by reference all preceding paragraphs as  
25 though set out in full herein.  
26  
27  
28

1           167. DEFENDANTS in the course of their retail business of selling ghost guns,  
2 engaged in business acts or practices that were unfair, deceptive, or misleading, and which  
3 therefore violated Bus. & Prof Code § 17200.

4           168. Specifically, by employing marketing tactics which emphasized that their  
5 products, including banned assault weapons, were untraceable and could be acquired without  
6 a background check or an interaction with an FFL, DEFENDANTS intentionally targeted  
7 prohibited persons and other dangerous individuals like NEAL. Such tactics and practices  
8 were unfair, immoral, unethical, oppressive, and unscrupulous.

9           169. As a direct and proximate result of the foregoing acts and practices,  
10 DEFENDANTS have received income, profits, and other benefits, which they would not  
11 have received if DEFENDANTS had not engaged in the violations of Bus. & Prof Code  
12 § 17200 as described in this Complaint for Damages.

13           170. Further, upon information and belief, had DEFENDANTS not violated  
14 California's prohibition on such unethical and unlawful marketing and business practices,  
15 NEAL could not have acquired the parts/kits used to assemble his AR-15 style "ghost gun"  
16 rifles or used these weapons to harm PLAINTIFF.

17           171. PLAINTIFF is informed and believes and thereon allege that defendants and  
18 each of their conduct was done in a conscious disregard and deliberate disregard for the  
19 rights and safety of others, including PLAINTIFF, and in a willful and reckless manner  
20 making the infliction of grievous bodily injury and/or death highly probable. Defendants  
21 conduct was despicable, willful, wanton and malicious within the meaning of California  
22 Civil Code §§ 3294, so as to warrant the imposition of punitive and  
23 exemplary damages against them in the fullest extent allowed by law.

24           172. PLAINTIFF is informed and believes and thereon allege that  
25 DEFENDANTS and each of their conduct was done in a conscious disregard and deliberate  
26  
27  
28

1 disregard for the rights and safety of others, including PLAINTIFF, and in a willful and  
2 reckless manner making the infliction of grievous bodily injury and/or death highly  
3 probable. DEFENDANTS conduct was despicable, willful, wanton and malicious within the  
4 meaning of California Civil Code §§ 3294, so as to warrant the imposition of punitive and  
5 exemplary damages against them in the fullest extent allowed by law.

6 173. To prevent their unjust enrichment, DEFENDANTS and each of them,  
7 should be required, pursuant to Business and Professions Code sections 17200, et seq, to  
8 disgorge their ill-gotten gains for the purpose of making full restitution to PLAINTIFF as a  
9 consequence of DEFENDANTS unlawful and unfair activities, injunctive relief, as well as  
10 all attorney's fees and costs.

11  
12 **JURY TRIAL DEMANDED**

13 174. Plaintiff requests and demands trial by jury as to each and every fact, claim,  
14 and cause of action alleged and pleaded herein.

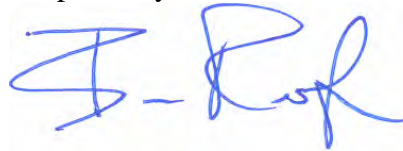
15 **PRAYER FOR RELIEF**

16 175. WHEREFORE, PLAINTIFF prays for judgment and relief against  
17 DEFENDANTS, jointly and severally, as follows:

- 18
- 19 a Compensatory damages for physical and emotional pain and suffering,  
20 including those non-economic damages which are enumerated under Cal. Civil  
Code § 1431.2(b)(2);
  - 21 b Compensatory damages for past medical expenses;
  - 22 c Compensatory damages for future medical expenses and medical monitoring;
  - 23 d Compensatory damages for past and future wage loss and loss of earning  
24 capacity;
  - 25 e Compensatory damages for damage to or destruction of personal property;
  - 26 f Punitive (exemplary) damages;
  - 27 g Incidental damages;
  - 28 h Presumed damages;

- 1 i Nominal damages;
- 2 j Attorney's fees, including pursuant to Code of Civ. Pro. § 1021.5 (California
- 3 Private Attorney General Doctrine) and § 2033.420(a) (in the event plaintiff has
- 4 to prove up any facts which defendants refused to admit in their responses to
- plaintiffs' Requests for Admissions);
- 5 k Costs of litigation;
- 6 l Pre- and post-judgment interest awardable at the highest legal rate(s) allowable,
- 7 including without limitation under Cal. Civil Code §§ 3287 and/or 3291; and
- 8 m Such further relief as the Court deems just and proper.

9 Respectfully Submitted,

10 

11 Dated: November 14, 2019

12 By: Ben Rosenfeld  
13 Gerald B. Singleton  
14 Attorneys for Plaintiff Cardenas

CIV-191114-CIV-DS1935422-SIF-090904



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System Code: CIV  
Case Number: DS1935422  
Case Type: CIV  
Action Code: SIF  
Action Date: 11/14/19  
Action Time: 9:09  
Action Seq: 0004  
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**Summons Issued and filed**



NEW FILE

# SUMMONS (CITACION JUDICIAL)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

GHOST GUNNER INC., d/b/a GHOSTGUNNER.NET; (continued on attachment)

## YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

TROY MCFADYEN, in his Individual Capacity, and as Heir at Law and Successor; (continued on attachment)

SUM-100

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN BERNARDINO  
SAN BERNARDINO DISTRICT

NOV 14 2019

BY Alma Vallejo Garcia  
ALMA VALLEJO GARCIA, DEPUTY

**NOTICE!** You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desear el caso.

The name and address of the court is:

(El nombre y dirección de la corte es): San Bernardino County Superior Court  
247 W. Third Street, 3rd Floor, 0210  
San Bernardino, CA 92415-0210

CASE NUMBER  
(Número del caso) **CV-DS 1935422**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):  
Estee Lewis, BARR & MUDFORD, LLP, P.O. Box 994390, Redding, CA 96099-4390 (530-243-8008)

DATE:  
(Fecha)

NOV 14 2019

Clerk, by  
(Secretaria)

Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)  
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

(SEAL)



### NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.  
2. ☐ as the person sued under the fictitious name of (specify):

Alma Vallejo Garcia

3. ☐ on behalf of (specify):

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)  
☐ other (specify):

4. ☐ by personal delivery on (date):

SUM-200(A)

SHORT TITLE: McFadyen, et al. v. Ghost Gunner Inc., et al	CASE NUMBER:
--	--------------

## INSTRUCTIONS FOR USE

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.  
→ If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

List additional parties (Check only one box. Use a separate page for each type of party.):

☐ Plaintiff ☒ Defendant ☐ Cross-Complainant ☐ Cross-Defendant

BLACKHAWK MANUFACTURING GROUP INC., d/b/a 80PERCENTARMS.COM;

RYAN BEEZLEY and BOB BEEZLEY, d/b/a RBTACTICALTOOLING.COM;

GHOST AMERICA LLC, d/b/a GHOSTGUNS.COM;

GHOST FIREARMS LLC, d/b/a GRID DEFENSE and GHOSTRIFLES.COM;

JUGGERNAUT TACTICAL INC., d/b/a JTACTICAL.COM;

MFY TECHNICAL SOLUTIONS LLC, d/b/a 5DTACTICAL.COM;

TACTICAL GEAR HEADS LLC, d/b/a 80- LOWER.COM; AR-15LOWERRECEIVERS.COM; and 80LOWERJIG.COM;

JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM;

INDUSTRY ARMAMENT INC., d/b/a AMERICANWEAPONSCOMPONENTS.COM;

THUNDER GUNS LLC, d/b/a THUNDERTACTICAL.COM;

DOES 1-100, Inclusive

Page 1 of 1

Page 1 of 1

SUM-200(A)

SHORT TITLE:

CASE NUMBER:

McFadyen, et al. v. Ghost Gunner Inc., et al

## INSTRUCTIONS FOR USE

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List additional parties (Check only one box. Use a separate page for each type of party.):

☒ Plaintiff    ☐ Defendant    ☐ Cross-Complainant    ☐ Cross-Defendant

PHILLIP BOW and SIA BOW, as Heirs at Law and Successors in Interest to MICHELLE MCFADYEN, Deceased;

BOB STEELE, a Dependent Adult, by and through his Guardian ad Litem, DAVID STEELE, Heir at Law and Successor in Interest to DIANA STEELE, Deceased;

MICHAEL ELLIOTT, Heir at Law and Successor in Interest to DANIEL LEE ELLIOT II, Deceased, and DIANA STEELE, Deceased;

G.E., a Minor, by and through his Guardian ad Litem, ALMA FEITELBERG, Heir at Law and Successor in Interest to DANIEL LEE ELLIOT II, Deceased, and DIANA STEELE, Deceased;

M.E., a Minor, by and through her Guardian ad Litem, LATISHA CORNWALL, Heir at Law And Successor in Interest to DANIEL LEE ELLIOT II, Deceased, and DIANA STEELE, Deceased,

MARCIA MCHUGH, Heir at Law and Successor in Interest to JOSEPH MCHUGH, Deceased;  
GRACE MCHUGH, Heir at Law and Successor in Interest to JOSEPH MCHUGH, Deceased;

A.H., a Minor, by and through his Guardian ad Litem, MARIA MONROY,

TIFFANY PHOMMATHEP,

JOHN PHOMMATHEP SR.

J.P. II, a Minor, by and through his Guardian ad Litem, TIFFANY PHOMMATHEP;

J.P., a Minor, by and through his Guardian ad Litem, TIFFANYPHOMMATHEP;

N.P, a Minor, by and through his Guardian ad Litem, TIFFANYPHOMMATHEP,

JAMES WOODS, JR.; and

JAMES WOODS, SR.

Page 1 of 1

Page 1 of 1

1 DUGAN BARR .....State Bar No. 40663  
 2 DOUGLAS MUDFORD .....State Bar No. 156392  
 3 ESTEE LEWIS .....State Bar No. 268358  
 4 CATIE BARR .....State Bar No. 295538  
 5 BRANDON STORMENT .....State Bar No. 267260  
 6 BARR & MUDFORD, LLP  
 1824 Court Street/Post Office Box 994390  
 Redding, California 96099-4390  
 Telephone: (530) 243-8008  
 Facsimile: (530) 243-1648

**FILED**  
 SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF SAN BERNARDINO  
 SAN BERNARDINO DISTRICT

NOV 14 2019

BY Alma Vallejo Garcia  
 ALMA VALLEJO GARCIA, DEPUTY

Attorneys for Plaintiffs

**IN THE SUPERIOR COURT OF CALIFORNIA**

**IN THE COUNTY OF SAN BERNARDINO**

**CIV DS 1935422**

12 TROY MCFADYEN, in his Individual  
 13 Capacity, and as Heir at Law and Successor  
 14 in Interest to MICHELLE MCFADYEN,  
 Deceased;

15 PHILLIP BOW and  
 16 SIA BOW, as Heirs at Law and Successors  
 17 in Interest to MICHELLE MCFADYEN,  
 Deceased;

18 BOB STEELE, a Dependent Adult, by and  
 19 through his Guardian ad Litem, DAVID STEELE,  
 Heir at Law and Successor in  
 20 Interest to DIANA STEELE, Deceased;

21 MICHAEL ELLIOTT, Heir at Law and  
 22 Successor in Interest to DANIEL LEE  
 ELLIOT II, Deceased, and  
 23 DIANA STEELE, Deceased;

24 G.E., a Minor, by and through his Guardian ad  
 25 Litem, ALMA FEITELBERG, Heir at Law  
 26 and Successor in Interest to DANIEL LEE  
 ELLIOT II, Deceased, and  
 DIANA STEELE, Deceased;

27 M.E., a Minor, by and through her Guardian ad  
 28 Litem, LATISHA CORNWALL, Heir at Law  
 and Successor in Interest to DANIEL LEE

No.

**COMPLAINT FOR DAMAGES**

**(DEMAND FOR JURY TRIAL)**

**(Personal Injury/Wrongful Death)**

**CAUSES OF ACTION:**

**1. NEGLIGENCE**

**2. NEGLIGENCE PER SE**

**3. NEGLIGENT ENTRUSTMENT**

**4. PUBLIC NUISANCE**

**5. VIOLATION OF BUSINESS AND  
 PROFESSIONS CODE SECTION  
 17200 (UNFAIR AND UNLAWFUL  
 SALES PRACTICES)**

**6. VIOLATION OF BUSINESS AND  
 PROFESSIONS CODE SECTION  
 17200 (UNFAIR MARKETING  
 TACTICS)**

1 ELLIOT II, Deceased, and  
2 DIANA STEELE, Deceased;  
3 MARCIA MCHUGH, Heir at Law and Successor  
4 in Interest to JOSEPH MCHUGH, Deceased;  
5 GRACE MCHUGH, Heir at Law and Successor  
6 in Interest to JOSEPH MCHUGH, Deceased;  
7 A.H., a Minor, by and through his Guardian ad  
8 Litem, MARIA MONROY;  
9 TIFFANY PHOMMATHEP;  
10 JOHN PHOMMATHEP SR.;  
11 J.P. II, a Minor, by and through his Guardian  
12 ad Litem, TIFFANY PHOMMATHEP;  
13 J.P., a Minor, by and through his Guardian  
14 ad Litem, TIFFANYPHOMMATHEP;  
15 N.P, a Minor, by and through his Guardian  
16 ad Litem, TIFFANYPHOMMATHEP;  
17 JAMES WOODS, JR.; and  
18 JAMES WOODS, SR.  
19 Plaintiffs,  
20 vs.  
21 GHOST GUNNER INC., d/b/a  
22 GHOSTGUNNER.NET;  
23 DEFENSE DISTRIBUTED d/b/a  
24 GHOSTGUNNER.NET  
25 CODY WILSON d/b/a GHOSTGUNNER.NET  
26 BLACKHAWK MANUFACTURING GROUP  
27 INC., d/b/a 80PERCENTARMS.COM;  
28 RYAN BEEZLEY and BOB BEEZLEY, d/b/a  
RBTACTICALTOOLING.COM;  
GHOST AMERICA LLC, d/b/a

1 GHOSTGUNS.COM;  
 2 GHOST FIREARMS LLC, d/b/a GRID  
 3 DEFENSE and GHOSTRIFLES.COM;  
 4 JUGGERNAUT TACTICAL INC., d/b/a  
 5 JTACTICAL.COM;  
 6 MFY TECHNICAL SOLUTIONS LLC, d/b/a  
 7 5DTACTICAL.COM;  
 8 TACTICAL GEAR HEADS LLC, d/b/a 80-  
 9 LOWER.COM; AR-  
 10 15LOWERRECEIVERS.COM; and  
 11 80LOWERJIG.COM;  
 12 JAMES TROMBLEE, JR., d/b/a  
 13 USPATRIOTARMORY.COM;  
 14 INDUSTRY ARMAMENT INC., d/b/a  
 15 AMERICANWEAPONSCOMPONENTS.COM;  
 16 THUNDER GUNS LLC, d/b/a  
 17 THUNDERTACTICAL.COM;  
 18 DOES 1-100, Inclusive,  
 19 Defendants.

### 18 COMPLAINT AND DEMAND FOR JURY TRIAL

19  
 20 1. COMES NOW PLAINTIFFS TROY MCFADYEN, in his Individual Capacity,  
 21 and as Heir at Law and Successor in Interest to MICHELLE MCFADYEN, Deceased ("TROY  
 22 MCFADYEN"); PHILLIP BOW and SIA BOW, as Heirs at Law and Successors in Interest to  
 23 MICHELLE MCFADYEN, Deceased ("PHILLIP BOW and SIA BOW"); BOB STEELE, a  
 24 Dependent Adult, by and through his Guardian ad Litem, DAVID STEELE, Heir at Law and  
 25 Successor in Interest to DIANA STEELE, Deceased ("BOB STEELE"); MICHAEL ELLIOTT,  
 26 Heir at Law and Successor in Interest to DANIEL LEE ELLIOT II, Deceased, and DIANA  
 27 STEELE, Deceased ("MICHAEL ELLIOT"); G.E., a Minor, by and through his Guardian ad  
 28

1 Litem, ALMA FEITELBERG, Heir at Law and Successor in Interest to DANIEL LEE ELLIOT  
2 II, Deceased, and DIANA STEELE, Deceased ("G.E., a minor"); and M.E., a Minor, by and  
3 through her Guardian ad Litem, LATISHA CORNWALL, Heir at Law and Successor in  
4 Interest to DANIEL LEE ELLIOT II, Deceased, and DIANA STEELE, Deceased ("M.E., a  
5 minor"); MARCIA MCHUGH, Heir at Law and Successor in Interest to JOSEPH MCHUGH,  
6 Deceased ("MARCIA MCHUGH"); GRACE MCHUGH, Heir at Law and Successor in Interest  
7 to JOSEPH MCHUGH, Deceased ("GRACE MCHUGH"); A.H., a Minor, by and through his  
8 Guardian ad Litem, MARIA MONROY ("A.H., a minor"); TIFFANY PHOMMATHEP; JOHN  
9 PHOMMATHEP SR.; J.P. II, a Minor, by and through his Guardian ad Litem, TIFFANY  
10 PHOMMATHEP ("J.P. II, a minor"); J.P., a Minor, by and through his Guardian ad Litem,  
11 TIFFANY PHOMMATHEP ("J.P., a minor"); N.P, a Minor, by and through his Guardian ad  
12 Litem, TIFFANY PHOMMATHEP ("N.P., minor"), JAMES WOODS, JR.; and JAMES  
13 WOODS, SR., ("collectively "PLAINTIFFS"), by and through their attorneys of record, and  
14 allege the following against DEFENDANTS GHOST GUNNER INC., d/b/a  
15 GHOSTGUNNER.NET; BLACKHAWK MANUFACTURING GROUP INC., d/b/a  
16 80PERCENTARMS.COM; RYAN BEEZLEY and BOB BEEZLEY, d/b/a  
17 RBTACTICALTOOLING.COM; GHOST AMERICA LLC, d/b/a GHOSTGUNS.COM;  
18 GHOST FIREARMS LLC, d/b/a GRID DEFENSE and GHOSTRIFLES.COM;  
19 JUGGERNAUT TACTICAL INC., d/b/a JTACTICAL.COM; MPY TECHNICAL  
20 SOLUTIONS LLC, d/b/a 5DTACTICAL.COM; TACTICAL GEAR HEADS LLC, d/b/a 80-  
21 LOWER.COM; AR-15LOWERRECEIVERS.COM; and 80LOWERJIG.COM; JAMES  
22 TROMBLER, JR., d/b/a USPATRIOTARMORY.COM; INDUSTRY ARMAMENT INC.,  
23 d/b/a AMERICANWEAPONSCOMPONENTS.COM; THUNDER GUNS LLC, d/b/a  
24 THUNDERTACTICAL.COM; and DOES 1-50 (collectively "DEFENDANTS"). Further,  
25  
26  
27  
28

1 PLAINTIFFS demand a jury trial.

2 **INTRODUCTION**

3 2. DEFENDANTS are companies that have chosen to intentionally undermine federal  
4 and state firearms laws by designing, manufacturing, marketing, distributing and/or selling kits  
5 and firearms parts that are easily assembled by the purchaser into fully functional weapons,  
6 including AR-15 style assault weapons to consumers across the nation, including within the State  
7 of California. DEFENDANTS have chosen to engage in this business primarily by utilizing  
8 online sales that enable purchasers to acquire such weapons without a background check or any  
9 interaction with a Federal Firearms Licensee ("FFL," an authorized gun dealer) and in violation of  
10 state law restrictions governing assault weapons, including restrictions in the State of California.

11 3. The weapons assembled from DEFENDANTS' kits and firearms parts are termed  
12 "ghost guns." This name reflects the fact that such weapons lack a serial number unless  
13 specifically required by state law and are difficult, if not impossible, for law enforcement to trace  
14 back to their manufacturer/seller when recovered from a crime scene.

15 4. DEFENDANTS knew when they entered this business that they would foreseeably  
16 be supplying criminals, killers, and others whose possession of firearms pose an unacceptably  
17 high threat of injury or death to others.

18 5. DEFENDANTS further knew that selling these kits and firearm parts violated state  
19 and federal statutes applicable to the registration, ownership, sale, and marking of firearms.

20 6. DEFENDANTS refused to use reasonable safety measures that could have limited  
21 the risk of their products falling into the hands of such dangerous individuals.

22 7. Instead, DEFENDANTS targeted their business at precisely such individuals by  
23 intentionally emphasizing features of their products that make them particularly attractive to such  
24 dangerous parties as major selling points. For example, DEFENDANTS intentionally  
25 emphasized that 1) their products can be used to assemble untraceable weapons and 2) enable the  
26 purchaser to evade background checks and interaction with an FFL.

27 8. DEFENDANTS chose profits over people and public safety, and launched and  
28 maintained their business in the unreasonably dangerous manner described herein.

1           9.     Since DEFENDANTS have launched their "ghost guns" business they have  
2 learned with certainty that their business is a massive and growing source of crime guns that are  
3 claiming innocent lives in California and elsewhere.

4           10.    DEFENDANTS could have changed their business practices to institute  
5 reasonable safety measures to minimize the damage done by the problem they created. Instead  
6 DEFENDANTS have continued to choose profits over people and public safety and have  
7 doubled down on their dangerous and irresponsible practices. By doing so, DEFENDANTS  
8 have and are acting with a reckless disregard, conscious disregard or deliberate indifference to a  
9 known and obvious risk that threatens the life and safety of others.  
10

11           11.    Upon information and belief, all DEFENDANTS designed, advertised, marketed,  
12 sold, distributed and/or offered, one or more "ghost gun" kits/parts that could be easily  
13 assembled into un-serialized AR-15 style "ghost gun" rifles that are prohibited under  
14 California's assault weapons ban to California residents leading up to and/or during November  
15 2017.  
16

17           12.    PLAINTIFFS bring this suit because they or their loved ones were killed or  
18 injured as a direct, foreseeable, and proximate result of DEFENDANTS' negligent, reckless,  
19 and intentionally unlawful actions.

20           13.    Specifically, PLAINTIFFS or their loved ones were killed or injured by a  
21 dangerous, mentally disturbed California resident named KEVIN NEAL, who was barred from  
22 firearms possession by one or more state court orders. NEAL would not have been able to  
23 legally acquire a firearm in the State of California. NEAL purchased parts/kits from one or more  
24 of the DEFENDANTS leading up to and/or during November 2017 and used these parts/kits to  
25 assemble at least two AR-15 style "ghost gun" rifles barred under California's prohibition on  
26 assault weapons. NEAL used these "ghost guns" in a rampage shooting that killed or injured  
27 PLAINTIFFS or their loved ones on November 13-14, 2017.  
28

14. DEFENDANTS, upon information and belief, continue to offer these products to California residents using marketing strategies and business practices that are identical or essentially the same as those used during and before November 2017.

### JURISDICTION

1. This is a civil action for negligence and violations of the California Unfair Competition Law (Cal. Bus. & Prof. Code § § 17200 et seq.). This Court has subject matter jurisdiction over this action as the amount of the claims exceeds \$25,000.00

2. Venue is proper in this court because several of the DEFENDANTS, RYAN BEEZLEY and BOB BEEZLEY d/b/a RBTACTIALTOOLING.COM, and DEFENDANT JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM are California residents and/or California Corporations who at all relevant times reside in and/or have their principal place of business in the City of Apple Valley, County of San Bernardino, State of California.

3. PLAINTIFFS seek an award of compensatory damages, punitive damages pursuant to Cal. Civil Code § 3294, statutory damages pursuant to Cal. Bus. And Prof. Code § 17200, injunctive and declaratory relief, costs and expenses, and reasonable attorney's fees.

### THE PARTIES

15. At all times pertinent hereto, PLAINTIFF TROY MCFADYEN was a resident of Cottonwood, County of Shasta, State of California. TROY MCFADYEN is the surviving spouse of MICHELLE MCFADYEN, deceased. TROY MCFADYEN brings this action in his individual capacity as a victim and as the heir of MICHELLE MCFADYEN, deceased.

16. At all times pertinent hereto, PLAINTIFF PHILLIP BOW was a resident of the Santa Rosa, County of Sonoma, State of California. PHILLIP BOW is the surviving adult son of MICHELLE MCFADYEN, deceased.

17. At all times pertinent hereto, PLAINTIFF SIA BOW was a resident of Redding,

1 County of Shasta, State of California. SIA BOW is the surviving adult daughter of MICHELLE  
2 MCFADYEN, deceased.

3 18. At all times pertinent hereto, TROY MCFADYEN, PHILLIP BOW and SIA  
4 BOW, were the surviving heirs of decedent MICHELLE MCFADYEN, based on California  
5 intestacy laws.

6 19. At all times pertinent hereto, PLAINTIFF BOB STEELE was a resident of  
7 Corning, County of Tehama, State of California. BOB STEELE currently resides in Red Bluff,  
8 County of Tehama, State of California. At all times pertinent hereto, BOB STEELE was  
9 incapacitated and a dependent adult due to numerous physical and mental ailments. BOB  
10 STEELE is being represented by his Guardian ad Litem, DAVID STEELE. BOB STEELE  
11 was, at all relevant times, a protected person pursuant to one or more court orders in effect  
12 against NEAL.  
13

14 20. At all times pertinent hereto, PLAINTIFF MICHAEL ELLIOT was a resident of  
15 the Mayville, County of Traill, State of North Dakota.  
16

17 21. At all times pertinent hereto, PLAINTIFF G.E., an 8-year-old, was a resident of  
18 Corning, County of Tehama, State of California. G.E. is currently a resident of Ware, County  
19 of Hampshire, State of Massachusetts, and is being represented by his Guardian ad Litem,  
20 ALMA FEITELBERG. G.E. was, all relevant times, a protected person pursuant to one or more  
21 court orders in effect against NEAL.  
22

23 22. At all times pertinent hereto, PLAINTIFF M.E., a 10-year-old, was a resident of  
24 Rio Linda, County of Sacramento, State of California. M.E. is being represented by her  
25 Guardian ad Litem, LATISHA CORNWALL. M.E. remains a resident of the County of  
26 Sacramento.  
27

28 23. BOB STEELE was the surviving husband of decedent, DIANA STEELE, and is

1 an heir to decedent DIANA STEELE. DIANA STEELE was also, at all relevant times, a  
2 protected person pursuant to one or more court orders in effect against NEAL.

3 24. At all times pertinent hereto, MICHAEL ELLIOT, G.E. and M.E., were the  
4 surviving children and heirs of decedent DANIEL ELLIOTT II, and the additional heirs of their  
5 grandmother, DIANA STEELE, based on California intestacy laws.

6 25. At all times pertinent hereto, PLAINTIFF MARCIA MCHUGH was a resident  
7 of the City of Corning, County of Tehama, State of California, and is the surviving mother, who  
8 was dependent on JOSEPH MCHUGH.

9 26. At all times pertinent hereto, PLAINTIFF GRACE MCHUGH was a resident of  
10 the Ceres, County of Stanislaus, State of California, and is the surviving adult daughter of  
11 JOSEPH MCHUGH.

12 27. At all times pertinent hereto, MARCIA MCHUGH and GRACE MCHUGH,  
13 were the surviving heirs of decedent JOSEPH MCHUGH, based on California intestacy laws.

14 28. At all times pertinent hereto, PLAINTIFF A.H., a minor, was a resident of the  
15 Corning, County of Tehama, State of California. A.H. is being represented by his Guardian ad  
16 Litem, MARIA MONROY.

17 29. At all times pertinent hereto, PLAINTIFF TIFFANY PHOMMATHEP is and  
18 was a resident of Corning in the County of Tehama, State of California.

19 30. At all times pertinent hereto, PLAINTIFF JOHN PHOMMATHEP is and was a  
20 resident of Corning in the County of Tehama, State of California.

21 31. At all times pertinent hereto, PLAINTIFF J.P. II., a minor is and was a resident  
22 of Corning in the County of Tehama, State of California. J.P. II., a minor, is being represented  
23 by his Guardian ad Litem, TIFFANY PHOMMATHEP.

24 32. At all times pertinent hereto, PLAINTIFF J.P., a minor is and was a resident of  
25  
26  
27  
28

1 Corning in the County of Tehama, State of California. J.P. is being represented by his Guardian  
2 ad Litem, TIFFANY PHOMMATHEP.

3 33. At all times pertinent hereto, PLAINTIFF N.P., a minor is and was a resident of  
4 Corning in the County of Tehama, State of California. N.P. is being represented by his  
5 Guardian ad Litem, TIFFANY PHOMMATHEP.

6 34. At all times pertinent hereto, PLAINTIFF JAMES WOODS JR., is and was a  
7 resident of Corning in the County of Tehama, State of California.

8 35. At all times pertinent hereto, PLAINTIFF JAMES WOODS SR., is and was a  
9 resident of Corning in the County of Tehama, State of California.

10 36. At all times pertinent hereto, DEFENDANT GHOST GUNNER INC. ("GHOST  
11 GUNNER"), d/b/a GHOSTGUNNER.NET, was a Texas corporation with its principal place of  
12 business in Austin, County of Travis, State of Texas. At all times pertinent hereto, GHOST  
13 GUNNER was engaged in the business of designing, marketing, distributing, manufacturing and  
14 selling parts/kits used to assemble "ghost guns," including AR-15 style "ghost gun" rifles to  
15 consumers across the nation, including to consumers within the State of California. GHOST  
16 GUNNER's registered agent is a Texas company named DEFENSE DISTRIBUTED.  
17 DEFENSE DISTRIBUTED and GHOST GUNNER ("DEFENSE DISTRIBUTED/GHOST  
18 GUNNER") should be viewed as interchangeable and inextricably linked for purposes of this  
19 Complaint for Damages; upon information and belief, the same individual, Cody Wilson, was  
20 involved with running both entities. DEFENSE DISTRIBUTED's website still links to GHOST  
21 GUNNER. See <https://defdist.org>.

22 37. At all times pertinent hereto, DEFENDANT BLACKHAWK  
23 MANUFACTURING GROUP INC. ("BLACKHAWK"), d/b/a 80PERCENTARMS.COM, was  
24 a California domestic corporation, with its principal place of business in the Garden Grove,  
25  
26  
27  
28

1 County of Orange, State of California. At all times pertinent hereto, BLACKHAWK was  
2 engaged in the business of designing, marketing, distributing, manufacturing and/or selling  
3 parts/kits used to assemble "ghost guns," including AR-15 style "ghost gun" rifles to consumers  
4 across the nation, including to consumers within the State of California.

5  
6 38. At all times pertinent hereto, DEFENDANTS RYAN BEEZLEY and BOB  
7 BEEZLEY have maintained addresses in Apple Valley, County of San Bernardino, State of  
8 California and were doing business as RBTACTICALTOOLING.COM. At all times pertinent  
9 hereto, RBTACTICALTOOLING.COM has maintained a business address in Apple Valley,  
10 County of San Bernardino, State of California. At all times pertinent hereto,  
11 RBTACTICALTOOLING.COM was engaged in the business of designing, marketing,  
12 distributing, manufacturing and selling parts/kits used to assemble "ghost guns," including AR-  
13 15 style "ghost gun" rifles to consumers across the nation, including to consumers within the  
14 State of California.  
15

16 39. At all times pertinent hereto, DEFENDANT GHOST AMERICA LLC  
17 ("GHOST AMERICA"), d/b/a GHOSTGUNS.COM, was a California limited liability company  
18 with its principal place of business in Yorba Linda, County of Orange, State of California. At  
19 all times pertinent hereto, GHOST AMERICA was engaged in the business of designing,  
20 marketing, distributing, manufacturing and selling parts/kits used to assemble "ghost guns,"  
21 including AR-15 style "ghost gun" rifles to consumers across the nation, including to consumers  
22 within the State of California.  
23

24 40. At all times pertinent hereto, GHOST FIREARMS LLC ("GHOST  
25 FIREARMS"), d/b/a GRID DEFENSE and GHOSTRIFLES.COM, was a limited liability  
26 company registered in Florida with its principal place of business in Daytona Beach, County of  
27 Volusia, State of Florida. At all times pertinent hereto, GHOST FIREARMS was engaged in  
28

1 the business of designing, marketing, distributing, manufacturing and selling parts/kits used to  
2 assemble "ghost guns," including AR-15 style "ghost gun" rifles to consumers across the  
3 nation, including to consumers within the State of California.

4 41. At all times pertinent hereto, DEFENDANT JUGGERNAUT TACTICAL INC.  
5 ("JUGGERNAUT"), d/b/a JTACTICAL.COM, was a California corporation with its principal  
6 place of business in Orange, County of Orange, State of California. At all times pertinent  
7 hereto, JUGGERNAUT was engaged in the business of designing, marketing, distributing,  
8 manufacturing and selling parts/kits used to assemble "ghost guns," including AR-15 style  
9 "ghost gun" rifles to consumers across the nation, including to consumers within the State of  
10 California.  
11

12 42. At all times pertinent hereto, DEFENDANT MFY TECHNICAL SOLUTIONS  
13 LLC ("MFY TECHNICAL"), d/b/a 5DTACTICAL.COM, was a Massachusetts limited liability  
14 company with its principal place of business in Westborough, County of Worcester, State of  
15 Massachusetts. At all times pertinent hereto, MFY TECHNICAL was engaged in the business  
16 of designing, marketing, distributing, manufacturing and selling parts/kits used to assemble  
17 "ghost guns," including AR-15 style "ghost gun" rifles to consumers across the nation,  
18 including to consumers within the State of California.  
19

20 43. At all times pertinent hereto, DEFENDANT TACTICAL GEAR HEADS LLC  
21 ("TACTICAL GEAR HEADS"), d/b/a 80-LOWER.COM; AR-15LOWERRECEIVERS.COM;  
22 and 80LOWERJIG.COM, was an Indiana limited liability company with its principle of  
23 business in Indianapolis, County of Marion, State of Indiana and/or in Fishers, County of  
24 Hamilton, State of Indiana. At all times pertinent hereto, TACTICAL GEAR HEADS, via its  
25 various retail websites, was engaged in the business of designing, marketing, distributing,  
26 manufacturing and selling parts/kits used to assemble "ghost guns," including AR-15 style  
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1 "ghost gun" rifles to consumers across the nation, including to consumers within the State of  
2 California.

3 44. At all times pertinent hereto, DEFENDANT JAMES TROMBLEE, JR., has  
4 maintained a mailing address in Apple Valley, County of San Bernardino, State of California.  
5 Upon information and belief, TROMBLEE began doing business as  
6 USPATRIOTARMORY.COM on April 25, 2014. USPATRIOTARMORY.COM has  
7 maintained a business and mailing address in Apple Valley, County of San Bernardino, State of  
8 California. At all times pertinent hereto, USPATRIOTARMORY.COM was engaged in the  
9 business of designing, marketing, distributing, manufacturing and selling parts/kits used to  
10 assemble "ghost guns," including AR-15 style "ghost gun" rifles to consumers across the  
11 nation, including to consumers within the State of California.  
12

13 45. At all times pertinent hereto, DEFENDANT INDUSTRY ARMAMENT INC.  
14 ("INDUSTRY ARMAMENT"), d/b/a AMERICANWEAPONSCOMPONENTS.COM, was a  
15 Delaware corporation with a principal place of business in Mesa, County of Maricopa, State of  
16 Arizona. At all times pertinent hereto, INDUSTRY ARMAMENT was engaged in the business  
17 of designing, marketing, distributing, manufacturing and selling parts/kits used to assemble  
18 "ghost guns," including AR-15 style "ghost gun" rifles to consumers across the nation,  
19 including to consumers within the State of California.  
20

21 46. At all times pertinent hereto, DEFENDANT THUNDER GUNS LLC  
22 ("THUNDER GUNS"), d/b/a THUNDERTACTICAL.COM, was a limited liability company  
23 registered in Florida with its principal place of business in Daytona Beach, County of Volusia,  
24 State of Florida. At all times pertinent hereto, THUNDER TACTICAL was engaged in the  
25 business of designing, marketing, distributing, manufacturing and selling parts/kits used to  
26 assemble "ghost guns," including AR-15 style "ghost gun" rifles to consumers across the  
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28

1 nation, including to consumers within the State of California.

2 47. DEFENDANTS DOE ONE through DOE ONE HUNDRED ("DOE  
3 DEFENDANTS") are sued herein under fictitious names. PLAINTIFFS assert that DOE  
4 DEFENDANTS are engaged in the business of designing, marketing, distributing, manufacturing  
5 and/or selling parts/kits used to assemble "ghost guns," including AR-15 style "ghost gun" rifles,  
6 to consumers across the nation, including to consumers within the State of California.  
7 PLAINTIFFS do not at this time know the true names or capacities of said DOE DEFENDANTS,  
8 but pray that the same may be alleged herein should that information be ascertained.  
9

10 48. The true names or capacities, whether individual, corporate, associate or  
11 otherwise, of DEFENDANT DOES ONE through ONE HUNDRED, inclusive, are unknown to  
12 PLAINTIFFS, who, therefore sue said DEFENDANTS by such fictitious names. PLAINTIFFS  
13 are informed and believe and thereon allege that each of the DEFENDANTS designated herein  
14 as a DOE is negligently, intentionally, or in some other manner, responsible for the events and  
15 happenings herein referred to and negligently, intentionally, or in some other manner, caused  
16 injury and damages proximately thereby to the PLAINTIFFS as herein alleged.  
17

18 49. DEFENDANTS were all actively engaged in the business of designing, marketing,  
19 distributing, manufacturing and/or selling these products to California residents leading up to and  
20 during November of 2017, while emphasizing features of their products that made them  
21 particularly attractive to dangerous actors like NEAL.

22 50. All herein complained actions of DEFENDANTS, and each of them, were done  
23 in a conscious disregard and deliberate disregard for the rights and safety of others, and in a  
24 willful and reckless manner making the infliction of grievous bodily injury and/or death highly  
25 probable. DEFENDANTS' conduct was despicable, willful, wanton and malicious within the  
26 meaning of California Civil Code §§ 3294, so as to warrant the imposition of punitive and  
27 exemplary damages against them in the fullest extent allowed by law. DEFENDANTS and each  
28

1 of them acted in a conscious disregard for the rights and safety of others, in a manner that  
2 shocks the conscience, and in a despicable manner sufficient to warrant the imposition  
3 of punitive damages against each and every DEFENDANT sued herein.

#### 4 CASE SPECIFIC ALLEGATIONS

5 51. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
6 though set out in full herein.

7  
8 A. The "Ghost Gun" Industry Negligently and Knowingly Arms Criminals and Other  
9 Dangerous People Like Neal and Intentionally Circumvents California and Federal  
10 Firearms Laws

11 52. Every year in America, firearms are used to commit over 500,000 crimes, and  
12 over 100,000 people are shot – close to 40,000 fatally.

13 53. Federal and state laws recognize the grave risk posed by firearms in the wrong  
14 hands, and as a result, regulate and restrict their sale and possession in numerous ways.

15 54. Only FFLs may engage in the business of selling firearms. Felons, domestic  
16 abusers, the dangerously mentally ill, and certain other categories of people are deemed to pose  
17 too great a danger to themselves or others are prohibited from possessing guns as a matter of  
18 federal and/or state law. FFLs are required to conduct background checks on gun buyers to  
19 prevent sales to such prohibited purchasers. Firearms sold by FFLs must include stamped serial  
20 numbers, to enable accurate record keeping and aid law enforcement in tracing the gun to its  
21 initial retail seller if it is later misused in a crime. Such tracing can help identify the chain of  
22 possession and ultimate user of such a crime gun.

23 55. FFLs are also required to exercise common sense in protecting the public by  
24 refusing firearms sales, even where a buyer passes a background check, if the buyer is displaying  
25 disturbing or erratic behavior suggesting a significant psychological disturbance. A FFL always  
26 retains discretion to refuse a firearms sale for any reason.

27 56. A FFL must carefully learn and comply with all federal laws, as well as the laws  
28 of the state in which it resides and, for certain sales to residents of other states, the laws of those

1 states. Some states, like California, prohibit sales of military-style assault weapons like AR-15  
2 style rifles.

3 57. DEFENDANTS sought – and continue to seek – to undermine and circumvent  
4 these federal and state public safety laws.

5 58. DEFENDANTS are not FFLs. At all times pertinent hereto, DEFENDANTS  
6 knew, and they continue to know, that law-abiding persons who desire firearms can and do  
7 obtain manufactured firearms through FFLs.

8 59. DEFENDANTS are companies and entities who chose, at all times pertinent  
9 hereto, to manufacture and/or sold unserialized, unfinished firearms parts (such as frames and  
10 receivers) or firearms assembly kits that can be used to produce “ghost guns,” including AR-15  
11 style “ghost gun rifles.”

12 60. Much of DEFENDANTS’ business involves online sales, and DEFENDANTS, at  
13 all times pertinent hereto, marketed, advertised, targeted and/or sold their products to individuals  
14 across the country, including in California.

15 61. DEFENDANTS, at all times pertinent hereto, manufactured and/or sold “ghost  
16 gun” parts that require very limited additional milling before they can be easily combined with  
17 other largely unregulated gun parts – which are often included in DEFENDANTS’ assembly  
18 kits— to form a fully functioning “ghost gun.”

19 62. One common “ghost gun” part sold by DEFENDANTS is an 80% receiver, which  
20 is designed to fall just outside of the federal definition of a “firearm” so as to evade federally  
21 required background checks and other regulations applicable to “firearms.”

22 63. The process of converting such parts into a “ghost gun,” whether it be a semi-  
23 automatic handgun or an AR-15 style assault rifle, involves just a few steps. DEFENDANTS’  
24 parts/kits can be used to create a fully functional “ghost gun” in as little as a few minutes without  
25 the consumer possessing any specialized skill or abilities.  
26  
27  
28

1           64. DEFENDANTS thus enabled anyone, including individuals prohibited from  
2 possessing any firearms or individuals prohibited from possessing assault weapons by virtue of  
3 state law, to build "ghost guns," including but not limited to assault weapons.

4           65. Once assembled, "ghost guns" are just as deadly and dangerous as traditional  
5 firearms.

6           66. DEFENDANTS purposefully chose – and continue to choose– not to stamp serial  
7 numbers on these parts or other parts included in their firearms assembly kits. This means that  
8 the "ghost guns" produced from DEFENDANTS' products cannot be traced back to the initial  
9 manufacturer or seller, making it harder to identify the chain of possession and ultimate user of a  
10 gun recovered from a crime scene. This makes the parts/kits used to assemble these weapons  
11 highly attractive to criminals and illegal gun traffickers.

12           67. Because DEFENDANTS' products were – and continue to be – readily available  
13 online for purchase with no background check, they are also very attractive to criminals,  
14 prohibited domestic abusers, and other dangerous individuals who would otherwise be prevented  
15 from purchasing a gun due to the inability to pass a background check.

16           68. Similarly, because DEFENDANTS' products were – and continue to be – capable  
17 of purchase without the buyer having any interaction with an FFL, these products are also  
18 attractive and accessible to individuals with psychological or behavioral issues who fear they  
19 may not be able to pass muster at a responsible FFL.

20           69. DEFENDANTS were, and still are, well aware that, as a special agent in charge  
21 of the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") Los Angeles field  
22 division recently told reporters, "Criminals are making their own weapons because they cannot  
23 buy them legally ... or they are paying other people to make those guns for them to get around  
24 the gun laws."

25           70. DEFENDANTS intentionally targeted and continue to target precisely the  
26 criminals and other dangerous parties described above.  
27  
28

1 71. In their marketing and advertising, DEFENDANTS purposefully emphasize the  
2 untraceable nature of "ghost guns" due the absence of a serial number as a major selling point.

3 72. In their marketing and advertising, DEFENDANTS purposefully emphasize the  
4 fact that their products can be purchased without a background check or interaction with an FFL  
5 as major selling points.

6 73. DEFENDANTS' marketing to the criminal market includes but is not limited to  
7 the following examples:  
8

- 9 a. RBTACTICALTOOLING.COM emphasizes that its products allow the  
10 production of unserialized weapons. See  
11 <https://www.rbttacticaltooling.com/about/>. One of its AR-15 receivers includes a  
12 stamp of an individual giving the middle finger to law enforcement personnel who  
13 would be looking for a serial number to trace a "ghost gun" recovered from a  
14 crime scene See <https://www.rbttacticaltooling.com/product/magpul-lower-receiver-ar-15/>:



- 22 b. A Q & A section on one of TACTICAL GEAR HEAD's retail websites includes  
23 this disclosure: "An AR-15 built using an 80% lower [receiver] will have no  
24 serialization or paperwork attached to it by default. Therefore, it is typically  
25 impossible to determine the firearm's origin or history." See <https://www.80-lower.com/faqs/>. The site further emphasizes that a purchaser need not interact  
26 with an FFL to acquire its parts/kits and make a "ghost gun" AR-15 style rifle.  
27 See <https://www.80-lower.com/products/ar-15-build-kit-5-56mm-nato-16-melonite-barrel-classic-a2-handguard-w-80-lower-1-7-twist/>.



- c. INDUSTRY ARMAMENT's website states, on a page listing an AR-15 receiver for sale, that "[t]he purchase of this component does not constitute the purchase of a firearm and as such does not require a FFL for transfer." See <https://americanweaponscomponents.com/product/80-ar-15-forged-anodized-lower-receiver>.
- d. THUNDER GUNS' website states, on a page offering a pack of 5 AR-15 lower receivers, that "[t]hese products are not FFL items." See <https://thundertactical.com/product/80-ar-lower-receiver-5-pack/>.

74. The above examples are illustrative rather than exhaustive. Upon information and belief, they are also identical to or essentially the same as DEFENDANTS' marketing tactics for "ghost gun" parts/kits that can be assembled into AR-15 style "ghost gun" rifles during the relevant time period.

75. Sales of "ghost gun" parts/kits have increased significantly in recent years. Not surprisingly, the use of "ghost guns" in crimes has also increased exponentially.

76. According to ATF, 30 percent of all guns recovered at California crime scenes are now untraceable "ghost guns."

77. "Ghost guns" – and, in particular, AR-15 style "ghost gun" rifles—have been used in many incidents of violence in California. For example:

- a. In June 2013, John Zawahri went on a shooting spree with a "ghost gun" and killed five people in Santa Monica, California. Zawahri, who had a documented history of mental illness, was a prohibited purchaser and the "ghost gun" he used was an AR-15 style rifle.

- 1 b. In July 2015, Scott Bertics shot and killed a woman with whom he was involved  
2 in a romantic relationship and he then used a second gun to kill himself in Walnut  
3 Creek, California. Both of the guns used were "ghost guns."  
4  
5 c. In July 2015, in Stockton, California, gunmen used an AK-47-style "ghost gun" in  
6 an attempted bank robbery, and held three people hostage.  
7  
8 d. In June 2019, 26-year-old Sacramento Police Officer Tara O'Sullivan was shot  
9 and killed with an AR-15 style "ghost gun" rifle while responding to a domestic  
10 disturbance call.  
11  
12 e. In August 2019, a convicted felon used an AR-15 style "ghost gun" rifle to kill  
13 California Highway Patrol officer Andre Moye and wound two of his colleagues,  
14 during a freeway shootout in Riverside, California.

15  
16 78. Upon information and belief, DEFENDANTS were aware of one or all of these  
17 and other incidents involving the unlawful use of "ghost guns."

18 79. AR-15 style rifles are, and were, prohibited assault weapons under California law.  
19 See Cal. Pen. Code § 30510(a)(5) (assault weapons include semiautomatic rifles within the "Colt  
20 AR-15 series"); § 30510(f) ("As used in this section, 'series' includes all other models that are  
21 only variations, with minor differences, of those models listed in subdivision (a), regardless of  
22 the manufacturer."); § 30605(a) (criminalizing possession of an assault weapon).

23 80. Federal law requires all FFLs—even those outside of a purchaser's state—to  
24 comply with the laws of a purchaser's state when selling long guns like AR-15 style rifles. See  
25 18 U.S.C. § 922(b)(3).

26 81. California's ban on AR-15 style rifles is a reasonable and responsible reaction to  
27 the grave threat that AR-15 style weapons pose to the health and safety of Californians. These  
28 types of weapons are favored by mass shooters. As illustrative examples, in addition to this case,  
the shooters in the Aurora, Colorado movie theater shooting in July 2012, the Newtown,  
Connecticut elementary school shooting in December 2012, and the aforementioned Santa  
Monica, California shooting in June 2013, all used AR-15 style rifles.

82. Upon information and belief, all DEFENDANTS were aware that AR-15 style  
rifles are frequently used by mass shooters.

1 83. "Ghost gun" parts/kits enable dangerous people in California like NEAL to  
2 obtain such banned weapons.

3 84. In September 2019, New York Attorney General Letitia James announced that she  
4 had ordered 16 websites to immediately stop selling products enabling the assembly of "ghost  
5 guns" in New York. Attorney General James acknowledged the reality that "ghost guns" had  
6 been providing the means to violate the state's assault weapons ban, stating: "There is only one  
7 purpose for the products that these companies are selling — to manufacture illegal and deadly  
8 assault weapons." James went on to note that "[t]he proliferation of these types of weapons has  
9 not only caused indescribable suffering across the country, but gravely endangers every New  
10 Yorker." DEFENDANTS' business practices similarly undermine California's assault weapons  
11 ban and endanger every Californian.

12 85. DEFENDANTS could have taken steps to avoid supplying individuals in  
13 California with prohibited assault weapons and/or violating various federal firearms laws.  
14 Below is a non-exhaustive list of feasible steps that a reasonable and law-abiding company  
15 would have taken to avoid undermining California law and/or federal law:

- 16 a. DEFENDANTS could have blocked Internet Protocol ("IP") addresses associated  
17 with California from accessing their websites and/or the portions of their websites  
18 listing products enabling the assembly of AR-15 style "ghost gun" rifles;  
19 b. DEFENDANTS could have refused to ship such products to California;  
20 c. DEFENDANTS could have required that their products only be transferred  
21 through a sale carried out by an FFL;  
22 d. DEFENDANTS could have required that only individuals who could legally  
23 purchase and possess firearms could purchase their products; and  
24 e. DEFENDANTS could have included serial numbers on their products.

25 86. Upon information and belief, none of the DEFENDANTS took these, or any other  
26 reasonable safety precautions, to prevent dangerous California residents from violating  
27 California and/or federal law and endangering the safety of others with "ghost guns" produced  
28 from DEFENDANTS products.

1 87. Instead, upon information and belief, all of the DEFENDANTS intentionally  
2 targeted California consumers.

3 88. For example, Cody Wilson of DEFENSE DISTRIBUTED/GHOST GUNNER  
4 stated that he aimed to undermine gun violence prevention legislation, and in particular,  
5 California's regulatory regime. Wilson, shortly after the Tehama attack in 2017, confirmed that  
6 much of DEFENSE DISTRIBUTED/GHOST GUNNER's business comes from California.

7 89. Similarly, on its website, BLACKHAWK specifically emphasizes that "in our  
8 home state of California, as well as almost every other state in the U.S., it is legal to build your  
9 own firearm for personal use." See <https://www.80percentarms.com/pages/faq.html>.

10 90. Upon information and belief, these and other DEFENDANTS were all  
11 intentionally designing, advertising, manufacturing, marketing and/or selling ghost guns  
12 parts/kits designed and intended to be assembled into AR-15 style rifles to California consumers  
13 like NEAL.

14 91. DEFENDANTS also, as noted above, purposefully emphasized features of their  
15 products they knew to be particularly attractive to criminals and dangerous parties like NEAL—  
16 such as their untraceability and the absence of a background check or interaction with a FFLs.

17 92. DEFENDANTS knew that "ghost guns" are frequently used by criminals and  
18 dangerous individuals and have continued to gain additional knowledge of this reality.

19 93. Upon information and belief, DEFENDANTS have, nevertheless, not changed  
20 their reckless and unlawful business practices.

21 **B. "Ghost Guns" Were Used To Harm PLAINTIFFS**

22 94. On November 13-14, 2017, NEAL engaged in a rampage shooting spree spanning  
23 across multiple locations in Tehama County, California which left PLAINTIFFS and/or their  
24 loved ones wounded or killed.

25 95. Prior to the shooting, NEAL was prohibited from possession firearms by one or  
26 more court orders. The order(s) required authorities to arrest NEAL if he violated these orders.  
27 Multiple PLAINTIFFS and/or their loved ones were named as protected parties on one or more  
28

1 of these orders, including PLAINTIFFS BOB STEELE and G.E., as well as decedent DIANA  
2 STEELE.

3 96. During his rampage, NEAL was in possession of and used at least two AR-15  
4 style semiautomatic rifles. Both of these firearms were "ghost guns."

5 97. Upon information and belief, at the time of the shooting, NEAL's "ghost guns"  
6 lacked any identifying serial numbers.

7 98. It is unknown how and where NEAL acquired the "ghost gun" parts/kits used to  
8 assemble the weapons used in the attack. Given DEFENDANTS' actions, it may be impossible  
9 to determine the exact manufacturer(s)/seller(s) of the "ghost gun" parts/kits NEAL used to  
10 assemble the AR-15 style "ghost gun" rifles used in the attack.

11 99. Upon information and belief, NEAL could not have legally acquired an AR-15  
12 style rifle like those utilized in the attack from a FFL either inside or outside of California,  
13 because of his status as a California resident and California's ban on the possession of assault  
14 weapons.

15 100. Upon information and belief, NEAL also could not have secured an AR-15 style  
16 rifle – or, indeed, any firearm – from an FFL because he was displaying erratic and disturbing  
17 behavior for a significant period of time leading up to the shooting due to severe mental illness.

18 101. The above discussion is not intended to be an exhaustive listing of the reasons  
19 why NEAL could not have purchased a serialized, fully assembled AR-15 style rifle from an  
20 FFL. Various other California or federal firearms restrictions may also have blocked such a sale.

21 102. NEAL was only able to acquire his arsenal of weapons through the negligence of  
22 DEFENDANTS. Had DEFENDANTS complied with the law and relevant standards of care,  
23 NEAL would not have been able to use "ghost guns" to harm PLAINTIFFS.

24 **C. The "Ghost Gun" Industry and Defendants' Role as Substantial Players in A**  
25 **Market Involving Fungible, Dangerous Goods**

26 103. Upon information and belief, DEFENDANTS were all intentionally  
27 making/marketing/selling "ghost guns" parts/kits designed and intended to be assembled into  
28

1 AR-15 style rifles into California leading up to and at the time of NEAL's purchase of the  
2 relevant "ghost gun" parts/kits.

3 104. Upon information and belief, DEFENDANTS also all purposefully targeted a  
4 dangerous subclass of California consumers who had no or limited access to these weapons by  
5 virtue of disqualifying records, mental illness, and/or relevant legal restrictions.

6 105. Upon information and belief, DEFENDANTS, in aggregate, were responsible for  
7 manufacturing and/or selling a substantial percentage of all "ghost gun" parts/kits enabling  
8 assembly of AR-15 style "ghost gun" rifles which entered into California leading up to and  
9 during November 2017.

10 106. Upon information and belief, there is a substantial probability that one or more of  
11 the DEFENDANTS sold NEAL one or more "ghost gun" parts/kits used to assemble the AR-15  
12 style rifles used in the attack, either online or via some other medium, with full knowledge that  
13 (1) NEAL was a resident of California, (2) that California prohibits the possession of AR-15  
14 style rifles, and (3) AR-15 style rifles have frequently been used in mass shootings.

15 107. Upon information and belief, there is a substantial probability that one or more of  
16 the DEFENDANTS shipped one or more "ghost gun" parts/kits used to assemble the weapons  
17 used in the attack to NEAL's California residence.

18 108. "Ghost gun" parts/kits that can be used to assemble unserialized AR-15 style  
19 rifles are fungible products. Such parts/kits share the same core characteristics and present an  
20 equivalent risk of danger to members of the public like PLAINTIFFS. These products provide  
21 dangerous parties like NEAL with an identical capability to possess untraceable assault weapons  
22 without going through an FFL and in violation of California's assault weapons ban.

23 109. Had these one or more DEFENDANTS complied with the law and relevant  
24 standards of care, NEAL would never have had access to the relevant products. Any and all  
25 DEFENDANTS named herein could and should have made, sold, distributed and/or marketed  
26 their products with greater precautions to (1) make it more difficult for California consumers to  
27 use their products to produce dangerous weapons that violated California law and (2) to make it  
28

1 more difficult for dangerous individuals like NEAL to assemble "ghost guns" from their  
2 products.

3 110. Without access to DEFENDANTS' one or more products, NEAL could not have  
4 assembled his "ghost guns" and could not have used them to harm PLAINTIFFS.

5 111. NEAL's misuse of these assembled products was particularly foreseeable to  
6 PLAINTIFFS because NEAL fell within the dangerous subclass of consumers specifically  
7 targeted by DEFENDANTS.

8 **COUNT I: NEGLIGENCE (AGAINST ALL DEFENDANTS)**

9 112. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
10 though set out in full herein.

11 113. A seller of "ghost gun" parts/kits – particularly parts/kits intended to be  
12 assembled into highly dangerous AR-15 style weapons commonly used by mass shooters like  
13 NEAL – owes the highest degree of care to the general public when selling such items.

14 114. This standard of care imposes a duty to take all reasonable and practical safety  
15 precautions to prevent dangerous and irresponsible individuals like NEAL from gaining access to  
16 "ghost gun" parts/kits designed and intended for assembly into AR-15 style rifles.

17 115. Such safety precautions would include, but are not limited to, carefully learning  
18 and continually checking relevant state and federal firearms laws regarding assault weapons,  
19 never shipping to states where the possession of an AR-15 style weapon created from one of a  
20 defendant's parts/kits would be deemed illegal, and blocking all IP addresses from such states.  
21 Additionally, a responsible seller of such products would take steps to verify that only  
22 individuals legally permitted to possess firearms and not displaying signs of significant  
23 psychological disturbance were buying its products—such as by requiring all transactions to go  
24 through an FFL in the buyer's home state.

25 116. Upon information and belief, none of these DEFENDANTS had, at the time  
26 NEAL purchased the relevant product(s) from the DEFENDANT(s), taken these or other  
27  
28

1 reasonable safety precautions which would have blocked NEAL's purchase of the relevant  
2 products.

3 117. DEFENDANTS' violation of the above standards of care proximately caused  
4 PLAINTIFFS' harm by granting NEAL access to highly lethal weapons he could not have  
5 legally acquired.

6 118. Had NEAL been denied access to the parts/kits used to make his two AR-15 style  
7 "ghost gun" rifles, he could not have used these weapons to harm PLAINTIFFS.

8 119. As a direct, proximate, immediate and foreseeable result of the actions and  
9 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
10 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, J.P., II, a minor, J.P.  
11 a minor, N.P. a minor, A.H., a minor, JAMES WOOD JR and JAMES WOOD SR. were injured  
12 and suffered grievous and permanent injuries to their physical, mental, emotional and nervous  
13 systems, all to their detriment in an amount greatly in excess of the minimum jurisdiction of this  
14 Court.  
15

16 120. As a further direct, proximate, immediate and foreseeable result of the actions and  
17 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and dangerous  
18 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, J.P., II, a minor, J.P.,  
19 a minor, N.P., a minor, A.H., a minor, JAMES WOOD JR and JAMES WOOD SR. were forced  
20 to hire physicians and surgeons and undergo other and further expense as and for their medical  
21 care, all in an amount which cannot yet be ascertained. PLAINTIFFS will seek leave to amend  
22 this Complaint for Damages to allege such amount when it becomes more certain.  
23

24 121. As a further direct, proximate, immediate and foreseeable result of the actions and  
25 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal, and dangerous  
26 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, JAMES WOOD JR,  
27 JAMES WOOD SR. and A.H., a minor, have lost wages or been greatly reduced in their working  
28

1 capacity and/or future working capacity. PLAINTIFFS are informed and believe and, on such  
2 information, and belief state that this said reduction in earning capacity will continue into the  
3 future in an amount which cannot yet be ascertained.

4 122. As a further direct, proximate, immediate and foreseeable result of the actions and  
5 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
6 weapons, DANNY ELLIOTT II, DIANA STEELE, MICHELLE MCFADYEN, and JOSEPH  
7 MCHUGH, were fatally shot, all to PLAINTIFFS' damage in an amount greatly in excess of the  
8 minimum jurisdiction of this Court.

9 123. As a further direct, proximate, immediate and foreseeable result of the actions and  
10 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
11 weapons, PLAINTIFFS TROY MCFADYEN, PHILLIP BOW, SIA BOW, BOB STEELE,  
12 MICHAEL ELLIOTT, G.E., a minor, M.E., a minor, MARCIA MCHUGH, and GRACE  
13 MCHUGH have been deprived of the care, comfort, society and support of their loved ones,  
14 DANNY ELLIOTT II, DIANA STEELE, MICHELLE MCFADYEN, and JOSEPH MCHUGH,  
15 all to PLAINTIFFS' damage in an amount greatly in excess of the minimum jurisdiction of this  
16 Court.

17 124. As a further direct, proximate, immediate and foreseeable result of the actions and  
18 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
19 weapons, PLAINTIFFS TROY MCFADYEN, PHILLIP BOW, SIA BOW, BOB STEELE,  
20 MICHAEL ELLIOTT, G.E., a minor, M.E., a minor, MARCIA MCHUGH, and GRACE  
21 MCHUGH have incurred funeral and burial expenses in an amount subject to proof at the time of  
22 trial of this matter.

23 125. As a further, direct, proximate and foreseeable result of the aforementioned  
24 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
25  
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1 highly lethal, illegal and dangerous weapons, PLAINTIFF TIFFANY PHOMMATHEP suffered  
2 serious and grievous injuries, which has caused her husband, JOHN PHOMMATHEP to suffer  
3 the loss of love, companionship, comfort, care, assistance, protection, affection, society, child-  
4 rearing, marital relations, and moral support that TIFFANY PHOMMATHEP would have  
5 provided had this incident now occurred.  
6

7 126. As a further, direct, proximate and foreseeable result of the aforementioned  
8 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
9 highly lethal, illegal and dangerous weapons, PLAINTIFFS have suffered, and will continue to  
10 suffer in the future, consequential damages and other incidental damages and out-of-pocket  
11 expenses, all to PLAINTIFFS' general damages in a sum to be determined at the time of trial.  
12

13 127. As a further, direct, proximate and foreseeable result of the aforementioned  
14 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
15 highly lethal, illegal and dangerous weapons, PLAINTIFFS were compelled to retain legal  
16 counsel to protect their rights. Therefore, DEFENDANTS, and each of them, are liable to  
17 PLAINTIFFS for those attorney's fees incurred by PLAINTIFFS in a sum to be determined at  
18 the time of trial.  
19

20 128. DEFENDANTS, and each of their negligence, as set forth above, was a  
21 substantial factor in causing PLAINTIFFS' harm.  
22

23 129. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS  
24 and each of their, conduct was done in a conscious disregard and deliberate disregard for the  
25 rights and safety of others, including PLAINTIFFS, and in a willful and reckless manner  
26 making the infliction of grievous bodily injury and/or death highly probable. DEFENDANTS  
27 conduct was despicable, willful, wanton and malicious within the meaning of California Civil  
28 Code §§ 3294, so as to warrant the imposition of punitive and exemplary damages against them

1 in the fullest extent allowed by law.

2 130. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS,  
3 and each of them, are negligent or in some other way responsible for acts of which PLAINTIFFS  
4 are unaware. PLAINTIFFS will seek leave of Court to amend this Complaint for Damages at  
5 such time as PLAINTIFFS discover the other acts of said DEFENDANTS constituting said  
6 liability.  
7

8 **COUNT II: NEGLIGENCE PER SE FOR VIOLATION OF CALIFORNIA AND/OR**  
9 **FEDERAL FIREARMS LAWS (AGAINST ALL DEFENDANTS)**

10 131. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
11 though set out in full herein.

12 132. NEAL's purchase of "ghost gun" parts/kits and the use of them to assemble AR-  
13 15 style rifles violated California's assault weapons ban. See Cal. Pen. Code § 30510(a)(5)  
14 (assault weapons include semiautomatic rifles within the "Colt AR-15 series"); § 30510(f) ("As  
15 used in this section, 'series' includes all other models that are only variations, with minor  
16 differences, of those models listed in subdivision (a), regardless of the manufacturer."); §  
17 30605(a) (criminalizing possession of an assault weapon).

18 133. DEFENDANTS are manufacturer/sellers of "ghost gun" parts/kits who  
19 intentionally targeted -- and continue to target -- the California market and ship "ghost gun"  
20 parts/kits designed for assembly into AR-15 style rifles to California consumers like NEAL.  
21 DEFENDANTS did so, and continue to do so, with the knowledge and intention that those  
22 consumers will use these products to assemble weapons prohibited under California law.

23 134. All of the DEFENDANTS are, thus, responsible as knowing accomplices, for  
24 their consumers' direct violations of, at minimum, California's ban on the possession of assault  
25 weapons. See Cal. Pen. Code § 31 (anyone who "aid[s] and abet[s]" in the commission of an  
26 offense is a principal); § 971 ("all persons concerned in the commission of a crime, who by the  
27 operation of other provisions of this code are principals therein, shall hereafter be prosecuted,

28

1 tried and punished as principals"); § 27(a)(1) (California has jurisdiction over crimes where at  
2 least part of the offense takes place within the state).

3 135. All of the DEFENDANTS may also be responsible, either directly or as an  
4 accomplice, for violation one or more additional state or federal firearms laws, including, but not  
5 limited to, various provisions of the Gun Control Act of 1968 or the National Firearms Act.

6 136. In addition to these laws explicitly referencing firearms, DEFENDANTS also  
7 violated California statutes prohibiting unfair, immoral and reckless business practices and the  
8 creation and maintenance of public nuisances, as discussed further below. *See* Cal. Bus. & Prof  
9 Code § 17200"; Cal. Civ. Code §§ 3479, 3480.

10 137. Whichever DEFENDANT or DEFENDANTS are responsible, either directly or  
11 as an accomplice, for selling NEAL one or more "ghost gun" parts/kits in violation of one or  
12 more statutes including, at minimum, California's assault weapons ban, breached the standard of  
13 care imposed by statute.

14 138. This violation proximately caused PLAINTIFFS' harm by providing NEAL  
15 access to highly lethal weapons that he could not have legally acquired in California.

16 139. Had NEAL been denied access to the "ghost gun" parts/kits used to make his two  
17 AR-15 style "ghost gun" rifles, he could not have used these weapons to harm PLAINTIFFS.

18 140. As a direct, proximate, immediate and foreseeable result of the actions and  
19 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
20 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, J.P., II, a minor, J.P.  
21 a minor, N.P. a minor, A.H., a minor, JAMES WOOD JR and JAMES WOOD SR. were injured  
22 and suffered grievous and permanent injuries to their physical, mental, emotional and nervous  
23 systems, all to their detriment in an amount greatly in excess of the minimum jurisdiction of this  
24 Court, including, but not limited to,

25  
26 141. As a further direct, proximate, immediate and foreseeable result of the actions and  
27 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
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1 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, J.P., II, a minor, J.P.,  
2 a minor, N.P., a minor, A.H., a minor, JAMES WOOD JR and JAMES WOOD SR. were forced  
3 to hire physicians and surgeons and undergo other and further expense as and for their medical  
4 care, all in an amount which cannot yet be ascertained. PLAINTIFFS will seek leave to amend  
5 this Complaint for Damages to allege such amount when it becomes more certain.  
6

7 142. As a further direct, proximate, immediate and foreseeable result of the actions and  
8 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
9 weapons, plaintiff, TROY MCFADYN, TIFFANY PHOMMATHEP, JAMES WOOD JR and  
10 JAMES WOOD SR. and A.H., a minor, have lost wages or been greatly reduced in their working  
11 capacity and/or future working capacity. PLAINTIFFS are informed and believe and, on such  
12 information, and belief state that this said reduction in earning capacity will continue into the  
13 future in an amount which cannot yet be ascertained.  
14

15 143. As a further direct, proximate, immediate and foreseeable result of the actions and  
16 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
17 weapons, DANNY ELLIOTT II, DIANA STEELE, MICHELLE MCFADYEN, and JOSEPH  
18 MCHUGH, were fatally shot, all to PLAINTIFFS' damage in an amount greatly in excess of the  
19 minimum jurisdiction of this Court.  
20

21 144. As a further direct, proximate, immediate and foreseeable result of the actions and  
22 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
23 weapons, PLAINTIFFS, TROY MCFADYEN, PHILLIP BOW, SIA BOW, BOB STEELE,  
24 MICHAEL ELLIOTT, G.E., a minor, M.E., a minor, MARCIA MCHUGH, and GRACE  
25 MCHUGH have been deprived of the care, comfort, society and support of their loved ones,  
26 DANNY ELLIOTT II, DIANA STEELE, MICHELLE MCFADYEN, and JOSEPH MCHUGH,  
27 all to PLAINTIFFS' damage in an amount greatly in excess of the minimum jurisdiction of this  
28

1 Court.

2 145. As a further direct, proximate, immediate and foreseeable result of the actions and  
3 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
4 weapons, PLAINTIFFS TROY MCFADYEN, PHILLIP BOW, SIA BOW, BOB STEELE,  
5 MICHAEL ELLIOTT, G.E., a minor, M.E., a minor, MARCIA MCHUGH, and GRACE  
6 MCHUGH have incurred funeral and burial expenses in an amount subject to proof at the time of  
7 trial of this matter.  
8

9 146. As a further, direct, proximate and foreseeable result of the aforementioned  
10 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
11 highly lethal, illegal and dangerous weapons, plaintiff TIFFANY PHOMMATHEP suffered  
12 serious and grievous injuries, which has caused her husband, JOHN PHOMMATHEP to suffer  
13 the loss of love, companionship, comfort, care, assistance, protection, affection, society, child-  
14 rearing, marital relations, and moral support that TIFFANY PHOMMATHEP would have  
15 provided had this incident now occurred.  
16

17 147. As a further, direct, proximate and foreseeable result of the aforementioned  
18 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
19 highly lethal, illegal and dangerous weapons, PLAINTIFFS have suffered, and will continue to  
20 suffer in the future, consequential damages and other incidental damages and out-of-pocket  
21 expenses, all to PLAINTIFFS' general damages in a sum to be determined at the time of trial.  
22

23 148. As a further, direct, proximate and foreseeable result of the aforementioned  
24 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
25 highly lethal, illegal and dangerous weapons, PLAINTIFFS were compelled to retain legal  
26 counsel to protect their rights. Therefore, DEFENDANTS, and each of them, are liable to  
27 plaintiffs for those attorney's fees incurred by PLAINTIFFS in a sum to be determined at the  
28

1 time of trial.

2 149. DEFENDANTS, and each of their negligence, as set forth above, was a  
3 substantial factor in causing PLAINTIFFS' harm.

4 150. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS  
5 and each of their, conduct was done in a conscious disregard and deliberate disregard for the  
6 rights and safety of others, including PLAINTIFFS, and in a willful and reckless manner  
7 making the infliction of grievous bodily injury and/or death highly probable. DEFENDANTS  
8 conduct was despicable, willful, wanton and malicious within the meaning of California Civil  
9 Code §§ 3294, so as to warrant the imposition of punitive and exemplary damages against them  
10 in the fullest extent allowed by law.

11 151. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS,  
12 and each of them, are negligent or in some other way responsible for acts of which PLAINTIFFS  
13 are unaware. PLAINTIFFS will seek leave of Court to amend this Complaint for Damages at  
14 such time as PLAINTIFFS discover the other acts of said DEFENDANTS constituting said  
15 liability.

16 **COUNT III: NEGLIGENT ENTRUSTMENT (AGAINST ALL DEFENDANTS)**

17 152. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
18 though set out in full herein.

19 153. Upon information and belief, DEFENDANTS purposefully targeted residents of  
20 states with strict gun violence prevention regimes, like California, who were seeking to bypass  
21 the laws of their home state.

22 154. By targeting and supplying dangerous individuals already showing contempt for  
23 the rule of law and disrespect towards the safety rules accepted by their communities,  
24 DEFENDANTS were purposefully selling to a class of purchasers who were inherently showing

1 a high likelihood of misusing their "ghost gun" parts/kits in a dangerous manner that would  
2 cause harm to third parties like PLAINTIFFS.

3 155. Whichever DEFENDANT or DEFENDANTS sold or shipped one or more "ghost  
4 gun" parts/kits capable of and intended to be assembled into AR-15 style rifles prohibited by  
5 California law to NEAL, despite knowing that he was a California resident and that California  
6 prohibits such weapons were, thus, negligently entrusting these one or more items.

7 156. This violation of relevant standards of care proximately caused PLAINTIFFS'  
8 harm by granting NEAL access to highly lethal weapons that he could not have legally acquired  
9 in California.

10 157. Had NEAL been denied access to the "ghost gun" parts/kits he used to assemble  
11 his two AR-15 style "ghost gun" rifles, he could not have used these weapons to harm  
12 PLAINTIFFS.

13 158. As a direct, proximate, immediate and foreseeable result of the actions and  
14 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
15 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, J.P., II, a minor, J.P.  
16 a minor, N.P. a minor, A.H., a minor, JAMES WOOD JR and JAMES WOOD SR. were injured  
17 and suffered grievous and permanent injuries to their physical, mental, emotional and nervous  
18 systems, all to their detriment in an amount greatly in excess of the minimum jurisdiction of this  
19 Court, including, but not limited to,  
20

21 159. As a further direct, proximate, immediate and foreseeable result of the actions and  
22 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
23 weapons, PLAINTIFFS TROY MCFADYN, TIFFANY PHOMMATHEP, J.P., II, a minor, J.P.,  
24 a minor, N.P., a minor, A.H., a minor, JAMES WOOD JR and JAMES WOOD SR. were forced  
25 to hire physicians and surgeons and undergo other and further expense as and for their medical  
26 care, all in an amount which cannot yet be ascertained. PLAINTIFFS will seek leave to amend  
27 this Complaint for Damages to allege such amount when it becomes more certain.  
28

1 160. As a further direct, proximate, immediate and foreseeable result of the actions and  
2 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
3 weapons, plaintiff, TROY MCFADYN, TIFFANY PHOMMATHEP, JAMES WOOD JR and  
4 JAMES WOOD SR. and A.H., a minor, have lost wages or been greatly reduced in their working  
5 capacity and/or future working capacity. PLAINTIFFS are informed and believe and, on such  
6 information, and belief state that this said reduction in earning capacity will continue into the  
7 future in an amount which cannot yet be ascertained.  
8

9 161. As a further direct, proximate, immediate and foreseeable result of the actions and  
10 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
11 weapons, DANNY ELLIOTT II, DIANA STEELE, MICHELLE MCFADYEN, and JOSEPH  
12 MCHUGH, were fatally shot, all to PLAINTIFFS' damage in an amount greatly in excess of the  
13 minimum jurisdiction of this Court.  
14

15 162. As a further direct, proximate, immediate and foreseeable result of the actions and  
16 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
17 weapons, PLAINTIFFS TROY MCFADYEN, PHILLIP BOW, SIA BOW, BOB STEELE,  
18 MICHAEL ELLIOTT, G.E., a minor, M.E., a minor, MARCIA MCHUGH, and GRACE  
19 MCHUGH have been deprived of the care, comfort, society and support of their loved ones,  
20 DANNY ELLIOTT II, DIANA STEELE, MICHELLE MCFADYEN, and JOSEPH MCHUGH,  
21 all to PLAINTIFFS' damage in an amount greatly in excess of the minimum jurisdiction of this  
22 Court.  
23

24 163. As a further direct, proximate, immediate and foreseeable result of the actions and  
25 conduct of DEFENDANTS, which granted NEAL access to highly lethal, illegal and dangerous  
26 weapons, PLAINTIFFS TROY MCFADYEN, PHILLIP BOW, SIA BOW, BOB STEELE,  
27 MICHAEL ELLIOTT, G.E., a minor, M.E., a minor, MARCIA MCHUGH, and GRACE  
28

1 MCHUGH have incurred funeral and burial expenses in an amount subject to proof at the time of  
2 trial of this matter.

3 164. As a further, direct, proximate and foreseeable result of the aforementioned  
4 actions, and conduct of DEFENDANTS and each of them, which granted NEAL access to highly  
5 lethal, illegal and dangerous weapons, plaintiff TIFFANY PHOMMATHEP suffered serious and  
6 grievous injuries, which has caused her husband, JOHN PHOMMATHEP to suffer the loss of  
7 love, companionship, comfort, care, assistance, protection, affection, society, child-rearing,  
8 marital relations, and moral support that TIFFANY PHOMMATHEP would have provided had  
9 this incident now occurred.  
10

11 165. As a further, direct, proximate and foreseeable result of the aforementioned  
12 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
13 highly lethal, illegal and dangerous weapons, PLAINTIFFS have suffered, and will continue to  
14 suffer in the future, consequential damages and other incidental damages and out-of-pocket  
15 expenses, all to plaintiffs' general damages in a sum to be determined at the time of trial.  
16

17 166. As a further, direct, proximate and foreseeable result of the aforementioned  
18 actions, and conduct of DEFENDANTS, and each of them, which granted NEAL access to  
19 highly lethal, illegal and dangerous weapons, PLAINTIFFS were compelled to retain legal  
20 counsel to protect their rights. Therefore, DEFENDANTS, and each of them, are liable to  
21 plaintiffs for those attorney's fees incurred by PLAINTIFFS in a sum to be determined at the  
22 time of trial.  
23

24 167. DEFENDANTS negligent entrustment of the dangerous instrumentalities, as set  
25 forth above, was a substantial factor in causing PLAINTIFFS' harm.

26 168. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS  
27 and each of their, conduct was done in a conscious disregard and deliberate disregard for the  
28

1 rights and safety of others, including PLAINTIFFS, and in a willful and reckless manner  
2 making the infliction of grievous bodily injury and/or death highly probable. DEFENDANTS  
3 conduct was despicable, willful, wanton and malicious within the meaning of California Civil  
4 Code §§ 3294, so as to warrant the imposition of punitive and exemplary damages against them  
5 in the fullest extent allowed by law.  
6

7 169. PLAINTIFFS are informed and believe and thereon allege that defendants, and  
8 each of them, are negligent or in some other way responsible for acts of which PLAINTIFFS are  
9 unaware. PLAINTIFFS will seek leave of Court to amend this Complaint for Damages at such  
10 time as PLAINTIFFS discover the other acts of said DEFENDANTS constituting said liability.  
11

12 **COUNT IV: PUBLIC NUISANCE (AGAINST ALL DEFENDANTS)**

13 170. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
14 though set out in full herein.

15 171. By negligently, recklessly, and/or intentionally selling vast quantities of "ghost  
16 gun" parts/kits enabling the assembly of AR-15 style rifles to buyers in California in violation of,  
17 at a minimum, California law, DEFENDANTS have negligently and/or knowingly participated  
18 in creating and maintaining an unreasonable interference with the rights held in common by the  
19 general public. This constitutes a public nuisance under California law, including California  
20 Civil Code §§ 3479 and 3480.

21 172. Without limitation, the acts of DEFENDANTS as alleged herein caused, created,  
22 and continue to maintain a substantial and unreasonable interference with the public's health,  
23 safety, convenience, comfort, peace, and use of public property and/or private property. These  
24 activities are injurious to health and offensive to the senses so as to interfere with the  
25 comfortable enjoyment of life or property in an entire community or neighborhood. Numerous  
26 members of the public are threatened, killed, injured, or are victims of criminal acts as a result of  
27 "ghost gun" parts/kits sold by DEFENDANTS. DEFENDANTS' acts and omissions as alleged  
28

1 herein cause a substantial and unreasonable increase in the number of members of the general  
2 public who are threatened, killed, and injured by "ghost guns."

3 173. The acts and omissions of DEFENDANTS, as alleged herein, substantially and  
4 unreasonably interfere with the public's use of public facilities, including the use of public  
5 highways and walkways. Public highways and walkways are made substantially and  
6 unreasonably unsafe because of the presence of ghost guns intentionally, negligently and  
7 unlawfully supplied by DEFENDANTS.

8 174. DEFENDANTS' acts and omissions as alleged herein substantially and  
9 unreasonably (a) increase the number of "ghost guns" in and on public facilities, including on  
10 public highways and walkways; (b) increase the degree to which unlawful possessors in and on  
11 public facilities, including on highways and walkways, are illegally armed with weapons; and (c)  
12 allow for banned assault weapons to be present in California, including on public highways and  
13 walkways.

14 175. DEFENDANTS' acts and omissions as alleged herein cause substantial and  
15 unreasonable interferences with the public's health, safety, convenience, comfort, and peace in  
16 numerous other ways, including: (a) increasing the number of unlawful possessors of weapons  
17 who use these weapons to commit violent crimes against innocent members of the general  
18 public; (b) increasing the number and severity of property crimes committed by those in  
19 possession of "ghost guns" against innocent members of the general public; (c) increasing the  
20 number and severity of incidents in which those in possession of "ghost guns" disturb the peace  
21 by being disorderly; and (d) increasing the amount of society's resources that are diverted toward  
22 dealing with the problems associated with the possession of "ghost guns."

23 176. DEFENDANTS know or have reason to know that the acts and omissions alleged  
24 herein caused substantial and unreasonable interferences with the public's health, safety,  
25 convenience, comfort, peace, and use of public facilities. DEFENDANTS' acts and omissions  
26 as alleged herein were undertaken with negligent and/or intentional disregard of the rights of the  
27 general public. DEFENDANTS knew that they could have taken precautions as outlined above  
28 that would have eliminated or minimized the injuries to the general public. Instead they chose

1 not to take those precautions and, in fact, actively exacerbated these risks with the irresponsible  
2 marketing campaign described herein in order to maximize their profits.

3 177. DEFENDANTS' interference with the public's health, safety, convenience,  
4 comfort, peace, and use of public facilities is unreasonable, unlawful, substantial, significant,  
5 continuing, and long-lasting. This interference, is annoying, offensive, and disturbing to an  
6 ordinary person. The interference is not insubstantial or fleeting, and involves deaths and serious  
7 injuries suffered by many people and a severe disruption of public health, peace, order, and  
8 safety.

9 178. The manner in which DEFENDANTS make, sell, and market their products has  
10 no social utility. Even if it did, the seriousness of their interference with the rights of the public  
11 and harm they cause far outweighs any social utility associated with DEFENDANTS' conduct.

12 179. DEFENDANTS' unlawful, negligent and/or intentional creation and maintenance  
13 of the public nuisance directly and proximately caused significant harm, including serious  
14 physical injury and associated harm to PLAINTIFFS that is different from the harm suffered by  
15 other members of the public, including loss of enjoyment of life, as well as those damages set  
16 forth in paragraphs 121-131 above, all to their damage in an amount to be determined at a trial of  
17 this matter.

18 180. PLAINTIFFS have not, at any time, consented to DEFENDANTS' conduct.

19 181. At all times herein mentioned, DEFENDANTS had notice and knowledge that  
20 their actions created a public nuisance.

21 182. PLAINTIFFS are informed and believe and thereon allege that defendants and  
22 each of their, conduct was done in a conscious disregard and deliberate disregard for the rights  
23 and safety of others, including PLAINTIFFS, and in a willful and reckless manner making the  
24 infliction of grievous bodily injury and/or death highly probable. Defendants conduct was  
25 despicable, willful, wanton and malicious within the meaning of California Civil Code §§ 3294,  
26 so as to warrant the imposition of punitive and exemplary damages against them in the fullest  
27  
28

1 extent allowed by law.

2 **COUNT V: VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION**

3 **17200 (AGAINST ALL DEFENDANTS)**

4 **(Unfair and Unlawful Competition in Sales Practices)**

5  
6 183. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
7 though set out in full herein.

8 184. DEFENDANTS in the course of their retail business of selling "ghost guns,"  
9 engaged in business acts or practices that were unlawful, unfair, deceptive, or misleading, and  
10 which therefore violated Bus. & Prof Code § 17200.

11 185. By selling to NEAL, a dangerous individual, who was prohibited from purchasing  
12 and possessing firearms, "ghost gun" parts/kits for a prohibited assault-style weapons, in  
13 violation of state and/or federal law, DEFENDANTS engaged in business practices that were  
14 unlawful, immoral, unethical, oppressive, and unscrupulous.

15 186. Also, by supplying to a subclass of purchasers who are inherently showing a high  
16 likelihood of misusing their "ghost gun" parts/kits in a dangerous manner that would cause harm  
17 to third parties like PLAINTIFFS, DEFENDANTS engaged in business practices that were  
18 unlawful, immoral, unethical, oppressive, and unscrupulous.

19 187. As a direct and proximate result of the foregoing acts and practices,  
20 DEFENDANTS have received income, profits, and other benefits, which they would not have  
21 received if DEFENDANTS had not engaged in the violations of Bus. & Prof Code § 17200 as  
22 described in this Complaint for Damages.

23  
24 188. Further, upon information and belief, had DEFENDANTS not violated  
25 California's prohibition on such unethical and unlawful marketing and business practices, NEAL  
26 could not have acquired the parts/kits used to assemble his AR-15 style "ghost gun" rifles or  
27 used these items to harm PLAINTIFFS.

28 189. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS

1 and each of their, conduct was done in a conscious disregard and deliberate disregard for the  
2 rights and safety of others, including PLAINTIFFS, and in a willful and reckless manner  
3 making the infliction of grievous bodily injury and/or death highly probable. DEFENDANTS  
4 conduct was despicable, willful, wanton and malicious within the meaning of California Civil  
5 Code §§ 3294, so as to warrant the imposition of punitive and exemplary damages against them  
6 in the fullest extent allowed by law.  
7

8 190. To prevent their unjust enrichment, DEFENDANTS and each of them, should be  
9 required, pursuant to Business and Professions Code sections 17200, et seq, to disgorge their ill-  
10 gotten gains for the purpose of making full restitution to PLAINTIFFS as a consequence of  
11 DEFENDANTS unlawful and unfair activities, injunctive relief, as well as all attorney's fees  
12 and costs.  
13

14 **COUNT VI: VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION**

15 **17200 (AGAINST ALL DEFENDANTS)**

16 **(Unfair Marketing Tactics)**

17 1. PLAINTIFFS hereby incorporate by reference all preceding paragraphs as  
18 though set out in full herein.

19 2. DEFENDANTS in the course of their retail business of selling ghost guns,  
20 engaged in business acts or practices that were unfair, deceptive, or misleading, and which  
21 therefore violated Bus. & Prof Code § 17200.  
22

23 3. Specifically, by employing marketing tactics which emphasized that their  
24 products, including banned assault weapons, were untraceable and could be acquired without a  
25 background check or an interaction with an FFL, DEFENDANTS intentionally targeted  
26 prohibited persons and other dangerous individuals like NEAL. Such tactics and practices were  
27 unfair, immoral, unethical, oppressive, and unscrupulous.  
28

1           4. As a direct and proximate result of the foregoing acts and practices,  
2 DEFENDANTS have received income, profits, and other benefits, which they would not have  
3 received if DEFENDANTS had not engaged in the violations of Bus. & Prof Code § 17200 as  
4 described in this Complaint for Damages.

5           5. Further, upon information and belief, had DEFENDANTS not violated  
6 California's prohibition on such unethical and unlawful marketing and business practices, NEAL  
7 could not have acquired the parts/kits used to assemble his AR-15 style "ghost gun" rifles or  
8 used these weapons to harm PLAINTIFFS.

9  
10          6. PLAINTIFFS are informed and believe and thereon allege that defendants and  
11 each of their, conduct was done in a conscious disregard and deliberate disregard for the rights  
12 and safety of others, including PLAINTIFFS, and in a willful and reckless manner making the  
13 infliction of grievous bodily injury and/or death highly probable. Defendants conduct was  
14 despicable, willful, wanton and malicious within the meaning of California Civil Code §§ 3294,  
15 so as to warrant the imposition of punitive and exemplary damages against them in the fullest  
16 extent allowed by law.

17  
18          7. PLAINTIFFS are informed and believe and thereon allege that DEFENDANTS  
19 and each of their, conduct was done in a conscious disregard and deliberate disregard for the  
20 rights and safety of others, including PLAINTIFFS, and in a willful and reckless manner  
21 making the infliction of grievous bodily injury and/or death highly probable. DEFENDANTS  
22 conduct was despicable, willful, wanton and malicious within the meaning of California Civil  
23 Code §§ 3294, so as to warrant the imposition of punitive and exemplary damages against them  
24 in the fullest extent allowed by law.

25  
26          8. To prevent their unjust enrichment, DEFENDANTS and each of them, should be  
27 required, pursuant to Business and Professions Code sections 17200, et seq, to disgorge their ill-  
28

1 gotten gains for the purpose of making full restitution to PLAINTIFFS as a consequence of  
2 DEFENDANTS unlawful and unfair activities, injunctive relief, as well as all attorney's fees  
3 and costs.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, PLAINTIFFS PRAY FOR A JURY TRIAL and judgment against  
6 DEFENDANTS as follows:

7  
8 1. For general damages for TROY MCFADYEN, against each DEFENDANT,  
9 jointly and severally, in the amount to be proven at trial;

10 2. For special damages for TROY MCFADYEN, against each DEFENDANT,  
11 jointly and severally, in the amount to be proved at trial;

12 3. For medical expenses of TROY MCFADYEN, against each DEFENDANT,  
13 jointly and severally, according to proof;

14 4. For loss of wages and earning capacity for TROY MCFADYEN, against each  
15 DEFENDANT, jointly and severally, in a sum according to proof;

16 5. For General damages for TROY MCFADYEN, SIA BOW and PHILLIP BOW,  
17 for the loss of society and companionship of decedent MICHELLE MCFADYEN, against each  
18 DEFENDANT, jointly and severally, in the amount to be proven at trial;

19 6. For funeral and burial expenses of MICHELL MCFADYEN, for TROY  
20 MCFADYEN, SIA BOW and PHILLIP BOW, against each DEFENDANT, jointly and  
21 severally, according to proof;

22 7. For special damages for TROY MCFADYEN, SIA BOW and PHILLIP BOW  
23 for future contributions and value of personal services, advice or training as to decedent  
24 MICHELLE MCFADYEN, against each DEFENDANT, jointly and severally, according to  
25 proof;  
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1           8.     For general damages to BOB STEELE, MICHAEL ELLIOT, G.E., and M.E. for  
2 the loss of society and companionship of decedents DANIEL ELLIOTT and DIANA STEELE,  
3 against each DEFENDANT, jointly and severally, in the amount to be proven at trial;

4           9.     For funeral and burial expenses of DANIEL ELLIOTT and DIANA STEELE,  
5 against each DEFENDANT, jointly and severally, according to proof;

6           10.    For special damages for BOB STEELE, MICHAEL ELLIOT, G.E., and M.E.,  
7 for future contributions and value of personal services, advice or training of decedents DANIEL  
8 ELLIOTT and DIANA STEELE, against each DEFENDANT, jointly and severally, according  
9 to proof;

10           11.    For general damages to MARCIA MCHUGH and GRACE MCHUGH for the  
11 loss of society and companionship of decedent JOSEPH MCHUGH, against each  
12 DEFENDANT, jointly and severally, in the amount to be proven at trial;

13           12.    For funeral and burial expenses of JOSEPH MCHUGH, against each  
14 DEFENDANT, jointly and severally, according to proof;

15           13.    For special damages for MARCIA MCHUGH and GRACE MCHUGH for future  
16 contributions and value of personal services, advice or training of decedent JOSEPH  
17 MCHUGH, against each DEFENDANT, jointly and severally, according to proof;

18           14.    For general damages for A.H. a minor, against each DEFENDANT, jointly and  
19 severally, in the amount to be proven at trial;

20           15.    For special damages for A.H. a minor, against each DEFENDANT, jointly and  
21 severally, in the amount to be proved at trial;

22           16.    For medical expenses of A.H. a minor, against each DEFENDANT, jointly and  
23 severally, according to proof;

24           17.    For loss of earning capacity for A.H. a minor, against each DEFENDANT,  
25  
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1 jointly and severally, in a sum according to proof;

2 18. For general damages for TIFFANY PHOMMATHEP, J.P. II. a minor, J.P. a  
3 minor, and N.P. a minor, against each DEFENDANT, jointly and severally, in the amount to be  
4 proven at trial;

5 19. For special damages for TIFFANY PHOMMATHEP, J.P. II. a minor, J.P. a  
6 minor, and N.P. a minor, against each DEFENDANT, jointly and severally, in the amount to be  
7 proved at trial;

8 20. For medical expenses of TIFFANY PHOMMATHEP, J.P. II. a minor, J.P. a  
9 minor, and N.P. a minor, against each DEFENDANT, jointly and severally, according to proof;

10 21. For lost wages and/or loss of earning capacity for TIFFANY PHOMMATHEP,  
11 J.P. II. a minor, J.P. a minor, and N.P. a minor, against each DEFENDANT, jointly and  
12 severally, in a sum according to proof;

13 22. For loss of consortium damages for JOHN PHOMMATHEP;

14 23. For general damages for JAMES WOODS JR., and JAMES WOOD SR., against  
15 each DEFENDANT, jointly and severally, in the amount to be proven at trial;

16 24. For special damages for JAMES WOODS JR., and JAMES WOOD SR., against  
17 each DEFENDANT, jointly and severally, in the amount to be proved at trial;

18 25. For medical expenses of JAMES WOODS JR., and JAMES WOOD SR., against  
19 each DEFENDANT, jointly and severally, according to proof;

20 26. For lost wages and/or loss of earning capacity for JAMES WOODS JR., and  
21 JAMES WOOD SR., against each DEFENDANT, jointly and severally, in a sum according to  
22 proof;

23 27. For punitive and exemplary damages to PLAINTIFFS against DEFENDANTS,  
24 and each of them, in an amount appropriate to punish them and deter others from engaging in  
25

1 similar misconduct;

2 28. For prejudgment interest, as allowed by law;

3 29. For injunctive relief against DEFENDANTS;

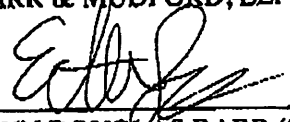
4 30. For an Order, pursuant to Business and Professions Code Section 17203, that  
5 DEFENDANTS be permanently enjoined from committing any unlawful, unfair, or fraudulent  
6 acts of unfair competition in Violation of Business and Professions Code Section 17200;

7 31. For attorney's fees and costs of this suit;

8 32. For such other and further relief as this Court may deem proper.  
9

10  
11 DATED: November 13, 2019

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF ORANGE

12 GHOST GUNNER FIREARMS CASES

13 Included actions:

14 30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost*  
15 *Gunner, Inc. dba GhostGunner.net, et al.*

16 CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner,*  
17 *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

**PLAINTIFFS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN OPPOSITION TO DEFENDANT  
POLYMER80'S DEMURRER  
(PLCAA)**

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

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## INTRODUCTION

The allegations of the Complaints that must be taken as true explain that defendants Polymer80, Inc. (“Polymer80”) and James Tromblee, d/b/a USPATRIOTARMORY.COM<sup>1</sup> (“Tromblee”) (together the “Demurring Defendants”) recklessly and unlawfully supplied “ghost guns” kits/parts to prohibited persons, and caused Plaintiffs’ injuries by arming the prohibited possessor who shot them (“Neal”).<sup>2</sup>

Plaintiffs allege that Defendants intentionally marketed and advertised their ghost gun kits/parts to persons who cannot lawfully obtain or possess a firearm. McFadyen Compl., ¶¶ 3, 7, 49, 70, 73, 90-91, 104, and 154; Cardenas Compl., ¶¶ 7, 33, 54, 57, 74-75, 88, 132, and 168. Despite Plaintiffs’ claims falling squarely within the predicate, negligence per se, and negligent entrustment exemptions to the Protection of Lawful Commerce in Arms Act (“PLCAA”) (15 U.S.C. §§ 7901-7903), Demurring Defendants contend, incorrectly, that PLCAA bars this Court from enforcing California law to provide Plaintiffs redress for the harms foreseeably caused by their misconduct. Mem. of P. & A. in Supp. of Dem. of Def. Polymer80, Inc. on PLCAA Grounds (“MP&A”) at 6-7. Demurring Defendants are wrong and their demurrer should be denied.

PLCAA only bars certain “qualified civil liability action[s]” which must both 1) fall within the general definition in § 7903(5)(A) and 2) not comprise an enumerated exception in § 7903(5)(A)(i-vi). Neither requirement is satisfied here. In fact, Plaintiffs’ allegations satisfy multiple exceptions that exempt Demurring Defendants from any protection under PLCAA. Demurring Defendants knowingly violated applicable laws in ways which proximately caused Plaintiffs’ harm, which satisfies PLCAA’s predicate and negligence per se exceptions (§ 7903(5)(A)(iii), (ii)). Plaintiffs also satisfy PLCAA’s negligent entrustment exception (§ 7903(5)(A)(ii)). These exceptions allow the entire “action” – including all claims – to proceed. Plaintiffs’ action also does not fall within the general definition of a qualified civil liability action in § 7903(5)(A). Alternatively, if PLCAA bars Plaintiffs’ claims, it is unconstitutional.

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<sup>1</sup> James Tromblee, d/b/a USPATRIOTARMORY.COM, filed a joinder to Polymer80’s demurrer.

<sup>2</sup> See Plaintiffs’ Opposition to Defendants’ Demurrer to Plaintiffs’ Complaints (the “Global Demurrer”) for why Demurring Defendants are liable under a market share theory.

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1 **ARGUMENT**

2 **A. These Cases Are Not Qualified Civil Liability Actions**

3 **1. Plaintiffs' Entire Actions Fall Within PLCAA Exceptions**

4 Plaintiffs' actions come within PLCAA's "predicate," negligence per se, and negligent  
5 entrustment exceptions to protection under the statute. Therefore, all claims are permitted and not  
6 subject to dismissal.

7 PLCAA's predicate exception (15 U.S.C. § 7903(5)(A)(iii)) allows an entire "action in  
8 which" the defendant's misconduct proximately contributed to a plaintiff's injury by knowingly  
9 violating a law "applicable to the sale or marketing" of firearms. An overwhelming consensus of  
10 courts have recognized that where the predicate exception is satisfied, PLCAA allows all claims  
11 within a case to survive – including individual claims for negligence and nuisance. *See, e.g.,*  
12 *Englund v. World Pawn Exch.*, No. 16CV00598, 2017 Ore. Cir. LEXIS 3, \*11-12 (June 30, 2017)  
13 ("the predicate exception's broad language provides that an entire 'action' survives – including all  
14 alleged claims") (Decl. of Amy K. Van Zant in Supp. of Pls.' Opp'n to Def. Polymer80, Inc.'s  
15 Dem. (PLCAA grounds) ("Van Zant Decl.") Ex. 1); *Fox v. L&J Supply, LLC*, No. 2014-24619  
16 (Pa. Ct. Com. Pl. Nov. 26, 2018) (Van Zant Decl. Ex. 2); *Coxie v. Academy, Ltd.*, No. 2018-CP-  
17 42-04297 (S.C. Ct. Com. Pl. July 29, 2019) (Van Zant Decl. Ex. 3); *Chiapperini v. Gander*  
18 *Mountain Co.*, 13 N.Y.S.3d 777 (N.Y. Sup. Ct. 2014) (Van Zant Decl. Ex. 4); *Smith & Wesson*  
19 *Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. App. 2007), *transfer denied*, 915 N.E.3d 978 (Ind.  
20 2009); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143 (N.Y. App. Div. 2012), *amended by* 103  
21 A.D.3d 1191 (N.Y. App. Div. 2013); *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123 (D.  
22 Nev. 2019).<sup>3</sup> Indeed, the *Chiapperini* court held: "as long as one PLCAA exception applies to one  
23 claim the entire action continues." 13 N.Y.S.3d at 785-87.

24 Demurring Defendants' reliance on *Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009) (cited in  
25 MP&A at 6) to argue that it is entitled to PLCAA's protections is misplaced. *Ileto* found the

26 \_\_\_\_\_  
27 <sup>3</sup> Demurring Defendants misleadingly cite to an earlier ruling in *Prescott* without informing this  
28 court that that Court later found the amended complaint satisfied the predicate exception. *See*  
MP&A at 6, 9; *compare Prescott v. Slide Fire Solutions, LP*, 341 F. Supp. 3d 1175 (D. Nev.  
2018), *with Prescott*, 410 F.Supp.3d at 1123.

1 predicate exception was not satisfied in that particular case, and thus did not consider whether the  
2 alleged negligence and public nuisance claims survived; here, the multiple exceptions are  
3 satisfied and thus the entire action (both cases) should continue. *Chiapperini*, 13 N.Y.S.3d at 785-  
4 87.

5 **2. Plaintiffs' Allegations Satisfy PLCAA's Predicate, Negligence Per Se**  
6 **And Negligent Entrustment Exceptions<sup>4</sup>**

7 **a. All Claims Survive Under PLCAA's Predicate Exception**

8 Plaintiffs allege that Demurring Defendants knowingly violated several laws applicable to  
9 the sale or marketing of firearms, thereby proximately causing them harm. McFadyen Compl., ¶¶  
10 132-150; Cardenas Compl., ¶¶ 113-128. Any one of these violations is sufficient to exempt  
11 Demurring Defendants from PLCAA's protections. However, Demurring Defendants are  
12 exempted from protection under both the predicate and negligence per se exceptions.<sup>5</sup>

13 **(1) Demurring Defendants Knowingly Violated Cal. Penal**  
14 **Code §§ 30510, 30515, 30605 and 18 U.S.C. § 922(o) In A**  
15 **Way Which Proximately Caused Plaintiffs' Harm**

16 Demurring Defendants knowingly aided and abetted Neal's unlawful possession of  
17 firearms classified as either prohibited "assault weapon[s]" under California law and/or  
18 "machinegun[s]" under federal law. McFadyen Compl., ¶¶ 132-35; Cardenas Compl., ¶¶ 113-16.  
19 "Assault weapon[s]" include, *inter alia*, the "Colt AR-15 series" (Cal. Penal Code § 30510(a)(5))  
20 and "all other models that are only variations, with minor differences, of those models listed in

21 <sup>4</sup> Demurring Defendants incorrectly suggest that PLCAA's product liability exception, 15 U.S.C.  
22 § 7903(5)(A)(v), is not implicated. *See* MP&A at 8, n.5. However, the alleged facts make out a  
23 product liability claim which satisfy this exception. *See* McFadyen Compl., ¶¶ 70-74, 90-92;  
24 Cardenas Compl., ¶¶ 56-60, 76-78 (providing examples of marketing tactics used by Defendants  
25 emphasizing the lack of serial numbers and background checks with the sole purpose of targeting  
26 criminal purchasers); *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138, 1143 (2018) (finding error  
27 in trial court sustaining demurrer where there was no strong public policy justifying the  
28 defendant's actions that were allegedly in violation of the UCL).

<sup>5</sup> Though PLCAA's negligence per se exception applies whether or not California recognizes  
negligence per se as a separate cause of action, California does recognize the doctrine of  
negligence per se. *Millard v. Biosources, Inc.*, 156 Cal. App. 4th 1338, 1353 n.2 (2007) (noting  
that negligence per se may apply when there is a "valid underlying cause of action for  
negligence"). In any event, PLCAA does not require that a state recognize negligence per se  
claims in order for the exception to apply. 15 U.S.C. § 7903(5)(A)(ii).

subdivision (a), regardless of the manufacturer.” Cal. Penal Code § 30510(f); *see also* § 30605(a). Federal law prohibits the general public from possessing “machinegun[s]” under 18 U.S.C. § 922(o) (incorporating the definition from 26 U.S.C. § 5845(b)). ATF Rule 82-8 explains that machine guns “include[] 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.” *Id.* at 1 (Van Zant Decl. Ex. 5).<sup>6</sup> The “ghost gun” AR-15 style firearms assembled from Defendants’ ghost gun kits/parts and used by Neal are machineguns, a variation on the prohibited Colt AR-15 model, and contain features rendering them readily susceptible to modification to fire in a fully automatic fashion.<sup>7</sup>

Demurring Defendants’ business practices were intended to enable dangerous California residents like Neal to make unserialized, untraceable AR-15 style firearms which constitute prohibited assault weapons and machineguns. *See, e.g.,* McFadyen Compl., ¶¶ 7, 33, 74; Cardenas Compl., ¶¶ 7, 49, 90. Demurring Defendants knowingly aided Neal’s illegal possession of assault weapons in violation of Cal. Penal Code § 30605(a), and unlawful machineguns under 18 U.S.C. § 922(o). *See also* Cal. Penal Code § 31, 18 U.S.C. § 2.<sup>8</sup> These violations proximately caused Plaintiffs’ harm. *See* McFadyen Compl., ¶¶ 138-49; Cardenas Compl., ¶¶ 121-27.

Demurring Defendants contend that the ghost gun parts/kits it provided were not, in and of themselves, “firearms” or outlawed under California or federal law and thus it did not aid and abet the violation of such laws. MP&A at 2, 9-14. Demurring Defendants are wrong. A supplier can aid and abet the unlawful possession of an unlawful product where it supplies components with the knowledge and intent that they will be used to create the outlawed product. Courts have repeatedly applied this rationale to suppliers of component parts/kits used to create prohibited firearms. *See, e.g., United States v. Evans*, 712 F. Supp. 1435, 1440 (D. Mont. 1989), *aff’d*, 928

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<sup>6</sup> Plaintiffs’ Request for Judicial Notice In Support of their Opposition to Polymer80’s Demurrer (“RJN”) Ex. 1.

<sup>7</sup> The allegations are sufficient to invoke 18 U.S.C. § 922(o). McFadyen Compl., ¶ 80; Cardenas Compl., ¶ 64.

<sup>8</sup> Demurring Defendants are incorrect, *see* MP&A at 11, that Plaintiffs failed to allege that they acted with specific intent to facilitate unlawful possession of illicit firearms. *See, e.g.,* McFadyen Compl., ¶ 155; Cardenas Compl., ¶ 133.

1 F.2d 858 (9th Cir. 1991) (allegations of aiding and abetting the possession of a machine gun were  
2 sufficient where defendant suppliers of firearm parts had knowledge the components would be  
3 assembled into a machine gun); *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996) (upholding  
4 defendants’ convictions for aiding and abetting the possession and manufacture of machine guns  
5 where one co-defendant ordered parts and tools used to manufacture fully automated weapons).  
6 Were there any doubt, a pending proposed ATF rule clarifies that ghost gun parts/kits like  
7 Demurring Defendants’ are firearms under federal law even prior to assembly.<sup>9</sup> Hence, the sale of  
8 ghost gun parts/kits without serial numbers and Brady background checks is illegal. *See id.* and  
9 18 U.S.C. §§ 922(t), 923.

10 Demurring Defendants also assert that even ghost guns *assembled from* its parts/kits are  
11 not firearms under federal law. MP&A at 9-10. But the federal definition of “firearm” includes  
12 “any weapon . . . which will or is designed to . . . expel a projectile by the action of an  
13 explosive.” 18 U.S.C. § 921(a)(3)(A) (emphasis added).<sup>10</sup> The massacre perpetrated by Neal  
14 shows that the assembled weapons unquestionably meet that definition.<sup>11</sup>

15 Demurring Defendants mistakenly contend that PLCAA bars Plaintiffs’ claims because  
16 the complaints do not reference violations of federal law with sufficient specificity. MP&A at 12-  
17 14. However, Demurring Defendants cite no authority that requires Plaintiffs to preemptively  
18 allege specific facts or laws needed to defeat an affirmative defense. *Id.* In fact, in *Williams*, the  
19 New York Court of Appeals rejected this very argument, holding: “although the complaint does  
20 not specify the statutes allegedly violated, it sufficiently alleges facts supporting a finding that  
21 defendants knowingly violated federal gun laws.” 100 A.D.3d at 149. Indeed, even were this

22 \_\_\_\_\_  
23 <sup>9</sup> ATF, *Definition of Frame or Receiver and Identification of Firearms*, 86 Fed. Reg. 27720,  
27726 (May 21, 2021) (Van Zant Decl. Ex. 6, RJN Ex. 2).

24 <sup>10</sup> California law contains a near identical definition of firearms. Cal. Penal Code § 16520(a).  
25 Demurring Defendants further cite a recent bill, AB-1621, in their argument concerning the  
26 definition of ghost guns, which would not be subject to judicial notice even had Demurring  
27 Defendants requested as the facts within are subject to dispute. MP&A at 10.

28 <sup>11</sup> Demurring Defendants’ reliance on *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021) (*cited in*  
MP&A at 13-14) is misplaced. That case considered whether a magazine packaged with a rifle  
was a component part. It has no bearing on the question of whether a *fully assembled weapon*  
built from component parts/kits provided by Demurring Defendants is a “firearm” under 18  
U.S.C. § 921(a)(3)(A).

1 Court to find contrary to *Williams* that Plaintiffs must allege Demurring Defendants' violation of  
2 federal laws with more specificity, the appropriate remedy would be to allow Plaintiffs to amend  
3 their complaints. *See Corporan v. Wal-Mart Stores East, LP*, No. 16-2305-JWL, 2016 U.S. Dist.  
4 LEXIS 93307, at \*10 (D. Kan. July 18, 2016) (Van Zant Decl. Ex. 7) ("Assuming that plaintiff  
5 amends her complaint as described here, her claims are sufficient to survive the PLCAA filter.").

6 **b. Demurring Defendants Knowingly Violated California's Unfair**  
7 **Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.) in a**  
8 **Way Which Proximately Caused Plaintiffs' Harm**

9 Demurring Defendants also violated California's Unfair Competition Law ("UCL") by  
10 marketing its products in a manner which made them especially attractive to a dangerous class of  
11 violent criminals. *See* McFadyen Compl., ¶¶ 3, 7, 49, 70, 73, 90-91, 104, 154; Cardenas Compl.,  
12 ¶¶ 7, 33, 54, 57, 74-75, 88, 132, 168. The complaints describe how Demurring Defendants'  
13 violation of the UCL helped motivate Neal to acquire and misuse its products, thereby  
14 proximately resulting in the Plaintiffs' harm. *See* McFadyen Compl., ¶¶ 2-5; Cardenas Compl., ¶¶  
15 167-170; *see also* McFadyen Compl., ¶¶ 73-74; Cardenas Compl., ¶¶ 57-58 (citing several  
16 illustrative examples of the types of marketing tactics used in the industry to attract and target  
17 criminal purchasers).

18 Demurring Defendants argue that state marketing statutes like the UCL cannot meet the  
19 definition of predicate statutes under PLCAA because they are not specifically or exclusively  
20 "applicable to the sale or marketing of" firearms. MP&A at 1-2, 7-8; 15 U.S.C. 7903(5)(A)(iii).  
21 However, courts throughout the country have concluded otherwise. For example, in *Soto v.*  
22 *Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019), *cert. denied sub nom., Remington*  
23 *Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019), the Supreme Court of Connecticut rejected this  
24 exact argument and instead held that PLCAA allowed claims that were premised on reckless  
25 advertising that violated a similar state statute to the California UCL at issue here. *Prescott* held  
26 similarly as to an analogous Nevada law. 410 F.Supp.3d 1123.

27 Demurring Defendants' other cited cases on this issue are similarly unavailing. For  
28 example, in *City of New York v. Baretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (cited in  
MP&A at 7), the Second Circuit "*reject[ed]* . . . the . . . argument that the [PLCAA] predicate

1 exception is necessarily limited to statutes that expressly regulate the firearms industry.” 524 F.3d  
2 at 400 (emphasis added). However, the Second Circuit ultimately determined that, since the  
3 statute at issue there was a generally applicable nuisance statute which was not targeted at “sales  
4 or marketing” activity, it did not satisfy the PLCAA predicate exception. *Id.* at 399 (“It is not  
5 disputed that New York Penal Law § 240.45 is a statute of general applicability that has never  
6 been applied to firearms suppliers for conduct like that complained of by the City.”). In contrast,  
7 the complaints at issue here assert California UCL claims for unfair, unlawful, and/or fraudulent  
8 advertising and marketing. *See* McFadyen Compl., ¶¶ 2-5; Cardenas Compl., ¶¶ 167-70.

9 Demurring Defendants also rely on *Soto* (cited in MP&A at 7), which, in fact, actually  
10 supports Plaintiff’s contentions. In *Soto*, the Supreme Court of Connecticut held that a similar  
11 unfair business practice statute to the California UCL at issue here that did not specifically  
12 regulate firearms nonetheless still “regulate[d] commercial sales activities and [wa]s, therefore,  
13 narrower in scope and more directly applicable than . . . general tort and nuisance statutes.” 202  
14 A.3d at 308 n.53; *see also Prescott*, 410 F. Supp. 3d at 1138 (emphasizing similar distinction).<sup>12</sup>  
15 Generally, a UCL claim is appropriate where Plaintiff alleges an injury in fact under one of  
16 several categories of economic injury.

17 c. **Plaintiffs’ Allegations Also Satisfy PLCAA’s Negligent**  
18 **Entrustment Exception**

19 PLCAA expressly exempts actions that satisfy Congress’ definition of “negligent  
20 entrustment,” from protection under the statute. Negligent entrustment claims involve “the  
21 supplying of a qualified product by a seller for use by another person when the seller knows, or  
22 reasonably should know, the person to whom the product is supplied is likely to, and does, use the  
23 product in a manner involving unreasonable risk of physical injury to the person or others.” 15  
24 U.S.C. § 7903(5)(B). Plaintiffs’ allegations satisfy this definition. *See, e.g.,* McFadyen Compl.,  
25

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26 <sup>12</sup> Demurring Defendants also cite *In re Firearm Cases*, 126 Cal. App. 4th 959 (2005), which was  
27 decided *prior to PLCAA’s enactment* and, thus, did not consider whether the UCL could be a  
28 predicate statute. It simply held that a UCL claim failed if, *at the summary judgment stage*, a  
plaintiff could not produce proof of causation. *See In re Firearm Cases*, 126 Cal. App. 4th at 977-  
82.

¶¶ 90-93; Cardenas Compl., ¶¶ 74-77 (alleging that Defendants, including Polymer80, “purposefully emphasized features of their products they knew to be particularly attractive to criminals and dangerous parties like Neal” and knew that their products “are frequently used by criminals and... have continued to gain additional knowledge of this reality”). Because Plaintiffs have pled claims for negligent entrustment, PLCAA does not bar the present cases.

Contrary to Demurring Defendants’ suggestion, *see* MP&A at 1-2, 6-7, PLCAA does not create or modify the elements of the common law tort of negligent entrustment or impose an additional pleading requirement. Rather, § 7903(5)(A)(ii) allows claims recognized by relevant state law if, as here, they come within Congress’s definition of the exemption. Courts in California and elsewhere have routinely allowed negligent entrustment claims involving firearms. *See, e.g., Hoosier v. Lander*, 14 Cal. App. 4th 234 (1993); *see also Chiapperini*, 13 N.Y.S.3d at 789 (finding negligent entrustment sufficiently alleged for supplying a gun to a dangerous individual).<sup>13</sup> The allegations thus state a claim under California law and satisfy PLCAA’s negligent entrustment exception.

**3. Even If No Exception Applies, These Cases Survive Because They Fall Outside of PLCAA’s General Definition of a Qualified Civil Liability Action**

The concept of federalism and canons of statutory construction require construing PLCAA to minimize federal intrusion into California’s traditional authority to make and apply tort law applicable within the state. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Bond v. United States*, 572 U.S. 844 (2014); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). As the Supreme Court cautioned, courts should “not [be] looking for a plain statement that [common law claims like Plaintiffs’] are excluded” from the PLCAA bar, but instead, should “not read [PLCAA] to [bar common law claims like Plaintiffs’] unless Congress has made it clear that [they] are *included*” in the ambit of the claims intended to be barred by PLCAA. *Gregory*, 501 U.S. at 467

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<sup>13</sup> *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015) is inapposite. *See* MP&A at 7. *Phillips*, applying Colorado law, dismissed a negligent entrustment claim where, unlike here, there were *no allegations* that defendants engaged in marketing designed to attract criminals and which put them on notice that their customers were inherently dangerous. Demurring Defendants’ reliance on *Phillips* to suggest that Plaintiffs have failed to adequately allege proximate cause under the predicate exception, MP&A at 9, is misplaced for the same reason.

1 (emphasis in original). The Supreme Court further clarified that even when the “express  
2 language” of a statute mandates some preemption, the “presumption [against preemption]  
3 reinforces the appropriateness of a narrow reading” of the “scope” of the preemption. 505 U.S. at  
4 516-18; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (discussing *Cipollone*) (emphasis  
5 omitted).

6 PLCAA lacks the requisite clear statement of intent to include claims like Plaintiffs’  
7 within the scope of the general definition of prohibited qualified civil liability actions in §  
8 7903(5)(A). On the contrary, PLCAA reflects an intent to *allow* a claim where, as here, a gun  
9 industry actor’s misconduct is alleged to be one cause of the harm. Indeed, PLCAA never states  
10 that tort claims against gun industry actors are barred outright. Instead, it provides a general  
11 definition of presumptively prohibited qualified civil liability actions against licensed gun  
12 companies for harm “resulting from the criminal or unlawful misuse” of a gun by a third party. 15  
13 U.S.C. § 7903(5)(A). The term “resulting from” as used in PLCAA is undefined, and should be  
14 read consistently with PLCAA’s Purposes and Findings, which express Congress’s intent to only  
15 “prohibit causes of action ... for the harm solely caused by the criminal or unlawful misuse of  
16 firearm products.” 15 U.S.C. § 7901(b)(1) and § 7901(a)(6) (similar “solely caused” language).  
17 Only this reading complies with “[t]he primary rule of statutory construction,” which is “to give  
18 effect to the intention of the legislature.” *Rodgers v. United States*, 185 U.S. 83, 86 (1902); *see*  
19 *also Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (statute must “be read as a whole”).

20 This reading furthers Congress’ intent not to protect gun companies where their  
21 misconduct and a later criminal act were *both* contributing causes of the resultant harm. As  
22 PLCAA’s chief Senate sponsor emphasized: “[PLCAA] ... does not protect firearms [industry  
23 actors] from . . . lawsuits based on their own negligence or criminal conduct . . . If manufacturers  
24 or dealers break the law or commit negligence, they are still liable . . . *See* 151 Cong. Rec. S9061,  
25 S9099 (July 27, 2005) (Sen. Craig) (Van Zant Decl. Ex. 8, RJN Ex. 3).

26 Further, “[s]olely” was added to PLCAA’s first Purpose as one of the few changes made  
27 to an earlier version of PLCAA that failed to pass. *Compare* S. 1805, 108<sup>th</sup> Cong. (2003) (Van  
28

1 Zant Decl. Ex. 9) with S. 397, 109th Cong. (2005) (Van Zant Decl. Ex. 10).<sup>14</sup> No statutory word  
2 should be read as “superfluous” (see *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104,  
3 112 (1991)) – especially not one that appears critical to PLCAA’s passage. The Supreme Court in  
4 *Soto* cited PLCAA’s “solely caused” language together with the holdings from *Bond* and  
5 *Cipollone*, in support of its finding that “in the absence of a clear statement in the statutory text or  
6 legislative history [of PLCAA] that Congress intended to supersede the states’ traditional  
7 authority . . . we are compelled to resolve any textual ambiguities in favor of the plaintiffs.” See  
8 *Soto*, 202 A.3d at 312-13, 313 n.58 (broadly interpreting PLCAA’s predicate exception to allow a  
9 claim).<sup>15</sup> A similar result is required here.

10 **B. In The Alternative, PLCAA Is An Unconstitutional Nullity**

11 This court need not decide whether PLCAA is unconstitutional because it does not bar this  
12 case. When a court is confronted with two “plausible” interpretations of a statute, “if one  
13 [statutory construction] would raise a multitude of constitutional problems, the other should  
14 prevail—whether or not those constitutional problems pertain to the particular litigant before the  
15 Court.” *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). Thus, the principle of constitutional  
16 avoidance supports adoption of Plaintiffs’ proposed reading of PLCAA. The arguments below  
17 assume *arguendo* that PLCAA bars this action, in which case it is unconstitutional.

18 **1. PLCAA Exceeds Congress’ Enumerated Powers**

19 Congress, in PLCAA, exceeded its Commerce Clause authority. PLCAA does not regulate  
20 commerce; it imposes no conditions or regulation on gun companies whatsoever. It only targets  
21 entities who have not engaged in any commercial conduct related to the firearms industry --  
22 private parties like the Plaintiffs, state lawmaking functions and state judges. These targets are  
23

24  
25 <sup>14</sup> See RJN Exs. 4 and 5.

26 <sup>15</sup> Although a few courts, have failed to read PLCAA with the required federalism-protective lens,  
27 those opinions are flawed and/or distinguishable. For example, the court in *Delana v. CED Sales,*  
28 *Inc.*, 486 S.W.3d 316 (Mo. 2016) incorrectly stated that *Bond* and *Gregory* only involved  
“implied preemption.” *Delana*, 486 S.W.3d at 322-323. But *Cipollone* and *Medtronic* explain that  
the presumption against preemption requires narrowly construing the reach of even express  
preemption language.

1 outside the scope of the Commerce Clause, and PLCAA lacks a foundation in any other  
2 enumerated power reserved to the federal government.

3 The Commerce Clause only authorizes Congress to regulate existing “commercial  
4 activity” – it may not force passive actors not engaged in commerce to bear costs of misconduct  
5 that would normally be imposed on the firearms industry. *See Nat’l Fed’n of Indep. Bus. v.*  
6 *Sebelius*, 567 U.S. 519, 558 (2012).<sup>16</sup> A state appellate court found PLCAA unconstitutional on  
7 these grounds, emphasizing that PLCAA impermissibly “regulates the inactivity of individuals  
8 who may *never* have engaged in a commercial transaction with the gun industry” and “forces  
9 [plaintiffs] to serve as financial sureties for the neglig[en]ce” of the industry by blocking  
10 otherwise valid suits. *Gustafson v. Springfield, Inc.*, 207 WDA 2019, 37-39 (Pa. Super. Ct. Sept.  
11 28, 2020), *opinion withdrawn subject to en banc reargument at 2020 Pa. Super. LEXIS 957* (Dec.  
12 3, 2020) (Van Zant Decl. Ex. 11) (applying *Nat’l Fed’n of Indep. Bus.*) (emphasis in original).<sup>17</sup>

13 Further, as the Supreme Court recognized in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018),  
14 “every form of [permissible] preemption [under the Commerce Clause] is based on a federal law  
15 that regulates the conduct of private actors, not the States” and state lawmaking functions are not  
16 sufficiently commercial activities to fall within the ambit of the Commerce Clause. *See id.* at  
17 1481; *see also id.* at 1485 (J. Thomas, concurring) (“even assuming the Commerce Clause allows  
18 Congress to prohibit intrastate sports gambling directly, it does not authorize Congress to regulate  
19 state governments regulation of interstate commerce”) (internal quotation omitted). Permissible  
20 preemption laws target private actors actively engaged in a given industry and require them to  
21 meet a defined federal standard, and as an incidental impact, override inconsistent state claims.  
22 *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-36 (2008).

23 PLCAA, however, does not regulate gun companies at all.

24 PLCAA only regulates passive non-market participants like the Plaintiffs, judges, and  
25 state lawmakers. It bars certain lawsuits by private plaintiffs, and requires states to utilize their  
26

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27 <sup>16</sup> Four dissenting Justices joined Chief Justice Roberts on this point regarding the requirement of  
28 active commercial conduct without joining his opinion.

<sup>17</sup> While the opinion was withdrawn pending *en banc* review, its reasoning remains persuasive.

1 legislatures, rather than their judiciaries if they wish to impose liability standards on gun  
2 companies. *See* 15 U.S.C. § 7903(5)(iii). PLCAA is not a permissible preemption statute

## 3 **2. PLCAA Violates The Tenth Amendment**

4 PLCAA violates the Tenth Amendment in multiple ways. The Tenth Amendment limits  
5 federal intrusion on state sovereignty, including by prohibiting “commandeering.” PLCAA  
6 violates the “anticommandeering rule” in several ways – including by commanding states not to  
7 enforce judicially-created liability standards against the firearms industry unless they are codified  
8 into statute. *See* § 7903(5)(A)(iii). The “Constitution has never been understood to confer upon  
9 Congress the ability to require the States to govern according to Congress' instructions.” *New*  
10 *York v. United States*, 505 U.S. 144, 162 (1992). How states allocate lawmaking authority among  
11 the branches of their governments is an essential aspect of their sovereignty reserved under the  
12 Tenth Amendment. “[W]hether the law of the State shall be declared by its Legislature in a statute  
13 or by its highest court in a *decision is not a matter of federal concern.*” *Erie R.R. Co. v. Tompkins*,  
14 304 U.S. 64, 78 (1938) (emphasis added).

15 In a case considering a similar statute in *Matter of Vargas* (“*Vargas*”), 131 A.D.3d 4 (2d  
16 Dep’t 2015), the New York Court of Appeal recognized that Congress “cannot, consistent with the  
17 core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal  
18 government the right to take away from the state its authority to determine which coequal branch  
19 of government should exercise the power of the sovereign.” 131 A.D.3d at 26–27 (rejecting reading  
20 of federal statute so as to require a legislative opt-out from its terms where state had chosen to  
21 allocate authority to the judiciary); *see also Alden v. Me.*, 527 U.S. 706, 739, 752-54 (1999)  
22 (“Congress c[annot] displace a State's allocation of governmental power and responsibility”  
23 between its judicial and legislative branches). Further, the federal government may not “regulat[e]  
24 [a] state government[’s] regulation” of its own citizens by limiting the ability of one branch of state  
25 government to exercise lawmaking authority in a given way. *See Murphy*, 138 S. Ct. at 1478, 1485  
26 (internal quotation and alteration omitted) (applying the “anticommandeering rule”). PLCAA  
27 represents similar federal overreach into how states delegate lawmaking functions and/or regulate  
28 their own citizens as illustrated by *Vargas*, *Alden*, and *Murphy*.

1 PLCAA also impermissibly purports to define one or more substantive rules of common  
2 law. “Congress has no power to declare substantive rules of common law applicable in a State.”  
3 *Erie*, 304 U.S. at 78. “There is no federal general common law.” *Id.* *Gustafson* recently  
4 acknowledged that “[b]y defining a ‘qualified-civil-liability action,’ Congress [in PLCAA]  
5 pronounced substantive rules of common law and therefore exercised a police power reserved for  
6 the several States under the Tenth Amendment.” (Van Zant Decl. Ex. 11 at 57).

### 7 **3. PLCAA Violates Due Process**

8 PLCAA purports to completely deny certain victims of gun industry misconduct of any  
9 remedy whatsoever from those companies who caused them injury. No other federal law purports  
10 to so utterly deprive claimants of any recovery. The Constitution does not allow it.

11 “[W]here there is a legal right, there is also a legal remedy by suit or action at law.”  
12 *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (internal quotation omitted). Consistent with this  
13 teaching, the Supreme Court has never permitted Congress to eradicate all rights to redress for  
14 victims of a negligent and/or unlawful industry. When the Supreme Court held that Congress may  
15 limit or eliminate certain state tort claims, Congress provided a reasonably adequate alternative  
16 remedy. *See Duke Power Co. v. Carolina Env’t Study Grp.*, 438 U.S. 59, 93 (1978) (finding that  
17 “[t]h[e] panoply of remedies and guarantees is at the least a reasonably just substitute for the  
18 common-law rights replaced by [the act].”); *see, e.g.*, the September 11<sup>th</sup> Victim Compensation  
19 Fund of 2001 (Pub. L. No. 107-42, 115 Stat. 237).<sup>18</sup> If read to bar Plaintiffs’ claims while leaving  
20 *no* remedy, PLCAA is an unconstitutional aberration.

21 An Indiana court held PLCAA unconstitutional for due process concerns. *City of Gary v.*  
22 *Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (Van Zant  
23 Decl. Ex. 13). A Wisconsin court held that PLCAA would violate due process if it barred the  
24 plaintiffs’ claims, which were similar to those at issue here. Mot. Hr’g Tr. at 24:14-25:6, *Lopez v.*  
25 *Badger Guns, Inc.*, No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014) (Van Zant Decl. Ex. 14); *see*  
26 *also* Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They*  
27 *Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72

28 <sup>18</sup> Van Zant Decl. Ex. 12; RJN Ex. 6.

1 U. Cin. L. Rev. 1739 (Summer 2004). Similarly, it would be a violation of due process to bar  
2 Plaintiffs' claims here.

3 **4. PLCAA Violates Equal Protection**

4 To apply PLCAA to bar recovery for gun violence victims in California while allowing  
5 recovery for otherwise similarly situated victims in states that have codified gun liability statutes  
6 with the same elements as the judicially created standards at issue here would violate equal  
7 protection principles. *See* 15 U.S.C. § 7903(5)(A)(iii). Such discrimination cannot survive even  
8 rational basis review. *See McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990);  
9 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

10 **CONCLUSION**

11 PLCAA does not apply to bar Plaintiffs' claims and, if it did, would be an unconstitutional  
12 act without force or effect. Demurring Defendants' Unique Demurrer on PLCAA Grounds should  
13 be denied.

14 Dated: March 9, 2022

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF ORANGE  
11

12 GHOST GUNNER FIREARMS CASES

13 Included actions:

14  
15 30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost*  
16 *Gunner, Inc. dba GhostGunner.net, et al.*

17 CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner,*  
18 *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

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

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

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

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

14 4. A true and correct copy of Decision by the Court, *Coxie v. Academy, Ltd.*, No.  
15 2018-CP-42-04297 (S.C. Ct. Com. Pl. July 29, 2019) is attached hereto as **Exhibit 3** and  
16 incorporated by reference herein.

17 5. A true and correct copy of *Chiapperini v. Gander Mountain Co., Inc.*, 13 N.Y.S.3d  
18 777 (N.Y. Sup. Ct. 2014) is attached hereto as **Exhibit 4** and incorporated by reference herein.

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

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

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

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

10. A true and correct copy of S. 1805, 108<sup>th</sup> 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

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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

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

This matter<sup>1</sup> came before the Court on March 23, 2017,<sup>2</sup> 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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<sup>1</sup> As the defendants' arguments cover similar subject matter, the Court addresses them together as opposed to independently.

<sup>2</sup> 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.<sup>3</sup>

## 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

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<sup>3</sup> 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 Makarov 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.<sup>4</sup> *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

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<sup>4</sup> 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 contain 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

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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

v.

L & J SUPPLY, LLC, d/b/a IN SITE FIREARMS  
& LAW ENFORCEMENT SUPPLIES, L & J  
SUPPLY, LLC, and LUKE J. KELLY III

No. 2014-24619



2014-24619-0189 11/26/2018 12:33 PM # 12075539  
Rcpt#Z3530572 Fee:\$0.00 Order  
Main (Public)  
MontCo Prothonotary

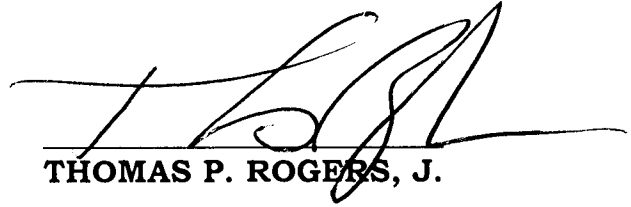
**ORDER: MOTION FOR SUMMARY JUDGMENT REGARDING BAR TO ALL  
CLAIMS BY THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT  
FILED BY DEFENDANTS LUKE J. KELLY, III AND L & J SUPPLY, LLC**

**AND NOW**, this 26<sup>th</sup> 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**.<sup>1</sup>

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<sup>1</sup> 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

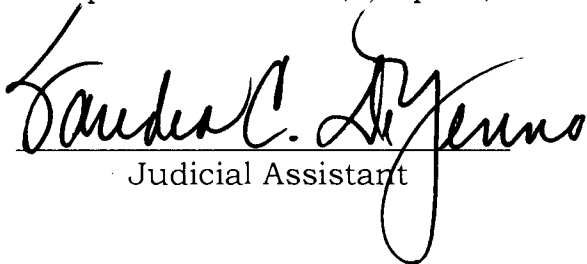
**By First-Class Mail:**

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

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[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 )

Cindy Coxie, )

PLAINTIFF, )

v. )

Academy, Ltd., d/b/a Academy )  
 Sports and Outdoors; and, Dustan )  
 Lawson, )

DEFENDANT )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-42-04297

**Form 4**

**SCRCP Rule 21(b)(6) Motion To Dismiss**

**Denied**

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ 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; ☒ 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.

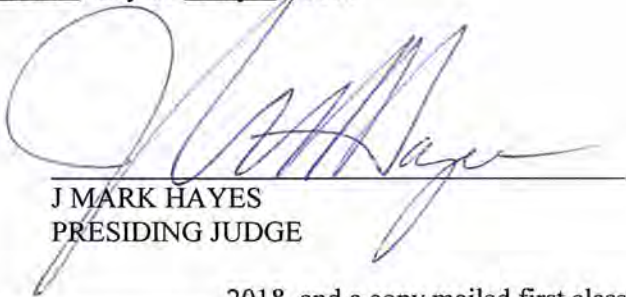
The better approach for all of the claims alleged in the complaint is to remain consistent with the standard of review required by a SCRCF Rule 12(b)(6) analysis and to allow a more thorough record to be developed.

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., 17<sup>th</sup> 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**



Positive

As of: June 1, 2021 2:54 PM Z

## **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 \*\*\*\*

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\(4\)\(a\)](#).

[\*\*\*\*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

## LexisNexis® Headnotes

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

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

## 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

### [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.

48 Misc. 3d 865, \*865; 13 N.Y.S.3d 777, \*\*777; 2014 N.Y. Misc. LEXIS 5910, \*\*\*5910; 2014 NY Slip Op 24429, \*\*\*\*1

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 > Require

ments 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.

48 Misc. 3d 865, \*865; 13 N.Y.S.3d 777, \*\*777; 2014 N.Y. Misc. LEXIS 5910, \*\*\*5910; 2014 NY Slip Op 24429, \*\*\*\*1

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**

48 Misc. 3d 865, \*865; 13 N.Y.S.3d 777, \*\*777; 2014 N.Y. Misc. LEXIS 5910, \*\*\*5910; 2014 NY Slip Op 24429, \*\*\*\*1

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**

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### **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 \[5\] \[A\] \[iii\]](#)). 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

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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,*

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// 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.<sup>1</sup>

[\*\*\*\*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<sup>2</sup>

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 inquiries 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.<sup>3</sup>

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.<sup>4</sup> 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

<sup>1</sup> 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.

<sup>2</sup> 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].)

<sup>3</sup> 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).

<sup>4</sup> Nguyen was sentenced on May 18, 2014, to 1½ 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 \[g\] \[3\]](#)).<sup>5</sup> 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.<sup>6</sup>

### 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

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<sup>5</sup> 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.

<sup>6</sup> 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).

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).<sup>7</sup> 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.<sup>8</sup>

### 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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<sup>7</sup> 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).

<sup>8</sup> 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

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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.<sup>9</sup>

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"])).<sup>10</sup>

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

<sup>10</sup> 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

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

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.

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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 \[a\] \[1\] \[A\]](#)).<sup>11</sup>

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

<sup>11</sup> 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](#)<sup>↑</sup> 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**<sup>12</sup> [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.<sup>12</sup> 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**<sup>13</sup> [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**<sup>14</sup> "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.<sup>13</sup> These red flags could suggest that Spengler

<sup>12</sup> 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.

<sup>13</sup> 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 \[4th Dept 1975\]\)](#).<sup>14</sup> 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.<sup>15</sup> (See generally [Miner v Long Is. Light](#).

<sup>14</sup> 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.

<sup>15</sup> 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

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[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](#)

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

[\[4th Dept 1982\]](#).) 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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*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

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[\[4th Dept 1981\]](#) [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.

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End of Document

# **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 disconnecter and a trip which prevent more than one shot being fired with a single function of the trigger.

The disconnecter 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 disconnecter 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](http://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](http://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.<sup>1</sup> 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)

<sup>1</sup> 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.

(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).<sup>2</sup>

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.”<sup>3</sup> 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.<sup>4</sup> While the GCA does not

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> 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<sup>5</sup> (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.<sup>6</sup> 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.<sup>7</sup>

#### *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,<sup>8</sup> 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.<sup>9 10</sup>

*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).

<sup>7</sup> *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.”).

<sup>8</sup> *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.”).

<sup>9</sup> 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].”).

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.<sup>11</sup>

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

<sup>10</sup> 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.

<sup>11</sup> See footnote 9 *supra*.

“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.”).

<sup>5</sup> 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.”

<sup>6</sup> 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->

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.”<sup>12</sup> 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.<sup>13</sup> Those firearms would include numerous widely available models, such as Glock-type and Sig Sauer P320<sup>14</sup> 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.<sup>15</sup> 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).<sup>16</sup>

#### 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.<sup>17</sup> 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:<sup>18</sup>

<sup>16</sup> *See* footnote 2, *supra*.

<sup>17</sup> *See* Baltimore police report a 400% increase in untraceable ‘ghost guns’, The Baltimore Sun (Feb. 18, 2021), <http://www.baltimoresun.com/news/crime/baltimore-police-report-a-400-increase-in-untraceable-ghost-guns-20210218-ae2dortu6ngn5llmfmg6yxtx6m-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-philadelphia-ghost-guns-20200318-jzyt4thyvvgntproexbleyley-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/>.

<sup>18</sup> Source: ATF Office of Strategic Intelligence and Information. These numbers (as of March 4, 2021)

<sup>12</sup> 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).

<sup>13</sup> *See* footnote 8, *supra*.

<sup>14</sup> 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).

<sup>15</sup> *See* Design of AR–15 could derail charges tied to popular rifle, *APnews.com* (Jan. 13, 2020), <https://apnews.com/article/396bbdbf4963a28bda99e7793ee6366>.

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.<sup>19</sup>

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.

<sup>19</sup> 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,

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

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-guilty-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-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-of-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>.

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).<sup>20</sup> Criminal investigations and studies highlight this concern.<sup>21</sup>

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

<sup>20</sup> 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.

<sup>21</sup> CBP: 3-D-printed full-auto rifle seized at Lukeville crossing, [tucsonsentinel.com](https://www.tucsonsentinel.com/feb-8-2016) (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](https://www.independent.co.uk/news/world/europe/3d-gun-print-germany-synagogue-shooting-stephan-balliet-neo-nazi-a9152746.html) (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](https://www.nextgov.com/emerging-tech/2020/03/tsa-confiscated-3d-printed-guns-raleigh-durham-international-airport/163533/) (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).<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

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”).<sup>26</sup> 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.<sup>27</sup> When a firearm is disposed to an unlicensed person, licensees are required to complete a Firearms Transaction Record, ATF Form 4473 (“Form 4473”).<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

<sup>25</sup> 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.

<sup>26</sup> 27 CFR 478.125(e).

<sup>27</sup> 18 U.S.C. 923(g)(1)(A); 27 CFR 478.125(e), (f).

<sup>28</sup> 18 U.S.C. 923(g)(1)(A); 27 CFR 478.124.

<sup>29</sup> 18 U.S.C. 923(g)(6); 27 CFR 478.39a(b).

<sup>30</sup> 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

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.<sup>31</sup> 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,<sup>32</sup> or to return any recovered stolen or lost PMFs to their rightful owners.

Not only does the inability to distinguish between unmarked firearms

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.

<sup>31</sup> 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).

<sup>32</sup> 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).

<sup>22</sup> 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.”).

<sup>23</sup> 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.”).

<sup>24</sup> 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).

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> Indeed, several States and municipalities have banned or severely restricted unserialized or 3D printed firearms.<sup>38</sup>

<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> 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

## 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.

(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 9A.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-3d/>; *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](https://mocoshow.com/blog/county-council-unanimously-approves-ghost-gun-bill/?fbclid=IwAR1KCyFal3Aid31WKCTLanR-uEuj_-dW_T32lND5gfKmle_-nvibZyT052).

<sup>33</sup> 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).

<sup>34</sup> 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).

<sup>35</sup> 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).

### 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”<sup>39</sup> or “may readily be converted”<sup>40</sup> to expel a projectile by the action of an explosive are “firearms” under the GCA.<sup>41</sup>

<sup>39</sup> 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).

<sup>40</sup> 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).

<sup>41</sup> 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

In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called “80% receivers,”<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> Any

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”).

<sup>42</sup> 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.

<sup>43</sup> See footnotes 39 and 40, *supra*.

<sup>44</sup> 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

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.<sup>45</sup> 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

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).

<sup>45</sup> 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.<sup>46</sup> 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”<sup>47</sup> 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.<sup>48</sup>

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

<sup>47</sup> 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.

<sup>48</sup> See 27 CFR 479.101(b); 478.92(a)(4)(iii); 479.102(f)(1).

<sup>46</sup> 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.

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 licensees for the manufacture or repair of complete devices (see Section II.H.9 of the preamble).<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

### 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.<sup>52</sup>

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

<sup>52</sup> 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.”).

<sup>50</sup> 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).

<sup>51</sup> See footnote 46, *supra*.

<sup>49</sup> This rule is consistent with ATF enforcement policy. See footnote 72 *infra*.

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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> 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<sup>56</sup> 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.<sup>57</sup>

*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\\_walmart.html](https://www.lehighvalleylive.com/news/2018/05/how_the_felon_killed_at_walmart.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/>.*

<sup>56</sup> 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.

<sup>57</sup> 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).

<sup>53</sup> ATF Letter to Private Counsel #907010 (Mar. 20, 2015).

<sup>54</sup> 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>.

<sup>55</sup> 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/>

### 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).<sup>58</sup> 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.<sup>59</sup> The term

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).

<sup>59</sup> The Federal Firearms Act of 1938 (repealed), the predecessor to the GCA, made it unlawful for

“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.<sup>60</sup>

### 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,<sup>61</sup> 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.<sup>62</sup>

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).

<sup>60</sup> 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).

<sup>61</sup> 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.

<sup>62</sup> 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,

<sup>58</sup> *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

### G. Definition of “Gunsmith”<sup>63</sup>

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.<sup>64</sup> 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).

<sup>63</sup> 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)(1)(B); *id.* at (a)(21)(D); 132 Cong. Rec. 9603–04 (May 6, 1986) (statement of Sen. McClure).

<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> At the same time, consistent with the intent of the GCA,<sup>69</sup> 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.<sup>70</sup> Persons should consult the laws and officials in their own States and localities to determine the lawfulness of PMFs.

<sup>65</sup> 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").

<sup>66</sup> 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).

<sup>67</sup> 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).

<sup>68</sup> 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).

<sup>69</sup> See Public Law 90–351, sec. 901(b), 82 Stat. 227.

<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

## 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

<sup>71</sup> 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.”).

<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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

<sup>73</sup> 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.").

<sup>74</sup> 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,<sup>75</sup> 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.<sup>76</sup> 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.

<sup>75</sup> 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).

<sup>76</sup> See 50 FR 26702 (June 28, 1985).

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

Category	NPRM
Affected Population .....	<ul style="list-style-type: none"> <li>• Update Marking Requirements.</li> <li>• New Gunsmithing Definition.</li> <li>• Update Record Retention.</li> <li>• Other Technical Amendments.</li> <li>• 113,204 FFLs (Record Retention).</li> <li>• Unknown number of FFLs manufacturers and importers (Definition of Receiver).</li> <li>• 35 Non-FFL manufacturers (Definition of Receiver).</li> <li>• 6,044 FFL retailers (PMFs).</li> <li>• 36 Non-FFL retailers (PMFs).</li> <li>• Unknown number of Individual Owners.</li> </ul>
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) .....	<ul style="list-style-type: none"> <li>• Provides clarity to courts on what constitutes a firearm frame or receiver.</li> <li>• Applies to new technology.</li> <li>• Makes consistent marking requirements.</li> <li>• Eases certain marking requirements.</li> <li>• Increases tracing of crime scene firearms to prosecute criminals.</li> </ul>

### 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.<sup>77</sup>

### 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.

<sup>77</sup> The Regulatory Impact Analysis is available on [www.regulations.gov](http://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.<sup>78</sup> 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

<sup>78</sup> 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.<sup>79</sup> 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 manufacturers 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*

<sup>79</sup> *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 rulemaking's 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](http://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](http://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)”;
- 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”;
- 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”;
- 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;

\* \* \* \* \*

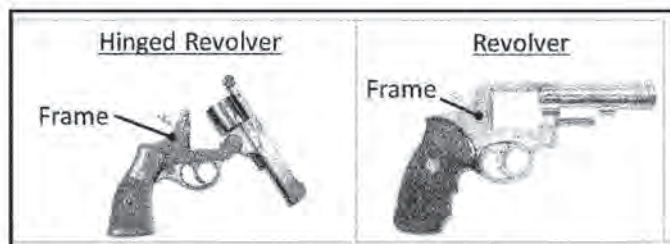
*Firearm.* Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an 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.



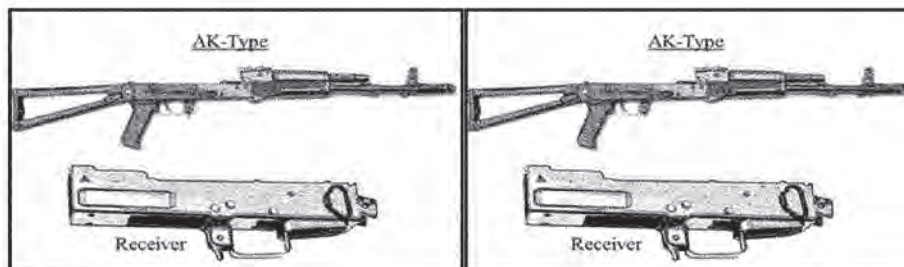
*Example 2 – Bolt action rifle:* The frame or receiver is the part of the rifle that provides a structure designed to hold the bolt, firing pin, and trigger mechanism.



*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).



(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.

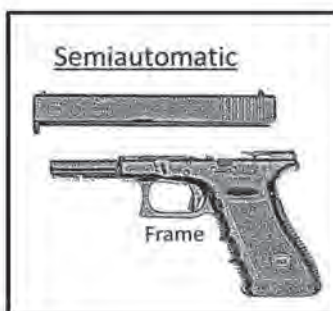
(3) The Director has previously determined that a specific part is the frame or receiver with respect to certain weapons with split or modular frames or receivers. The following is a nonexclusive list of such weapons and the specific part identified as the frame or receiver as they existed on [date of 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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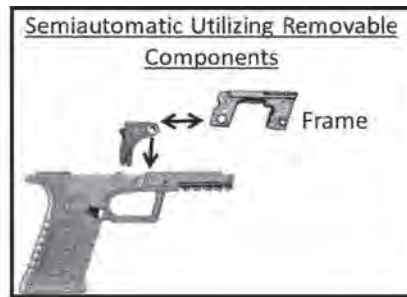
(ii) *Glock-type striker-fired semiautomatic pistols*: the lower portion of the pistol, or grip, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



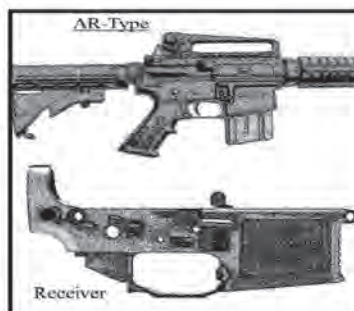
(iii) *Sig Sauer P320-type semiautomatic pistols*: the internal removable chassis of the pistol, partially exposed to the exterior to allow identification, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



(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.



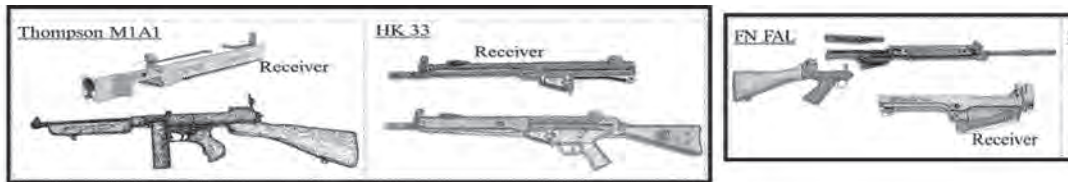
(v) *AR-15-type, and Beretta AR-70-type firearms*: the lower part of the weapon that provides housing for the trigger mechanism and hammer.



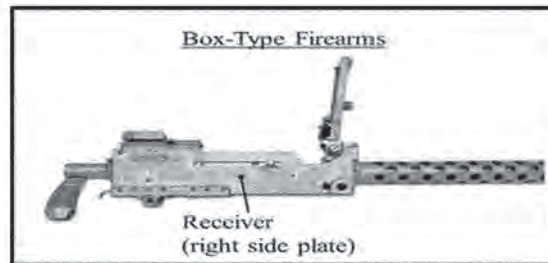
(vi) *Steyr AUG-type firearms*: the central part of the weapon that provides housing for the rods in the bolt carrier sub-assembly and a structure designed to attach the barrel.



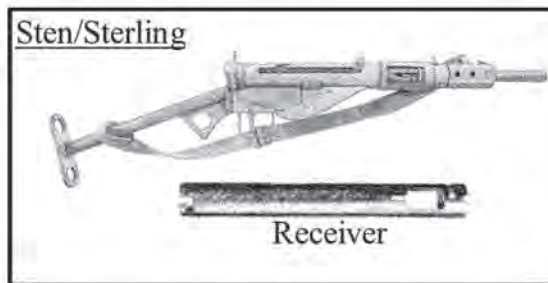
(vii) *Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP 40, and SIG 550-type firearms, and HK-type machineguns and semiautomatic variants*: the upper part of the weapon that provides housing for the bolt and firing pin.



(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 1/4 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 dyeing 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)”;
- 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)”;

■ 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)”;

■ 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  $\frac{1}{16}$  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.*

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# **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.<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> 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."

<sup>2</sup> 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).<sup>3</sup>

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

<sup>3</sup> 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. Cox](#), 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.<sup>4</sup>

### *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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<sup>4</sup>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

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# **EXHIBIT 8**



United States  
of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 109<sup>th</sup> 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 perse-

verance, 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.



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S9059

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. Hutchinson, 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]—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."

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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 per-

son, 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.

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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

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## 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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protection of Lawful  
5 Commerce in Arms Act”.

1 **SEC. 2. FINDINGS; PURPOSES.**

2 (a) FINDINGS.—The Congress finds the following:

3 (1) Citizens have a right, protected by the Sec-  
4 ond Amendment to the United States Constitution,  
5 to keep and bear arms.

6 (2) Lawsuits have been commenced against  
7 manufacturers, distributors, dealers, and importers  
8 of firearms that operate as designed and intended,  
9 which seek money damages and other relief for the  
10 harm caused by the misuse of firearms by third par-  
11 ties, including criminals.

12 (3) The manufacture, importation, possession,  
13 sale, and use of firearms and ammunition in the  
14 United States are heavily regulated by Federal,  
15 State, and local laws. Such Federal laws include the  
16 Gun Control Act of 1968, the National Firearms  
17 Act, and the Arms Export Control Act.

18 (4) Businesses in the United States that are en-  
19 gaged in interstate and foreign commerce through  
20 the lawful design, manufacture, marketing, distribu-  
21 tion, importation, or sale to the public of firearms or  
22 ammunition that has been shipped or transported in  
23 interstate or foreign commerce are not, and should  
24 not, be liable for the harm caused by those who  
25 criminally or unlawfully misuse firearm products or

1       ammunition products that function as designed and  
2       intended.

3           (5) The possibility of imposing liability on an  
4       entire industry for harm that is solely caused by oth-  
5       ers is an abuse of the legal system, erodes public  
6       confidence in our Nation's laws, threatens the dimi-  
7       nution of a basic constitutional right and civil lib-  
8       erty, invites the disassembly and destabilization of  
9       other industries and economic sectors lawfully com-  
10      peting in the free enterprise system of the United  
11      States, and constitutes an unreasonable burden on  
12      interstate and foreign commerce of the United  
13      States.

14          (6) The liability actions commenced or con-  
15      templated by the Federal Government, States, mu-  
16      nicipalities, and private interest groups are based on  
17      theories without foundation in hundreds of years of  
18      the common law and jurisprudence of the United  
19      States and do not represent a bona fide expansion  
20      of the common law. The possible sustaining of these  
21      actions by a maverick judicial officer or petit jury  
22      would expand civil liability in a manner never con-  
23      templated by the framers of the Constitution, by  
24      Congress, or by the legislatures of the several  
25      States. Such an expansion of liability would con-

1       stitute a deprivation of the rights, privileges, and  
2       immunities guaranteed to a citizen of the United  
3       States under the Fourteenth Amendment to the  
4       United States Constitution.

5       (b) PURPOSES.—The purposes of this Act are as fol-  
6       lows:

7               (1) To prohibit causes of action against manu-  
8       facturers, distributors, dealers, and importers of  
9       firearms or ammunition products for the harm  
10      caused by the criminal or unlawful misuse of firearm  
11      products or ammunition products by others when  
12      the product functioned as designed and intended.

13              (2) To preserve a citizen's access to a supply of  
14      firearms and ammunition for all lawful purposes, in-  
15      cluding hunting, self-defense, collecting, and com-  
16      petitive or recreational shooting.

17              (3) To guarantee a citizen's rights, privileges,  
18      and immunities, as applied to the States, under the  
19      Fourteenth Amendment to the United States Con-  
20      stitution, pursuant to section 5 of that Amendment.

21              (4) To prevent the use of such lawsuits to im-  
22      pose unreasonable burdens on interstate and foreign  
23      commerce.

24              (5) To protect the right, under the First  
25      Amendment to the Constitution, of manufacturers,

1 distributors, dealers, and importers of firearms or  
2 ammunition products, and trade associations, to  
3 speak freely, to assemble peaceably, and to petition  
4 the Government for a redress of their grievances.

5 **SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL**  
6 **LIABILITY ACTIONS IN FEDERAL OR STATE**  
7 **COURT.**

8 (a) IN GENERAL.—A qualified civil liability action  
9 may not be brought in any Federal or State court.

10 (b) DISMISSAL OF PENDING ACTIONS.—A qualified  
11 civil liability action that is pending on the date of enact-  
12 ment of this Act shall be immediately dismissed by the  
13 court in which the action was brought.

14 **SEC. 4. DEFINITIONS.**

15 In this Act, the following definitions shall apply:

16 (1) ENGAGED IN THE BUSINESS.—The term  
17 “engaged in the business” has the meaning given  
18 that term in section 921(a)(21) of title 18, United  
19 States Code, and, as applied to a seller of ammuni-  
20 tion, means a person who devotes, time, attention,  
21 and labor to the sale of ammunition as a regular  
22 course of trade or business with the principal objec-  
23 tive of livelihood and profit through the sale or dis-  
24 tribution of ammunition.

1           (2) MANUFACTURER.—The term “manufac-  
2           turer” means, with respect to a qualified product, a  
3           person who is engaged in the business of manufac-  
4           turing the product in interstate or foreign commerce  
5           and who is licensed to engage in business as such a  
6           manufacturer under chapter 44 of title 18, United  
7           States Code.

8           (3) PERSON.—The term “person” means any  
9           individual, corporation, company, association, firm,  
10          partnership, society, joint stock company, or any  
11          other entity, including any governmental entity.

12          (4) QUALIFIED PRODUCT.—The term “qualified  
13          product” means a firearm (as defined in subpara-  
14          graph (A) or (B) of section 921(a)(3) of title 18,  
15          United States Code), including any antique firearm  
16          (as defined in section 921(a)(16) of such title), or  
17          ammunition (as defined in section 921(a)(17)(A) of  
18          such title), or a component part of a firearm or am-  
19          munition, that has been shipped or transported in  
20          interstate or foreign commerce.

21          (5) QUALIFIED CIVIL LIABILITY ACTION.—

22                (A) IN GENERAL.—The term “qualified  
23                civil liability action” means a civil action  
24                brought by any person against a manufacturer  
25                or seller of a qualified product, or a trade asso-

1           ciation, for damages resulting from the criminal  
2           or unlawful misuse of a qualified product by the  
3           person or a third party, but shall not include—

4                   (i) an action brought against a trans-  
5                   feror convicted under section 924(h) of  
6                   title 18, United States Code, or a com-  
7                   parable or identical State felony law, by a  
8                   party directly harmed by the conduct of  
9                   which the transferee is so convicted;

10                   (ii) an action brought against a seller  
11                   for negligent entrustment or negligence per  
12                   se;

13                   (iii) an action in which a manufac-  
14                   turer or seller of a qualified product vio-  
15                   lated a State or Federal statute applicable  
16                   to the sale or marketing of the product,  
17                   and the violation was a proximate cause of  
18                   the harm for which relief is sought, includ-  
19                   ing—

20                           (I) any case in which the manu-  
21                           facturer or seller knowingly made any  
22                           false entry in, or failed to make ap-  
23                           propriate entry in, any record re-  
24                           quired to be kept under Federal or  
25                           State law;

1 (II) any case in which the manu-  
2 facturer or seller aided, abetted, or  
3 conspired with any person in making  
4 any false or fictitious oral or written  
5 statement with respect to any fact  
6 material to the lawfulness of the sale  
7 or other disposition of a qualified  
8 product; or

9 (III) any case in which the man-  
10 ufacturer or seller aided, abetted, or  
11 conspired with any other person to  
12 sell or otherwise dispose of a qualified  
13 product, knowing, or having reason-  
14 able cause to believe, that the actual  
15 buyer of the qualified product was  
16 prohibited from possessing or receiv-  
17 ing a firearm or ammunition under  
18 subsection (g) or (n) of section 922 of  
19 title 18, United States Code;

20 (iv) an action for breach of contract  
21 or warranty in connection with the pur-  
22 chase of the product; or

23 (v) an action for physical injuries or  
24 property damage resulting directly from a  
25 defect in design or manufacture of the

1 product, when used as intended or in a  
2 manner that is reasonably foreseeable.

3 (B) NEGLIGENT ENTRUSTMENT.—As used  
4 in subparagraph (A)(ii), the term “negligent en-  
5 trustment” means the supplying of a qualified  
6 product by a seller for use by another person  
7 when the seller knows, or should know, the per-  
8 son to whom the product is supplied is likely to,  
9 and does, use the product in a manner involving  
10 unreasonable risk of physical injury to the per-  
11 son or others.

12 (C) REASONABLY FORESEEABLE.—As used  
13 in subparagraph (A)(v), the term “reasonably  
14 foreseeable” does not include any criminal or  
15 unlawful misuse of a qualified product, other  
16 than possessory offenses.

17 (D) RULE OF CONSTRUCTION.—The excep-  
18 tions described in subparagraph (A) shall be  
19 construed so as not to be in conflict and no pro-  
20 vision of this Act shall be construed to create  
21 a Federal private cause of action or remedy.

22 (6) SELLER.—The term “seller” means, with  
23 respect to a qualified product—

24 (A) an importer (as defined in section  
25 921(a)(9) of title 18, United States Code) who

1 is engaged in the business as such an importer  
2 in interstate or foreign commerce and who is li-  
3 censed to engage in business as such an im-  
4 porter under chapter 44 of title 18, United  
5 States Code;

6 (B) a dealer (as defined in section  
7 921(a)(11) of title 18, United States Code) who  
8 is engaged in the business as such a dealer in  
9 interstate or foreign commerce and who is li-  
10 censed to engage in business as such a dealer  
11 under chapter 44 of title 18, United States  
12 Code; or

13 (C) a person engaged in the business of  
14 selling ammunition (as defined in section  
15 921(a)(17) of title 18, United States Code) in  
16 interstate or foreign commerce at the wholesale  
17 or retail level, who is in compliance with all ap-  
18 plicable Federal, State, and local laws.

19 (7) STATE.—The term “State” includes each of  
20 the several States of the United States, the District  
21 of Columbia, the Commonwealth of Puerto Rico, the  
22 Virgin Islands, Guam, American Samoa, and the  
23 Commonwealth of the Northern Mariana Islands,  
24 and any other territory or possession of the United

1 States, and any political subdivision of any such  
2 place.

3 (8) TRADE ASSOCIATION.—The term “trade as-  
4 sociation” means any association or business organi-  
5 zation (whether or not incorporated under Federal  
6 or State law)—

7 (A) that is not operated for profit;

8 (B) of which 2 or more members are man-  
9 ufacturers or sellers of a qualified product; and

10 (C) that is involved in promoting the busi-  
11 ness interests of its members, including orga-  
12 nizing, advising, or representing its members  
13 with respect to their business, legislative or  
14 legal activities in relation to the manufacture,  
15 importation, or sale of a qualified product.

16 (9) UNLAWFUL MISUSE.—The term “unlawful  
17 misuse” means conduct that violates a statute, ordi-  
18 nance, or regulation as it relates to the use of a  
19 qualified product.

Calendar No. 363

108TH CONGRESS  
1ST SESSION

**S. 1805**

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**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.

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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.

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

Protection of  
Lawful  
Commerce in  
Arms Act.  
15 USC 7901  
note.

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.

(a) SHORT TITLE.—This section may be cited as the “Child Safety Lock Act of 2005”.

(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

Child Safety  
Lock Act of 2005.  
18 USC 921 note.

18 USC 922 note.

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.

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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**



Warning  
As of: June 1, 2021 3:03 PM Z

**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

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**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

# **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]

Air  
Transportation  
Safety and  
System  
Stabilization Act.  
49 USC 40101  
note.

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,*

**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.

(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.

Appropriation  
authorization.

(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 SUB-  
CONTRACTORS 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; TREAT-  
MENT 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

### SEC. 401. SHORT TITLE.

This title may be cited as the “September 11th Victim Compensation Fund of 2001”.

### SEC. 402. DEFINITIONS.

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.

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.

(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;

September 11th  
Victim  
Compensation  
Fund of 2001.  
Terrorism.  
49 USC 40101  
note.

49 USC 40101  
note.

49 USC 40101  
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49 USC 40101  
note.

(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.

(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.

Electronic  
document.

(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.  
Deadline.

#### **SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.**

(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.  
Deadline.

#### **SEC. 407. REGULATIONS.**

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.

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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       )  
                                  ) SS:  
COUNTY OF LAKE       )

LAKE SUPERIOR COURT  
CIVIL DIVISION, ROOM FIVE  
HAMMOND, INDIANA

CITY OF GARY, INDIANA, by its Mayor,   )  
SCOTT L. KING,                               )  
                                  Plaintiff,       )  
vs.    )  
SMITH & WESSON CORP., et al.,           )  
                                  Defendants.    )

CAUSE NO. 45D05-0005-CT-00243

Filed in Open Court

OCT 23 2006

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**ORDER OF OCTOBER 23, 2006**

*Thomas R. Phelps*  
CLERK LAKE SUPERIOR COURT

**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 safeguarded 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 judiciary's 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.



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ROBERT A. PETE, JUDGE

# **EXHIBIT 14**

1 STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY  
2 BRANCH 32

3  
4 JOSE LOPEZ III and ALEJANDRO ARCE,  
5 Plaintiffs,

6 v. Case No. 10-CV-18530

7 BADGER GUNS, INC., BADGER OUTDOORS, INC.,  
8 ADAM ALLAN, WALTER ALLAN, MILTON BEATOVIC,  
9 and WEST BEND MUTUAL INSURANCE COMPANY,  
10 Defendants.

11 MOTION HEARING PROCEEDINGS

12 March 24, 2014 Honorable Michael D. Guolee  
13 Circuit Court Judge Presiding

14 A P P E A R A N C E S:

15 CANNON & DUNPHY, S.C. by Attorney Patrick Dunphy  
16 and Attorney Brett Eckstein, 595 North Barker Road,  
17 Brookfield, Wisconsin 53008, appear on behalf of the  
18 Plaintiffs.

19 Attorney Jonathan Lowy, Esq., Brady Center to  
20 Prevent Gun Violence Legal Action Project, 1225 Eye Street,  
21 N.W. Ste. 1100, Washington, D.C. 20005, appears as  
22 co-counsel for the Plaintiffs, pro hac vice.

23 VON BRIESEN & ROPER, S.C. by Attorney Philip Reid,  
24 411 East Wisconsin Avenue, Ste. 700, Milwaukee, Wisconsin  
25 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

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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

1 materials?

2 MR. VOGTS: Well, you know --

3 THE COURT: Use your microphone, please.

4 You are very far away. My reporter has to hear you.

5 Thank you.

6 MR. VOGTS: Well, as your Honor knows,  
7 based on the briefs, the issues before the Court are  
8 issues primarily of statutory construction and  
9 statutory interpretation which are questions of law for  
10 the Court's determination. Those questions involve the  
11 Protection of Lawful Commerce in Arms Act, which I am  
12 sure you have read and studied. That statute was  
13 passed by Congress in 2005 to protect firearms  
14 manufacturers and sellers against claims for damages  
15 like claims in this case arising from criminal or  
16 unlawful misuse of firearms. The operative provision  
17 of the PLCAA is section 7902, which very plainly states  
18 all qualified civil liability action may not be brought  
19 in any federal or state court. The statute then goes  
20 on to define what a civil, qualified civil liability  
21 action is, and that is an action like this case -- a  
22 case for personal injury damages arising from a third  
23 party's criminal or unlawful use, misuse of a firearm.

24 There is really no dispute up to this  
25 point on those facts. Where the dispute lies is how to

1 interpret the six exceptions that Congress created to a  
2 qualified civil liability action. Those six exceptions  
3 are -- in those six exceptions, Congress first  
4 specifically described certain claims by label; for  
5 example, breach of contract, breach of warranty,  
6 negligent entrustment, negligence per se, then  
7 described a couple of them with greater language,  
8 understood by label. One of those was marketed a  
9 strict liability claim for design or manufacturing  
10 defect. Another requires a knowing violation of a law  
11 applicable to the sale or marketing firearms provided  
12 that violation is a proximate cause of the harm. So in  
13 creating the general rule that firearm sellers are  
14 immune from suit, with the exception of those six type  
15 of claims that they define, that's really where we are  
16 right here. And where, where the parties fundamentally  
17 differ is whether stating a claim under one of the six  
18 exceptions, specifically the third exception, which  
19 some courts have called predicate exception, opens the  
20 door to any and all claims against the firearm seller.

21           Whether Congress just intended, you know,  
22 each of these six exceptions identify specific claims  
23 that you may bring within the contours of how they  
24 describe those claims, or how the common law may  
25 describe those claims. One of the claims the

1 plaintiffs bring in this case is an ordinary negligence  
2 claim. And it doesn't take much effort to look through  
3 the six exceptions and see that there is no exception  
4 for an ordinary negligence claim. And, in fact, two  
5 federal appellate courts sitting in the 9th Circuit, DC  
6 Circuit upheld that there is no exception for an  
7 ordinary negligence claim.

8 State Supreme Court in Alaska also held  
9 that Congress did not create an exception for ordinary  
10 negligence, so what Congress did was create exceptions  
11 for various of ordinary negligence, specifically  
12 negligence per se and negligent entrustment. That's  
13 how they tried to treat negligence claims. But they did  
14 not open the door to ordinary negligence claims. And  
15 as your Honor knows, when interpreting a statute, you  
16 are to first look at the plain ordinary meaning of the  
17 words. You are to look at the purpose of the statute,  
18 structure and the context. With those guideposts in  
19 mind, you simply can't find room in this statutory  
20 provision for ordinary negligence.

21 Plaintiffs, however, as I have already  
22 alluded, believe that provided they can state a claim  
23 that the defendants knowingly violated a firearms  
24 statute, they are now free to plead negligence claim.  
25 Quite frankly any claim whatsoever. I think that's a

1 fundamentally incorrect way to interpret the statute,  
2 and no published decision has even addressed that  
3 argument, much less accepted that argument. So the  
4 ordinary negligence claim against Badger Guns and Adam  
5 Allan should be dismissed because there is simply not  
6 an exception for that kind of claim.

7 Another claim the plaintiffs make is a  
8 public nuisance claim. The public nuisance claim like  
9 ordinary negligence is not found in the six  
10 exceptions. The plain language doesn't allow for  
11 public nuisance. The plaintiffs argue again that,  
12 well, they can plea a knowing violation of federal  
13 firearm statutes, so the doors are blown off, and they  
14 can allege public nuisance. Again there is no published  
15 decision allowing for that interpretation of this  
16 statute. And any attempt to shoehorn a statutory  
17 public nuisance claim into the third exception, knowing  
18 violation of a statute applicable to the sale,  
19 marketing of a firearm should also fail, because the  
20 Wisconsin Nuisance Statute is not on its face  
21 applicable to the sale and marketing of firearms. In  
22 fact, there is no language in that statute whatsoever  
23 that could be construed to be applicable to sale or  
24 marketing of firearms. So those two claims clearly  
25 should be dismissed. There is simply no place for them

1 under this statute.

2 With regard to plaintiff's negligence per  
3 se claim, plaintiffs allege that defendants violated  
4 numerous federal firearms laws, all found in under the  
5 Gun Control Act, 18 U.S.C. 922, 923, 924. But the law  
6 in Wisconsin is that there is no civil liability under  
7 those criminal statutes. The Olson v. Ratzel case  
8 speaks to that directly.

9 THE COURT: Spell that, please. Go ahead.

10 MR. REID: Olson v. Ratzel speaks to that  
11 directly. In Wisconsin, in order to find a civil cause  
12 of action under criminal statute, three requirements  
13 have to be met. One, the harm inflicted has to be the  
14 type of harm that the statute was intended to protect  
15 against. The injured person has to be within the class  
16 of persons that the statute was intended to protect.  
17 Most importantly, there has to be very clear expression  
18 of legislative intent in the statute to create a civil  
19 cause of action.

20 THE COURT: Counsel, much of this has been  
21 in your briefs and so on. I'd really like you to  
22 highlight anything different you want to bring out. I  
23 do read these materials. So just to recite it again  
24 into the record takes up the reporter's time, the  
25 Court's time, and so on. Is there anything specific

1       above and beyond your briefing that you'd like the  
2       Court to note?

3                   MR. VOGTS:  As you know, the parties  
4       briefed these issues exhaustively.  I don't believe  
5       there is anything that I haven't touched on already in  
6       our briefs.  I certainly would be willing to answer any  
7       questions you have regarding the defendant's position  
8       on any of these issues.

9                   THE COURT:  Let me ask you.  Were you the  
10      attorney before Judge Conen also?

11                  MR. VOGTS:  Yes, sir.

12                  THE COURT:  What's the status of that  
13      case?

14                  MR. VOGTS:  Well, the status of that case,  
15      we have a trial date on September 2nd.

16                  THE COURT:  So it's been scheduled.

17                  MR. VOGTS:  It's been scheduled.  Yes,  
18      sir.

19                  THE COURT:  Thank you.  Anything else?

20                  MR. VOGTS:  No, sir.

21                  THE COURT:  All right, Mr. Reid.

22                  MR. REID:  Judge, Phil Reid for West  
23      Bend.  I just want to put on the record we join in  
24      Mr. Vogts' arguments.  If the Court will indulge me for  
25      one minute, I have a little bit to add that's not in

1 the briefs.

2 As Mr. Vogts correctly pointed out, the  
3 defense in this case does not believe that the  
4 negligence action is permitted. The plaintiffs cite  
5 three cases for the proposition it is. I read those  
6 cases in the last week because we are briefing a  
7 similar issue right now in front of Judge Conen. None  
8 of those cases support the proposition of plaintiff's,  
9 say it supports. One is called the City of Gary ex  
10 rel. King. That's a 2003 Indiana case. The fact is  
11 that was decided two years before the PLCAA even  
12 existed, so it simply did not address the issue whether  
13 post that act a negligence claim is permitted.

14 A second case they cite is City of New  
15 York v. A-1 Jewelry & Pawn Inc. I don't know, I don't  
16 want the Court to take my words for it, so I will read  
17 from that decision. One of the headnotes says, "The  
18 city was entitled to leave to amend the Complaint  
19 against the firearms retailer where amended Complaint  
20 was identical to the original Complaint, except that  
21 the three negligence claims had been deleted." So the  
22 negligence was not even in that case any longer.

23 The third case they cite to that  
24 proposition is one called Williams v. Beemiller. The  
25 important point for the Court's purposes in deciding

1       our motion is the fact that that case was decided at  
2       the Motion to Dismiss stage. And again, for reading  
3       from the case, the Court there said, the defendant's  
4       remedy was to serve a demand for a Bill of Particulars  
5       under New York law, not to move for dismissal of the  
6       Complaint. That was decided on procedural grounds. It  
7       didn't touch on this question at all. So for those  
8       specific reasons, plus all those reasons Mr. Vogts put  
9       in his brief, we join in his motion.

10               THE COURT: Let me ask you. Are you  
11       familiar with Judge Cooper's decision in this case, in  
12       the Norberg case?

13               MR. REID: I am not. I have not read that  
14       recently. I was not at that hearing.

15               THE COURT: All right. Thank you. All  
16       right. Plaintiff.

17               MR. LOWY: Your Honor, Jon Lowy for the  
18       plaintiffs.

19               THE COURT: Pull the microphone close to  
20       you again, please. Thank you.

21               MR. LOWY: And I will try to be very  
22       brief. A number of courts across the country have  
23       considered issues very similar to this, actually have  
24       addressed the central argument of Badger Guns. That  
25       is, the argument of whether if a gun dealer engages in

1 unlawful commerce, whether they have special immunity  
2 under the Protection of Lawful Commerce in Arms Act.  
3 Every single court in the country that has considered  
4 this issue has considered, has held that the gun dealer  
5 engages in unlawful commerce. If they knowingly  
6 violate a gun law, they have absolutely no special  
7 protection from the law.

8 THE COURT: And in this case, what was the  
9 violation?

10 MR. LOWY: In this case, well first of  
11 all, there is no dispute for purposes of this motion  
12 that there was a violation. I am not asking for  
13 purposes of this motion they are. There were a number  
14 of violations. One was the sale of a firearm to a  
15 prohibited person, in this case a person who was an  
16 unlawful user of controlled substance, and Badger knew  
17 or had reasonable cause to believe that that person was  
18 a user of unlawful substances. Also essentially a  
19 straw purchase, that is the person Badger sold the gun  
20 to was someone who was not the intended buyer;  
21 therefore, Badger accepted false information in the  
22 documentation. And we cite the statutory provisions in  
23 our brief.

24 But as your Honor noted, or intimated in  
25 this very courthouse, these identical arguments have

1       been raised and rejected three times already before  
2       judge -- most notably by Judge Conen's decision.  
3       Norberg's case provides a perfect road map for this  
4       case. But also Judge Cooper in the Motion to Dismiss  
5       stage, and Judge Dugan in the Motion to Dismiss stage  
6       here. Even though this is not a Motion to Dismiss, it  
7       essentially actually is because of the way Badger has  
8       formed this Summary Judgment argument as Badger notes  
9       its totally legal arguments. So actually from their  
10      perspective, nothing has changed. They decided not to  
11      rely on the facts.

12                   THE COURT: But Judge Cooper did eliminate  
13      some of the claims, right?

14                   MR. LOWY: That's exactly correct. I  
15      would like to address those. But just briefly, because  
16      I think that the description of the case law is with  
17      all due respect was incorrect. City of Gary case,  
18      there was a decision after the Protection of Lawful  
19      Commerce in Arms Act. The Court of Appeals counsel  
20      cited to a different decision which is not the only one  
21      that we rely on. The Court of Appeals in Indiana held  
22      after the Protection of Lawful Commerce in Arms Act was  
23      enacted that the case could go forward because the  
24      court held that the defendant's violation of Indiana's  
25      public nuisance statute constituted a knowing violation

1 of applicable law which came under the predicate  
2 exception. And that decision was, the Supreme Court of  
3 Indiana denied review of that decision. And that  
4 appellate decision allowed negligence claims to go  
5 forward as well. They weren't discussed in the opinion  
6 except to say they remained in the case. So negligence  
7 cases were allowed.

8 The Williams case, that was a Motion to  
9 Dismiss. The Williams case, as Judge Conen noted, is  
10 the most similar to this. There is another appellate  
11 court in New York, New York Appellate Division, 4th  
12 Department. In there, the Court held that where there  
13 was an allegation of a known violation of law, there is  
14 therefore no special immunity for gun dealers. That  
15 shouldn't be so controversial. That isn't saying that  
16 gun dealers are necessarily liable. It is just that if  
17 they knowingly violate the law, they are treated like  
18 every other litigant, and they don't get a get-out-of-  
19 court free card, which PLCAA, the Protection of Lawful  
20 Commerce in Arms Act gives them.

21 THE COURT: Say that again, please?

22 MR. LOWY: The Protection of Lawful  
23 Commerce in Arms Act. In the Shirley v. Glass case,  
24 which was decided both by the Kansas Court of Appeals  
25 and the Supreme Court of Kansas, the court did not

1 discuss the Protection of Lawful Commerce in Arms Act  
2 specifically; however, it was a post-Protection of  
3 Lawful Commerce in Arms Act case, and the court allowed  
4 negligence claims to go forward. So we have at least  
5 six decisions going the way of saying you get no  
6 special immunity, and zero. The entire country zero  
7 cases holding that if you knowingly violate gun laws,  
8 you still get special immunity of some form. Every  
9 single case that Badger relies on, as Judge Conen  
10 points out in his decision, every single one of those  
11 cases do not involve a knowing violation of gun laws.  
12 So the most those cases say is that if a gun company  
13 does not violate the law, then they get immunity from  
14 basic negligence claims. None of them say that if you  
15 do violate the law, you get protection from special  
16 negligence claims.

17 THE COURT: Let me ask you. Are you still  
18 attacking the constitutionality of this law?

19 MR. LOWY: Well we are, but, your Honor,  
20 that's an argument that would not be addressed unless  
21 you decide in Badger's favor.

22 THE COURT: It's an alternative argument.

23 MR. LOWY: It is an alternative. In fact,  
24 the doctrine of constitutional avoidance, if you can  
25 avoid that constitutional ruling, you should. The only

1 way you would do that is to deny the Motion for Summary  
2 Judgment.

3 THE COURT: Thank you.

4 MR. LOWY: So because there is known  
5 violation of law, there is no special protection for  
6 the negligence claim, and for the public nuisance  
7 claim. And we also come under the negligence per se,  
8 negligent entrustment exceptions, and those are dealt  
9 with at length in the briefs and also in Judge Conen's  
10 decision.

11 Now to address the two points that were,  
12 the two cause of actions that were dismissed by --

13 THE COURT: Judge Cooper.

14 MR. LOWY: Judge Cooper, yeah. With all  
15 due respect, I think those were incorrect. And, in  
16 fact, in the transcript of that hearing, there is not  
17 really a clear reasoning set forth as to why those two  
18 causes of action were dismissed.

19 Negligence per se, Badger relies almost  
20 entirely on this Olson case. And that case is  
21 distinguishable for a number of reasons. One, what  
22 Olson deals with is a plaintiff who in the court's  
23 words were seeking to impose a duty beyond that imposed  
24 by the common law. That is not the case here in our  
25 negligence per se count.

1                   THE COURT:  Doesn't it imply a private  
2     right of action?  Doesn't the statute, the federal  
3     statute want to do away with that type of thing in  
4     general?

5                   MR. LOWY:  Your Honor, I think there is  
6     in, that is, I think another point because there is a  
7     distinction between negligence per se and private  
8     rights of action.  The Olson case is much more similar  
9     to a private right of action.  We are not claiming a  
10    private right of action.  Private right of action would  
11    be if we were saying we don't have a negligence claim;  
12    however, we are, our cause of action derives from  
13    simply from this violation of the statute.  That would  
14    be a right of implied right of action.  What we are  
15    seeking is negligence per se, which is a negligence  
16    cause of action.

17                  THE COURT:  Excuse me.  Did Judge Conen  
18    address that, that issue once Cooper, Judge Cooper put  
19    it out there?

20                  MR. LOWY:  We did not, we did not appeal  
21    or seek reconsideration of that decision.  Essentially  
22    we won on most counts, and we decided rather than delay  
23    the case, we would live with it, even though we didn't  
24    agree with it.  And so, I think Olson, another reason  
25    that Olson is distinguishable is the court in Olson

1       noted that that case involved an accidental shooting by  
2       a minor. And the court basically looked at the  
3       purposes of the Gun Control Act and said that really  
4       wasn't what the Gun Control Act was about. That wasn't  
5       the intended purpose of the act. The intended purpose  
6       was, I am paraphrasing, to prevent criminals from  
7       getting guns. And that is, that wasn't that case.  
8       That is this case. This, the evidence is that this was  
9       a buyer for the Latin Kings, the notorious Latin Kings  
10      street gang who was buying guns from Badger, actually  
11      putting back into what is essentially a lending library  
12      for guns in that, in a gang house. That's actually  
13      what the shooter says that's how he got the guns from  
14      this. I am using the term "lending library." That's  
15      the way he describes it. So that goes at the heart  
16      what that criminal act is all about.

17                   Finally, and this is a key point, if the  
18      Court looks at the intent of the Olson case was I  
19      believe 1979 I think.

20                   THE COURT: Yes, it was.

21                   MR. LOWY: The length of intent to allow  
22      negligence per se actions is now crystal clear. In  
23      fact, undeniable because of PLCAA itself. PLCAA does  
24      not create cause of action. I am not suggesting that  
25      it does. However, PLCAA creates, it says there is an

1 express exception for negligence per se actions, and it  
2 also in other exceptions specifies cause of action  
3 available for other violations of the Gun Control Act.  
4 Well clearly Congress is perfectly fine with causes of  
5 action for negligence per se and for other violations  
6 of the Gun Control Act. Congress could not be saying,  
7 PLCAA, we allow for, we specifically allow the  
8 negligence per se actions and other actions based on  
9 violations of gun laws, except that we don't intend for  
10 there to be cause of action, those exact causes of  
11 action.

12 THE COURT: Move on to some other issue if  
13 you want to. Keep it as short as you can.

14 MR. LOWY: Okay. Well, your Honor, I, I  
15 think that addresses the negligence per se claim. I  
16 would note that the Williams' decision, which is a New  
17 York appellate decision, allowed the negligence per se  
18 claim to go forward. In Shirley, the Kansas Supreme  
19 Court, this is another straw purchase case against gun  
20 dealer. Very similar. And that is more current, post-  
21 Protection of Lawful Commerce in Arms Act law. Thank  
22 you, your Honor.

23 THE COURT: Any reply, short reply?

24 MR. VOGTS: Yes, your Honor. Just  
25 briefly. I hope it doesn't get lost in the morass of

1       briefing that you read and the argument here, but  
2       Mr. Lowy did acknowledge that the PLCAA does not create  
3       causes of action through these exceptions. They are  
4       merely saying claims falling within these exceptions  
5       are not preempted by federal law. If you are within  
6       the exception, we then have to look to state law to see  
7       whether there is such a claim under state law. And the  
8       Olson case speaks for itself. There is no negligence  
9       per se claim under the Gun Control Act or under the  
10      Wisconsin Firearms Statutes that were at issue in this  
11      case under the same statutes essentially that the  
12      plaintiffs raise here.

13                   There is no question that under the third  
14      exception, a knowing violation, knowing is important  
15      violation of a law applicable to the sale and marketing  
16      of firearms. It is not subject to preemption. Again,  
17      you have to look to the state law to see whether that  
18      claim can be pled. And the defendant's argument is  
19      that the statutes, the plaintiffs attempt to plead  
20      under that exception are not statute that you can plead  
21      in a civil court as a basis for damages.

22                   Lastly, your Honor, the point that we  
23      didn't brief, but I want to raise now because I know  
24      the plaintiffs make this argument. There are  
25      individuals in this case that were named defendants.

1 And the named defendants, not in any sort of  
2 shareholder capacity or vicarious capacity, but as  
3 direct defendants who are alleged to have negligently  
4 sold the gun to Jose Fernandez. The plaintiffs have  
5 argued both here and in Judge Conen's courtroom that  
6 those individuals are not entitled to protection under  
7 the PLCAA, that the statute only protects federal  
8 licensees, the gun store. Well, actually individuals  
9 who work at the gun stores have the same protections  
10 afforded to the licensee, a seller.

11 THE COURT: Isn't that the issue about  
12 piercing the corporate veil, getting after the actual  
13 people who did the, or really running this company?

14 MR. VOGTS: I think that's a separate  
15 issue. The plaintiffs do seek to pierce the corporate  
16 veil. They also seek to hold these individuals  
17 directly responsible in the first instance, not for the  
18 corporate act, but for their own act. The plaintiffs  
19 allege that, that those people are not protected under  
20 the PLCAA because they are not sellers. Only sellers  
21 have protection. But the statute defines a seller as a  
22 dealer. It refers the reader to the section of the Gun  
23 Control Act defining a dealer. A dealer is defined as  
24 any person who's engaged in the business of selling  
25 firearms at wholesale or retail for a livelihood and

1       for profit. So the people who are selling guns, the  
2       people who own gun stores are entitled to the same  
3       protection under the PLCAA as their employer, the  
4       licensee itself.

5                     THE COURT: Mr. Reid.

6                     MR. REID: Nothing further, your Honor.

7                     THE COURT: All right. It's interesting,  
8       the comment brought up, "the lending library." I have  
9       been around long enough that I remember when there were  
10      not a lot of guns here in Milwaukee available to street  
11      criminals, and I prosecuted people who would lend guns  
12      for robbers. They would bring them back when they were  
13      done. It was interesting. So we had kind of a lending  
14      situation, because this guy had guns and other people  
15      wanted to commit crimes didn't. Anyway, interesting  
16      sidelight. I guess there are enough guns around. You  
17      don't have to worry about that, or they are available.

18                    Well, it's interesting. I think the  
19      Court has to take cognizant of Judge Conen's decision.  
20      We must be mindful it's in the same district. We  
21      should try to have some continuity in this particular  
22      district. If, in fact, the matter is appealed at some  
23      point, there should be some continuity. I am not  
24      saying I wouldn't make my own decision, but I have read  
25      his decision. I have read the materials in the other

1 case and the arguments, the briefing and so on. I  
2 think I am in position to, in fact, stay pretty much in  
3 accord with Judge Conen on many of the issues. So I  
4 ask the plaintiff to draft an order consistent with  
5 this Court's decision. And I am telling you, I don't  
6 want a long decision trying to say what I said. You  
7 might say something like the motion is denied. On  
8 these parts of the motion are denied based on the  
9 statements made by the Court in his oral decision,  
10 which is there, will be there. My reporter I am sure  
11 at some point will type it up.

12 Now there are a lot of parallels in this  
13 case with the facts of the other case. Apparently two  
14 officers were shot in that case also. Two officers  
15 were shot here. So we have two police officers who  
16 were shot, Jose Lopez III, and Alejandro Arce, I guess  
17 it is A-r-c-e, were police officers, were shot by  
18 Victor, last name V-e-l-o-z with a gun purchased by  
19 Jose Fernandez. And they seek to hold Badger Guns and  
20 others legally liable for the shooting under various  
21 series. They claim that Badger Guns sale of the  
22 firearm to Fernandez was the cause of their injuries.  
23 And they allege various grounds and various claims;  
24 negligence, negligent entrustment, et cetera, and we  
25 will deal with each one of those.

1                   The defendant seeks Summary Judgment on  
2     all these claims and these cases are so similar in many  
3     ways to the facts in the Norberg v. Badger Guns, the  
4     case decided by Judge Conen. And it is interesting.  
5     He had an opportunity to decide it before I decided it,  
6     so I can in fact look at his reasoning and in many ways  
7     parallel it.

8                   Apparently the public nuisance and  
9     negligence per se claim were dismissed on the  
10    pleadings, and they were not part of that argument and  
11    apparently were not, that issue was not appealed as  
12    Mr. Lowy has indicated. And I believe Judge Cooper was  
13    the one who did that.

14                  This case is not about the individual's  
15    right to keep or bear arms. It is about a gun  
16    retailer's obligation to follow federal and state law  
17    applicable to sales and marketing of firearms. At  
18    issue is the scope of the Protection of Lawful Commerce  
19    in Arms Act. Later we will talk about PLCAA, which was  
20    enacted by Congress to protect federally licensed  
21    manufacturers and sellers from civil liability asserted  
22    by victims of crime and so on. And it's very clear why  
23    that was done, and it is the law that is dealt with.  
24    And I will indicate that I am not going to get involved  
25    in the constitutionality except to say as far as I can

1       see, it is in fact constitutional. That would be the  
2       Court's ruling if in fact we went beyond. I really  
3       don't have to make that ruling at this point.

4                       Now this act, the real question is in  
5       this case is undisputed that the matter falls within  
6       the PLCAA's general definition of qualified civil  
7       liability actions. At issue is whether one or more of  
8       the statutory exceptions apply. And relevant to this  
9       case, the PLCAA, does not preclude claims for negligent  
10      entrustment or negligence per se, nor does the PLCAA  
11      preclude an action in which a manufacturer or seller of  
12      qualified products knowingly violates state or federal  
13      statute. So that's really the important issue here.

14                      It has been talked about as a predicate  
15      exception, which is a very interesting way of stating  
16      it, but I think it is. We look for that predicate in  
17      the facts here when we are deciding whether to grant  
18      Summary Judgment and grant the defendant's immunity.  
19      You see, immunity is a very strong bar for a plaintiff  
20      if it in fact has no exceptions, or no discretion left  
21      to parties reviewing the record to give someone, as  
22      someone said, "a free pass." No matter what they do,  
23      it would be improper. I don't think any act should in  
24      fact, could in fact allow that. And if it did, I would  
25      find it unconstitutional. Because I don't think that

1 is proper to bar people from coming to court because  
2 something has been lobbied by some groups to persuade  
3 Congress to do something. So that's a little editorial  
4 comment, but. So the question is do they, the  
5 plaintiffs fall, their claim fall within the safe  
6 harbor of the PLCAA. So let's go on.

7                   The Gun Control Act makes it unlawful for  
8 dealers to transfer firearms based upon information in  
9 that act and knowingly that they know is as reason to  
10 believe is false. The act also makes it unlawful for  
11 dealers to sell or transfer firearms if they know the  
12 purchaser is an unlawful user of controlled  
13 substances. In this case, the plaintiff has provided  
14 evidence that Fernandez was a dealer of illegal drugs.  
15 A jury could reasonably find Fernandez was under the  
16 influence of illegal drugs each time he went to Badger  
17 Guns. His drug use was evident from his behavior,  
18 appearance and smell. Therefore, there is reasonable  
19 inference could be made that the defendants knew that  
20 Fernandez was an illegal drug user, and that he lied  
21 when he filled out the Form 4473. In other words, a  
22 reasonable inference could be made that the defendant  
23 knowingly violated the Gun Control Act when he sold,  
24 when they sold him firearms. So the plaintiff's claim  
25 for negligent entrustment meets the definition of

1 negligent entrustment under PLCAA.

2 Defendants argue that the negligent  
3 entrustment claim does not meet that definition, but  
4 the Court will find it does. Judge Conen considered  
5 and rejected this argument. Judge Conen concluded that  
6 the use of the word "use" is broader than "discharge,"  
7 especially since Congress used the word "discharge" in  
8 a different subsection. I am persuaded by Judge  
9 Conen's conclusion, and I agree with it. I think it's  
10 well reasoned. Accordingly, Summary Judgment will be  
11 denied on the negligent entrustment claim.

12 Then we look at the negligence per se. I  
13 have already dealt with that. Judge Conen dismissed  
14 that. The Court's not going to consider that in this  
15 particular case. Again, it's a judge in the same  
16 district. So negligence per se will not be considered  
17 by this Court, and if I were requested a Motion to  
18 Dismiss, I would in fact do so.

19 Now Summary Judgment will also be denied  
20 in the civil conspiracy claim. Judge Conen again found  
21 material issues of fact, and I think in this particular  
22 case, we can do so to state a claim for civil  
23 conspiracy the Complaint must allege certain things,  
24 and we have talked about that, or you have argued those  
25 things. And I think 79 Wis. 2d 241 allows for that

1 particular type of claim under, if there are  
2 violations, or it is shown that these, number one, that  
3 the formation, operation of a conspiracy, the wrongful  
4 act or acts done pursuant thereto, and the damages  
5 resulted from such act.

6 Now it is interesting when we look at what  
7 happened here, you know, I don't know how this is going  
8 to sell to a jury, but it is very damning I think. And  
9 the defendants argue that it can't be a basis for civil  
10 conspiracy. And there is no evidence of conspiracy to  
11 sell. Judge Conen considered that and rejected similar  
12 arguments, found material issues of fact. Whether the  
13 defendant formed or operated a conspiracy to maintain  
14 the unlawful sales practice at Badger Guns after ATF  
15 threatened to revoke their license; whether the lawful  
16 sale was a civil wrong; and three, whether the  
17 plaintiff's injury was a foreseeable result. I am  
18 persuaded by his reasoning. And accordingly, Summary  
19 Judgment shall be denied under the civil conspiracy  
20 claim.

21 You know, we will get into more of this  
22 piercing the corporate veil, but it is an interesting  
23 phenomena what happened here with the transfer of this  
24 property, or this licensing and so on. It smacks of  
25 really maybe even underhand activity.

1                   So did they aid and abet? In light of  
2     Judge Conen's ruling on similar facts, Summary Judgment  
3     will be denied on that also. They transferred Badger  
4     Outdoors Inventory to Adam Allan for no money down;  
5     facilitating the operation of Badger Guns; three,  
6     continuing Badger Guns with the same employees and  
7     utilizing the same unlawful sales practices. It is  
8     interesting that there was this, as I indicated  
9     earlier, potential conspiracy or aiding and abetting.  
10    Let's just keep doing what we were doing before. We  
11    will just change the owner, the name.

12                  And that dovetails right into the  
13    piercing the corporate veil. Judge Conen ruled under  
14    similar facts. It may be unclear at this stage of the  
15    proceedings whether fraud was committed in order to  
16    sell guns illegally. In this case, the plaintiff  
17    submitted evidence that Allan Adam or Adam Allan had  
18    complete domination over Badger Guns as the sole  
19    shareholder. And it's interesting. So we will in fact  
20    allow the issue of piercing the corporate veil, and  
21    it'll be interesting jury instructions and verdicts on  
22    that. But I can tell you right now some other judge  
23    will have to worry about that I think because I am  
24    leaving here July 31st, retiring after 38 years. And  
25    Judge DiMotto will be the judge who will probably take

1 up this issue, or this trial and how it's going to be  
2 tried.

3 In light of Judge Conen's ruling, Summary  
4 Judgment is denied with respect to plaintiff's claim  
5 against Allan Adam, or Adam Allan individually. And he  
6 declined to dismiss the plaintiff's claim against him  
7 as an individual. And the Court will rule the same.  
8 Thus, the defendant's Motion for Summary Judgment is  
9 granted in part on the negligence per se claim, and it  
10 is not granted, or it is granted, I'm sorry, and denied  
11 in part under all the other claims I have indicated.  
12 So I guess the next thing should be is that you should  
13 get together with my clerk and find a date that's  
14 convenient for all of you. I will schedule this case,  
15 get you moving. But I can tell you, with my vacation  
16 time and things coming up, I am not going to be trying  
17 this case. I am sure you will do a lot of discovery  
18 anyway.

19 MR. VOGTS: Your Honor, if I may, your  
20 Honor, I don't believe you addressed the public  
21 nuisance claim that Judge Cooper dismissed.

22 THE COURT: I guess I didn't. Yeah.  
23 Well, it was dismissed by Judge Cooper. I will in fact  
24 do the same here. That hasn't really been argued that  
25 greatly here.

1                   Okay. All right, plaintiff is to draft an  
2                   order consistent with the Court's decision under the  
3                   five-day rule. And you sit with my clerk and your  
4                   calendars, find a good date for a -- that can fit my  
5                   calendar for scheduling. We will get you all together.  
6                   Those that are out of town may be able to appear by  
7                   phone, but I would like to have most of the main  
8                   parties here so we can fully discuss the time, timing  
9                   you need. Okay, so we will go off the record now and  
10                  get together with my clerk.

11                  MR. DUNPHY: Judge, we can stay off the  
12                  record for this.

13                  (Discussion held off the record).

14                  THE COURT: Let's do this. Set it for  
15                  pretrial with Judge DiMotto after the trial before  
16                  Judge Conen. Hopefully that trial will go on and won't  
17                  be adjourned.

18                  We are going to do a scheduling order  
19                  right now off the record.

20                  (Whereupon further proceedings were held  
21                  off the record and the proceedings concluded).

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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



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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF ORANGE

12 GHOST GUNNER FIREARMS CASES

13 Included actions:

14 30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost*  
15 *Gunner, Inc. dba GhostGunner.net, et al.*

16 CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner,*  
17 *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

**REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
POLYMER80, INC.'S DEMURRER  
(PLCAA)**

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

1 Please take notice that, under California Evidence Code Rules 452 and 453, and California  
2 Rules of Court, rules 3.1113(l) and 3.1306(c), Plaintiffs through their counsel of record  
3 respectfully request that this Court take judicial notice of the following documents in connection  
4 with Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Polymer80's  
5 ("Polymer80") Demurrer (PLCAA) in the coordinated Ghost Gunner Firearms cases:

6 1. ATF Rule 82-8, 27 C.F.R. § 179.11 (1982) – A true and correct copy is attached as

7 **Exhibit 1.**

8 2. ATF, *Definition of "Frame or Receiver" and Identification of Firearms*, 86 Fed. Reg.  
9 27720, 27726 (May 21, 2021) – a true and correct copy is attached as **Exhibit 2.**

10 3. 151 Cong. Rec. at S9061, S9099 (July 27, 2005) (statements of Sen. Craig) – a true and  
11 correct copy is attached as **Exhibit 3.**

12 4. The Protection of Lawful Commerce in Arms Act ("PLCAA"), S. 1805, 108<sup>th</sup> Cong. (1<sup>st</sup>  
13 Sess. 2003) – a true and correct copy is attached as **Exhibit 4.**

14 5. PLCAA, Pub. L. 109-92, 119 Stat. 2095 (2005) – a true and correct copy is attached as  
15 **Exhibit 5.**

16 6. Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 230  
17 (2001) – a true and correct copy is attached as **Exhibit 6.**

18 The Court must take the requested judicial notice if the moving party "(a) [g]ives each  
19 adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such  
20 adverse party to prepare to meet the request; and [,] (b) [f]urnishes the court with sufficient  
21 information to enable it to take judicial notice of the matter." Evid. Code, § 453.

22 Here, **Exhibit 1**, a true and correct copy of ATF Rule 82-8, as published in the Code of  
23 Federal Regulations in 1982, is judicially noticeable under Evidence Code section 452,  
24 subdivision (b). This subdivision permits courts to take judicial notice of "[r]egulations and  
25 legislative enactments issued by or under the authority of the United States or any public entity in  
26 the United States." This exhibit would also be noticeable under Evidence Code section 452,  
27 subdivision (c), which permits courts to take judicial notice of "[o]fficial acts of the legislative,  
28 executive, and judicial departments of the United States and of any state of the United States."

1 California courts routinely take judicial notice of rules and regulations published by federal  
2 agencies. *See, e.g., Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 374 (Cal. 2000) (taking notice  
3 of an EPA regulation as an “‘official act’ of the federal government within the meaning of”  
4 subdivision (c)); *W. States Petroleum Ass’n v. Dept. of Health Servs.*, 122 Cal. Rptr. 2d 117, 120  
5 n.1 (Cal. App. 2002) (granting request for judicial notice under subdivision (c) for certain  
6 materials, including a “notice of intent to initiate rulemaking” by a federal executive agency).

7 **Exhibit 2**, a true and correct copy of an ATF Proposed Rule titled *Definition of “Frame*  
8 *or Receiver” and Identification of Firearms*, as published in the Federal Register on May 21,  
9 2021, is also judicially noticeable under Evidence Code section 452, subdivision (c) as an  
10 “official act.” *See supra*. Judicial notice is appropriate for exhibits representing proposed  
11 changes to agency rules, and reasons for such changes. *See Johnson v. Am. Stand., Inc.*, 179 P.3d  
12 905, 909 n.4 (Cal. 2008) (taking judicial notice of “several regulations and regulatory  
13 interpretations” of a federal agency standard, including exhibits that detailed the problems the  
14 agency’s standard aimed to reduce); *As You Sow v. Conbraco Indus.*, 37 Cal. Rptr. 3d 399, 405  
15 nn.3, 4 (Cal. App. 2005) (granting request for judicial notice of a state agency’s notice of  
16 proposed rulemaking); *cf. Duskin v. S.F. Redevelopment Agency*, 107 Cal. Rptr. 667 (Cal. App.  
17 1973) (taking judicial notice of state agency’s regulations even though they were *not* published in  
18 the Federal Register). The publication of this proposed rule as clarifying current definitions under  
19 ATF regulations is what is relevant.

20 **Exhibit 3**, a true and correct copy of comments from PLCAA’s chief Senate sponsor  
21 Senator Craig, published in the Congressional Record, is judicially noticeable under Evidence  
22 Code section 452, subdivision (c) as an official legislative act. *See Stand. P. Corp. v. Super. Ct.*,  
23 98 Cal. Rptr. 3d 295, 299 (Cal. App. 2009) (taking judicial notice of legislative materials  
24 regarding the enactment of the law at issue to assist with analyzing the purpose of the law);  
25 *Syngenta Crop Prot., Inc. v. Helliker*, 42 Cal. Rptr. 3d 191 (Cal. App. 2006) (granting judicial  
26 notice of the analysis by the Senate Rules Committee on a bill that became the law at issue); *In re*  
27 *Devon C.*, 94 Cal. Rptr. 2d 513, 516 n.6 (Cal. App. 2000) (taking judicial notice of statements  
28 made by the relevant law’s bill sponsors regarding the purpose of the bill). Senator Craig’s

1 comments are relevant to demonstrating the legislative intent behind the law.

2        Additionally, **Exhibit 4**, a true and correct copy of a previous version of PLCAA, as  
3 introduced in the Senate on October 31, 2003, and **Exhibit 5**, a true and correct copy of the  
4 amended version of the same bill, which became law in 2005, are both judicially noticeable under  
5 Evidence Code section 452, subdivision (c) as “official acts” of Congress. *See Stand. P. Corp.*,  
6 98 Cal. Rptr. 3d at 299 (taking judicial notice of Senate bill that was then enacted into federal  
7 law); *Arya Grp., Inc. v. Cher*, 91 Cal. Rptr. 2d 815, 819 n.3 (Cal. App. 2000) (taking judicial  
8 notice of legislative materials for the purpose of determining legislative intent); *As You Sow*, 37  
9 Cal. Rptr. 3d at 405 nn.3, 4 (taking judicial notice, pursuant to subdivision (c), of a state agency’s  
10 initial statement of reasons for a rule change and the proposed amendments to the rule). What is  
11 relevant regarding these bills is the change in language between the two as it relates to PLCAA  
12 and the legislative intent of its passage.

13        Lastly, **Exhibit 6**, a true and correct copy of the Air Transportation Safety and System  
14 Stabilization Act, enacted in 2001, is judicially noticeable under Evidence Code section 451,  
15 subdivision (a), which requires judicial notice for any “decisional, constitutional, and public  
16 statutory law of this state and of the United States and the provisions of any charter described in  
17 Section 3, 4, or 5 of Article XI of the California Constitution.” *See also Freis v. Soboroff*, 97 Cal.  
18 Rptr. 2d 429, 430 (Cal. App. 2000) (noting that federal statutes are judicially noticeable under  
19 subdivision (a)). Of particular relevance is Title IV of the bill, titled “September 11<sup>th</sup> Victim  
20 Compensation Fund of 2001,” which serves as an example of Congress providing a “reasonably  
21 adequate alternative” remedy for certain tort claims.

22        For these reasons, the Court should grant Plaintiffs’ Request for Judicial Notice in Support  
23 of their Opposition to Polymer80’s Unique Demurrer on PLCAA Grounds.

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1 Dated: March 9, 2022

ORRICK HERRINGTON & SUTCLIFFE LLP  
AMY K. VAN ZANT  
RIC T. FUKUSHIMA  
SHAYAN SAID

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7 Attorneys for Plaintiffs  
8 Francisco Gudino Cardenas and  
9 Troy McFadyen, et al.  
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# **EXHIBIT 1**

## **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 disconnecter and a trip which prevent more than one shot being fired with a single function of the trigger.

The disconnecter 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 disconnecter 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 2**

## 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](http://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](http://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.<sup>1</sup> 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)

<sup>1</sup> 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.

(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).<sup>2</sup>

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.”<sup>3</sup> 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.<sup>4</sup> While the GCA does not

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> 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<sup>5</sup> (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.<sup>6</sup> 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.<sup>7</sup>

#### *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,<sup>8</sup> 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.<sup>9 10</sup>

*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).

<sup>7</sup> *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.”).

<sup>8</sup> *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.”).

<sup>9</sup> 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].”).

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.<sup>11</sup>

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

<sup>10</sup> 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.

<sup>11</sup> See footnote 9 *supra*.

“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.”).

<sup>5</sup> 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.”

<sup>6</sup> 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->

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.”<sup>12</sup> 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.<sup>13</sup> Those firearms would include numerous widely available models, such as Glock-type and Sig Sauer P320<sup>14</sup> 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.<sup>15</sup> 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).<sup>16</sup>

#### *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.<sup>17</sup> 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:<sup>18</sup>

<sup>16</sup> *See* footnote 2, *supra*.

<sup>17</sup> *See* Baltimore police report a 400% increase in untraceable ‘ghost guns’, The Baltimore Sun (Feb. 18, 2021), <http://www.baltimoresun.com/news/crime/baltimore-pr-md-ci-cr-ghost-gun-ban-20210218-ae2dortu6ngn5llmfmg6yxtx6m-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-philadelphia-ghost-guns-20200318-jzyt4thyvvgntproexbleyley-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/>.

<sup>18</sup> Source: ATF Office of Strategic Intelligence and Information. These numbers (as of March 4, 2021)

<sup>12</sup> 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).

<sup>13</sup> *See* footnote 8, *supra*.

<sup>14</sup> 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).

<sup>15</sup> *See* *Design of AR–15 could derail charges tied to popular rifle*, APnews.com (Jan. 13, 2020), <https://apnews.com/article/396bbdbf4963a28bda99e7793ee6366>.

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.<sup>19</sup>

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.

<sup>19</sup> 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,

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

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-guilty-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-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-of-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>.

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).<sup>20</sup> Criminal investigations and studies highlight this concern.<sup>21</sup>

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

<sup>20</sup> 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.

<sup>21</sup> CBP: 3-D-printed full-auto rifle seized at Lukeville crossing, [tucsonsentinel.com](https://www.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](https://www.independent.co.uk/news/world/europe/3d-gun-print-germany-synagogue-shooting-stephan-balliet-neo-nazi-a9152746.html) (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](https://www.nextgov.com/emerging-tech/2020/03/tsa-confiscated-3d-printed-guns-raleigh-durham-international-airport/163533/) (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).<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup>

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”).<sup>26</sup> 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.<sup>27</sup> When a firearm is disposed to an unlicensed person, licensees are required to complete a Firearms Transaction Record, ATF Form 4473 (“Form 4473”).<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

<sup>25</sup> 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.

<sup>26</sup> 27 CFR 478.125(e).

<sup>27</sup> 18 U.S.C. 923(g)(1)(A); 27 CFR 478.125(e), (f).

<sup>28</sup> 18 U.S.C. 923(g)(1)(A); 27 CFR 478.124.

<sup>29</sup> 18 U.S.C. 923(g)(6); 27 CFR 478.39a(b).

<sup>30</sup> 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

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.<sup>31</sup> 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,<sup>32</sup> or to return any recovered stolen or lost PMFs to their rightful owners.

Not only does the inability to distinguish between unmarked firearms

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.

<sup>31</sup> 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).

<sup>32</sup> 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).

<sup>22</sup> 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.”).

<sup>23</sup> 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.”).

<sup>24</sup> 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).

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> Indeed, several States and municipalities have banned or severely restricted unserialized or 3D printed firearms.<sup>38</sup>

<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> 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

## 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.

(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 9A.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-3d/>; 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](https://mocoshow.com/blog/county-council-unanimously-approves-ghost-gun-bill/?fbclid=IwAR1KCyFal3Aid31WKCTLanR-uEuj_-dW_T32lND5gfKmle_-nvibZyT052).

<sup>33</sup> 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).

<sup>34</sup> 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).

<sup>35</sup> 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).

### 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”<sup>39</sup> or “may readily be converted”<sup>40</sup> to expel a projectile by the action of an explosive are “firearms” under the GCA.<sup>41</sup>

<sup>39</sup> 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).

<sup>40</sup> 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).

<sup>41</sup> 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

In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called “80% receivers,”<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> Any

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”).

<sup>42</sup> 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.

<sup>43</sup> See footnotes 39 and 40, *supra*.

<sup>44</sup> 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

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.<sup>45</sup> 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

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).

<sup>45</sup> 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.<sup>46</sup> 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”<sup>47</sup> 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.<sup>48</sup>

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

<sup>47</sup> 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.

<sup>48</sup> See 27 CFR 479.101(b); 478.92(a)(4)(iii); 479.102(f)(1).

<sup>46</sup> 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.

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 licensees for the manufacture or repair of complete devices (see Section II.H.9 of the preamble).<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

### 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.<sup>52</sup>

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

<sup>52</sup> 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.”).

<sup>50</sup> 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).

<sup>51</sup> See footnote 46, *supra*.

<sup>49</sup> This rule is consistent with ATF enforcement policy. See footnote 72 *infra*.

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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> 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<sup>56</sup> 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.<sup>57</sup>

*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\\_walmart.html](https://www.lehighvalleylive.com/news/2018/05/how_the_felon_killed_at_walmart.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/>.*

<sup>56</sup> 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.

<sup>57</sup> 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).

<sup>53</sup> ATF Letter to Private Counsel #907010 (Mar. 20, 2015).

<sup>54</sup> 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>.

<sup>55</sup> 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/>

### 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).<sup>58</sup> 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.<sup>59</sup> The term

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).

<sup>59</sup> The Federal Firearms Act of 1938 (repealed), the predecessor to the GCA, made it unlawful for

“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.<sup>60</sup>

### 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,<sup>61</sup> 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.<sup>62</sup>

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).

<sup>60</sup> 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).

<sup>61</sup> 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.

<sup>62</sup> 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,

<sup>58</sup> *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

### G. Definition of “Gunsmith”<sup>63</sup>

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.<sup>64</sup> 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).

<sup>63</sup> 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)(1)(B); *id.* at (a)(21)(D); 132 Cong. Rec. 9603–04 (May 6, 1986) (statement of Sen. McClure).

<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> At the same time, consistent with the intent of the GCA,<sup>69</sup> 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.<sup>70</sup> Persons should consult the laws and officials in their own States and localities to determine the lawfulness of PMFs.

<sup>65</sup> 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").

<sup>66</sup> 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).

<sup>67</sup> 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).

<sup>68</sup> 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).

<sup>69</sup> See Public Law 90–351, sec. 901(b), 82 Stat. 227.

<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

## 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

<sup>71</sup> 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.”).

<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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

<sup>73</sup> 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.").

<sup>74</sup> 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,<sup>75</sup> 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.<sup>76</sup> 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.

<sup>75</sup> 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).

<sup>76</sup> See 50 FR 26702 (June 28, 1985).

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

Category	NPRM
Affected Population .....	<ul style="list-style-type: none"> <li>• Update Marking Requirements.</li> <li>• New Gunsmithing Definition.</li> <li>• Update Record Retention.</li> <li>• Other Technical Amendments.</li> <li>• 113,204 FFLs (Record Retention).</li> <li>• Unknown number of FFLs manufacturers and importers (Definition of Receiver).</li> <li>• 35 Non-FFL manufacturers (Definition of Receiver).</li> <li>• 6,044 FFL retailers (PMFs).</li> <li>• 36 Non-FFL retailers (PMFs).</li> <li>• Unknown number of Individual Owners.</li> </ul>
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) .....	<ul style="list-style-type: none"> <li>• Provides clarity to courts on what constitutes a firearm frame or receiver.</li> <li>• Applies to new technology.</li> <li>• Makes consistent marking requirements.</li> <li>• Eases certain marking requirements.</li> <li>• Increases tracing of crime scene firearms to prosecute criminals.</li> </ul>

### 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.<sup>77</sup>

### 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.

<sup>77</sup> The Regulatory Impact Analysis is available on [www.regulations.gov](http://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.<sup>78</sup> 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

<sup>78</sup> 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.<sup>79</sup> 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 manufacturers 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*

<sup>79</sup> *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 rulemaking's 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](http://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](http://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)”;
- 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”;
- 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”;
- 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;

\* \* \* \* \*

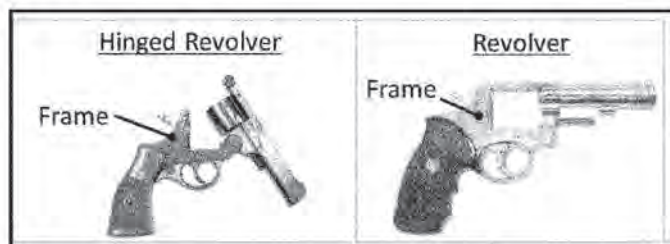
*Firearm.* Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an 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:

**BILLING CODE 4410-FY-P**

*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.



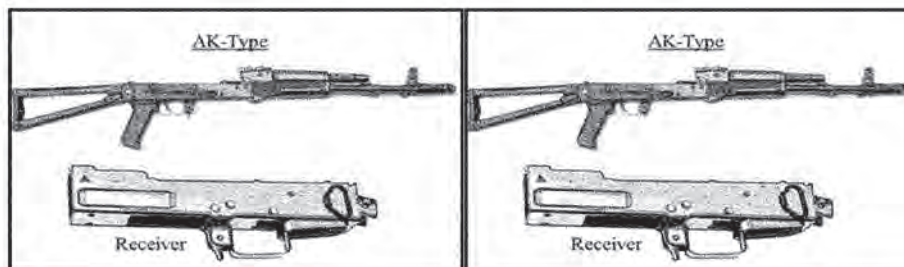
*Example 2 – Bolt action rifle:* The frame or receiver is the part of the rifle that provides a structure designed to hold the bolt, firing pin, and trigger mechanism.



*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).



(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.

**BILLING CODE 4410-FY-P**



(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.



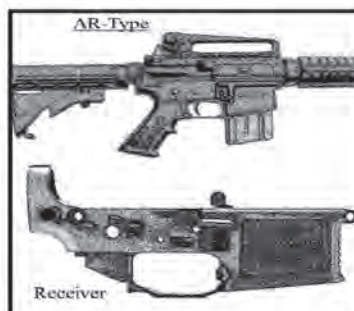
(iii) *Sig Sauer P320-type semiautomatic pistols*: the internal removable chassis of the pistol, partially exposed to the exterior to allow identification, that provides housing for the trigger mechanism, and a structure designed to integrate the slide rails.



(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.



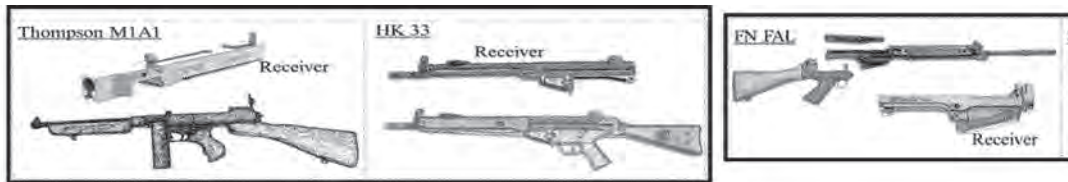
(v) *AR-15-type, and Beretta AR-70-type firearms*: the lower part of the weapon that provides housing for the trigger mechanism and hammer.



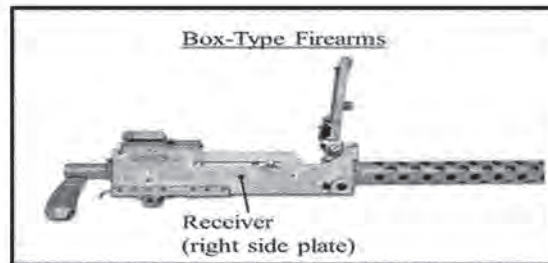
(vi) *Steyr AUG-type firearms*: the central part of the weapon that provides housing for the rods in the bolt carrier sub-assembly and a structure designed to attach the barrel.



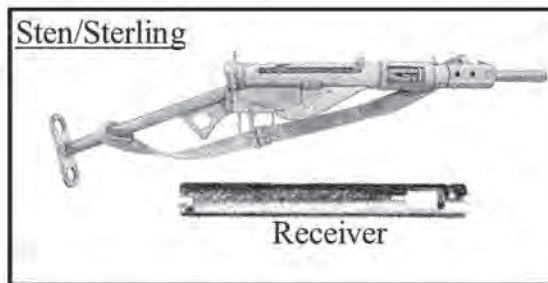
(vii) *Thompson M1A1-type machineguns and semiautomatic variants, and L1A1, FN FAL, FN FNC, MP38, MP 40, and SIG 550-type firearms, and HK-type machineguns and semiautomatic variants*: the upper part of the weapon that provides housing for the bolt and firing pin.



(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 1/4 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 dyeing 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)”;
- 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)”;

■ 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)”;

■ 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  $\frac{1}{16}$  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.*

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# **EXHIBIT 3**



United States  
of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 109<sup>th</sup> 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 perse-

verance, 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.



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S9059

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. Hutchinson, 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]—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 per-

son, 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 4**

## 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.

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### 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

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## 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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protection of Lawful  
5 Commerce in Arms Act”.

1 **SEC. 2. FINDINGS; PURPOSES.**

2 (a) FINDINGS.—The Congress finds the following:

3 (1) Citizens have a right, protected by the Sec-  
4 ond Amendment to the United States Constitution,  
5 to keep and bear arms.

6 (2) Lawsuits have been commenced against  
7 manufacturers, distributors, dealers, and importers  
8 of firearms that operate as designed and intended,  
9 which seek money damages and other relief for the  
10 harm caused by the misuse of firearms by third par-  
11 ties, including criminals.

12 (3) The manufacture, importation, possession,  
13 sale, and use of firearms and ammunition in the  
14 United States are heavily regulated by Federal,  
15 State, and local laws. Such Federal laws include the  
16 Gun Control Act of 1968, the National Firearms  
17 Act, and the Arms Export Control Act.

18 (4) Businesses in the United States that are en-  
19 gaged in interstate and foreign commerce through  
20 the lawful design, manufacture, marketing, distribu-  
21 tion, importation, or sale to the public of firearms or  
22 ammunition that has been shipped or transported in  
23 interstate or foreign commerce are not, and should  
24 not, be liable for the harm caused by those who  
25 criminally or unlawfully misuse firearm products or

1       ammunition products that function as designed and  
2       intended.

3           (5) The possibility of imposing liability on an  
4       entire industry for harm that is solely caused by oth-  
5       ers is an abuse of the legal system, erodes public  
6       confidence in our Nation's laws, threatens the dimi-  
7       nution of a basic constitutional right and civil lib-  
8       erty, invites the disassembly and destabilization of  
9       other industries and economic sectors lawfully com-  
10      peting in the free enterprise system of the United  
11      States, and constitutes an unreasonable burden on  
12      interstate and foreign commerce of the United  
13      States.

14          (6) The liability actions commenced or con-  
15      templated by the Federal Government, States, mu-  
16      nicipalities, and private interest groups are based on  
17      theories without foundation in hundreds of years of  
18      the common law and jurisprudence of the United  
19      States and do not represent a bona fide expansion  
20      of the common law. The possible sustaining of these  
21      actions by a maverick judicial officer or petit jury  
22      would expand civil liability in a manner never con-  
23      templated by the framers of the Constitution, by  
24      Congress, or by the legislatures of the several  
25      States. Such an expansion of liability would con-

1       stitute a deprivation of the rights, privileges, and  
2       immunities guaranteed to a citizen of the United  
3       States under the Fourteenth Amendment to the  
4       United States Constitution.

5       (b) PURPOSES.—The purposes of this Act are as fol-  
6       lows:

7               (1) To prohibit causes of action against manu-  
8       facturers, distributors, dealers, and importers of  
9       firearms or ammunition products for the harm  
10      caused by the criminal or unlawful misuse of firearm  
11      products or ammunition products by others when  
12      the product functioned as designed and intended.

13              (2) To preserve a citizen's access to a supply of  
14      firearms and ammunition for all lawful purposes, in-  
15      cluding hunting, self-defense, collecting, and com-  
16      petitive or recreational shooting.

17              (3) To guarantee a citizen's rights, privileges,  
18      and immunities, as applied to the States, under the  
19      Fourteenth Amendment to the United States Con-  
20      stitution, pursuant to section 5 of that Amendment.

21              (4) To prevent the use of such lawsuits to im-  
22      pose unreasonable burdens on interstate and foreign  
23      commerce.

24              (5) To protect the right, under the First  
25      Amendment to the Constitution, of manufacturers,

1 distributors, dealers, and importers of firearms or  
2 ammunition products, and trade associations, to  
3 speak freely, to assemble peaceably, and to petition  
4 the Government for a redress of their grievances.

5 **SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL**  
6 **LIABILITY ACTIONS IN FEDERAL OR STATE**  
7 **COURT.**

8 (a) IN GENERAL.—A qualified civil liability action  
9 may not be brought in any Federal or State court.

10 (b) DISMISSAL OF PENDING ACTIONS.—A qualified  
11 civil liability action that is pending on the date of enact-  
12 ment of this Act shall be immediately dismissed by the  
13 court in which the action was brought.

14 **SEC. 4. DEFINITIONS.**

15 In this Act, the following definitions shall apply:

16 (1) ENGAGED IN THE BUSINESS.—The term  
17 “engaged in the business” has the meaning given  
18 that term in section 921(a)(21) of title 18, United  
19 States Code, and, as applied to a seller of ammuni-  
20 tion, means a person who devotes, time, attention,  
21 and labor to the sale of ammunition as a regular  
22 course of trade or business with the principal objec-  
23 tive of livelihood and profit through the sale or dis-  
24 tribution of ammunition.

1           (2) MANUFACTURER.—The term “manufac-  
2           turer” means, with respect to a qualified product, a  
3           person who is engaged in the business of manufac-  
4           turing the product in interstate or foreign commerce  
5           and who is licensed to engage in business as such a  
6           manufacturer under chapter 44 of title 18, United  
7           States Code.

8           (3) PERSON.—The term “person” means any  
9           individual, corporation, company, association, firm,  
10          partnership, society, joint stock company, or any  
11          other entity, including any governmental entity.

12          (4) QUALIFIED PRODUCT.—The term “qualified  
13          product” means a firearm (as defined in subpara-  
14          graph (A) or (B) of section 921(a)(3) of title 18,  
15          United States Code), including any antique firearm  
16          (as defined in section 921(a)(16) of such title), or  
17          ammunition (as defined in section 921(a)(17)(A) of  
18          such title), or a component part of a firearm or am-  
19          munition, that has been shipped or transported in  
20          interstate or foreign commerce.

21          (5) QUALIFIED CIVIL LIABILITY ACTION.—

22                (A) IN GENERAL.—The term “qualified  
23                civil liability action” means a civil action  
24                brought by any person against a manufacturer  
25                or seller of a qualified product, or a trade asso-

1           ciation, for damages resulting from the criminal  
2           or unlawful misuse of a qualified product by the  
3           person or a third party, but shall not include—

4                   (i) an action brought against a trans-  
5                   feror convicted under section 924(h) of  
6                   title 18, United States Code, or a com-  
7                   parable or identical State felony law, by a  
8                   party directly harmed by the conduct of  
9                   which the transferee is so convicted;

10                   (ii) an action brought against a seller  
11                   for negligent entrustment or negligence per  
12                   se;

13                   (iii) an action in which a manufac-  
14                   turer or seller of a qualified product vio-  
15                   lated a State or Federal statute applicable  
16                   to the sale or marketing of the product,  
17                   and the violation was a proximate cause of  
18                   the harm for which relief is sought, includ-  
19                   ing—

20                           (I) any case in which the manu-  
21                           facturer or seller knowingly made any  
22                           false entry in, or failed to make ap-  
23                           propriate entry in, any record re-  
24                           quired to be kept under Federal or  
25                           State law;

1 (II) any case in which the manu-  
2 facturer or seller aided, abetted, or  
3 conspired with any person in making  
4 any false or fictitious oral or written  
5 statement with respect to any fact  
6 material to the lawfulness of the sale  
7 or other disposition of a qualified  
8 product; or

9 (III) any case in which the man-  
10 ufacturer or seller aided, abetted, or  
11 conspired with any other person to  
12 sell or otherwise dispose of a qualified  
13 product, knowing, or having reason-  
14 able cause to believe, that the actual  
15 buyer of the qualified product was  
16 prohibited from possessing or receiv-  
17 ing a firearm or ammunition under  
18 subsection (g) or (n) of section 922 of  
19 title 18, United States Code;

20 (iv) an action for breach of contract  
21 or warranty in connection with the pur-  
22 chase of the product; or

23 (v) an action for physical injuries or  
24 property damage resulting directly from a  
25 defect in design or manufacture of the

1 product, when used as intended or in a  
2 manner that is reasonably foreseeable.

3 (B) NEGLIGENCE ENTRUSTMENT.—As used  
4 in subparagraph (A)(ii), the term “negligent en-  
5 trustment” means the supplying of a qualified  
6 product by a seller for use by another person  
7 when the seller knows, or should know, the per-  
8 son to whom the product is supplied is likely to,  
9 and does, use the product in a manner involving  
10 unreasonable risk of physical injury to the per-  
11 son or others.

12 (C) REASONABLY FORESEEABLE.—As used  
13 in subparagraph (A)(v), the term “reasonably  
14 foreseeable” does not include any criminal or  
15 unlawful misuse of a qualified product, other  
16 than possessory offenses.

17 (D) RULE OF CONSTRUCTION.—The excep-  
18 tions described in subparagraph (A) shall be  
19 construed so as not to be in conflict and no pro-  
20 vision of this Act shall be construed to create  
21 a Federal private cause of action or remedy.

22 (6) SELLER.—The term “seller” means, with  
23 respect to a qualified product—

24 (A) an importer (as defined in section  
25 921(a)(9) of title 18, United States Code) who

1 is engaged in the business as such an importer  
2 in interstate or foreign commerce and who is li-  
3 censed to engage in business as such an im-  
4 porter under chapter 44 of title 18, United  
5 States Code;

6 (B) a dealer (as defined in section  
7 921(a)(11) of title 18, United States Code) who  
8 is engaged in the business as such a dealer in  
9 interstate or foreign commerce and who is li-  
10 censed to engage in business as such a dealer  
11 under chapter 44 of title 18, United States  
12 Code; or

13 (C) a person engaged in the business of  
14 selling ammunition (as defined in section  
15 921(a)(17) of title 18, United States Code) in  
16 interstate or foreign commerce at the wholesale  
17 or retail level, who is in compliance with all ap-  
18 plicable Federal, State, and local laws.

19 (7) STATE.—The term “State” includes each of  
20 the several States of the United States, the District  
21 of Columbia, the Commonwealth of Puerto Rico, the  
22 Virgin Islands, Guam, American Samoa, and the  
23 Commonwealth of the Northern Mariana Islands,  
24 and any other territory or possession of the United

1 States, and any political subdivision of any such  
2 place.

3 (8) TRADE ASSOCIATION.—The term “trade as-  
4 sociation” means any association or business organi-  
5 zation (whether or not incorporated under Federal  
6 or State law)—

7 (A) that is not operated for profit;

8 (B) of which 2 or more members are man-  
9 ufacturers or sellers of a qualified product; and

10 (C) that is involved in promoting the busi-  
11 ness interests of its members, including orga-  
12 nizing, advising, or representing its members  
13 with respect to their business, legislative or  
14 legal activities in relation to the manufacture,  
15 importation, or sale of a qualified product.

16 (9) UNLAWFUL MISUSE.—The term “unlawful  
17 misuse” means conduct that violates a statute, ordi-  
18 nance, or regulation as it relates to the use of a  
19 qualified product.

Calendar No. 363

108TH CONGRESS  
1ST SESSION

**S. 1805**

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**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.

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NOVEMBER 3, 2003

Read the second time and placed on the calendar

# **EXHIBIT 5**

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.

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

Protection of  
Lawful  
Commerce in  
Arms Act.  
15 USC 7901  
note.

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.

(a) SHORT TITLE.—This section may be cited as the “Child Safety Lock Act of 2005”.

(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

Child Safety  
Lock Act of 2005.  
18 USC 921 note.

18 USC 922 note.

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.

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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 6**

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]

Air  
Transportation  
Safety and  
System  
Stabilization Act.  
49 USC 40101  
note.

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,*

**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.

(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.

Appropriation  
authorization.

(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 SUB-  
CONTRACTORS 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; TREAT-  
MENT 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

### SEC. 401. SHORT TITLE.

This title may be cited as the “September 11th Victim Compensation Fund of 2001”.

### SEC. 402. DEFINITIONS.

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.

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.

(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;

September 11th  
Victim  
Compensation  
Fund of 2001.  
Terrorism.  
49 USC 40101  
note.

49 USC 40101  
note.

49 USC 40101  
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49 USC 40101  
note.

(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.

(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.

Electronic  
document.

(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.  
Deadline.

#### **SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.**

(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.  
Deadline.

#### **SEC. 407. REGULATIONS.**

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.

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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.

