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Via E-mail
Ms. Denise Brown
Mailstop 6N-602
Office of Regulatory Affairs, Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Avenue NE
Washington, D.C. 20226
ATTN: *AP Ammo Comments*

Re: Comment on Proposed ATF Framework for Determining Whether Certain Projectiles are "Primarily Intended for Sporting Purposes" Within the Meaning of 18 U.S.C. § 921(a)(17)

Dear Ms. Brown,

Thank you for the opportunity to comment on the BATFE's Proposed Framework regarding whether certain projectiles are eligible for exemption from classification as "armor piercing" under 18 U.S.C. § 921 (a)(17). The undersigned author of these comments is an attorney licensed to practice in Ohio, Kentucky and Washington, is admitted to practice before the United States Supreme Court, and is registered to practice before the U.S. Patent and Trademark Office. In my law practice, I provide legal representation to clients who are manufacturers, distributors and instructors in the firearms industry. I hold a federal firearms license (FFL, Type 7) and am a Special Occupational Taxpayer (SOT, Class 2), which I use in the course of consulting with and providing legal representation to clients. As such, I have particular knowledge, experience and special interest in the promulgation of proper ATF regulations.

On February 13, 2015, the Bureau of Alcohol, Tobacco, Firearms and Explosives (hereafter "BATFE") published a notice of and accompanying memo regarding a proposed ATF Framework for Determining Whether Certain Projectiles are Primarily Intended for Sporting

Purposes with respect to those projectiles regulated under 18 U.S.C. 921(a)(17) (hereafter "Proposed Framework"). As explained below, the Proposed Framework relies on several erroneous assumptions of fact and law, which render the entire underlying proposed framework untenable.

The Proposed Framework is a Promulgation of Regulations Subject to the APA

First, the Proposed Framework is in the nature of substantive rulemaking subject to promulgation in compliance with the Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237 (5 U.S.C. § 500 *et seq*.). The APA governs the process by which administrative agencies may propose and establish regulations and also sets up a process for the courts to directly review agency decisions. Proposed rules and regulations are required to be published in the Federal Register with a 90-day period for comment prior to adoption. By characterizing the substantive criteria proposed for determining whether certain projectiles are eligible for a statutorily prescribed exemption as a "framework," the BATFE has overstepped its delegated authority by attempting to skirt compliance with the APA and avoid the public scrutiny that follows from it.

27 C.F.R. § 478.148, adopted by BATFE in 1988, addresses the process by which requests for exemption of certain projectiles that would otherwise be prohibited as being primarily intended for sporting purposes. The Proposed Framework is a substantive amendment to this regulation, purporting to add objective criteria by which requests for exemption will be granted or denied, and is, therefore, subject to compliance with the APA rulemaking process.

18 U.S.C. § 921(a)(17) Does Not Describe M855 Ammunition

One type of ammunition is specifically addressed in the Proposed Framework and the conclusion expressed that "[t]o ensure consistency, upon final implementation of the sporting purpose framework outlined above, ATF must withdraw the exemptions for 5.56 mm 'green tip'

ammunition, including both the SS109 and M855 cartridges" (p.15).[1] This conclusion is based, however, on several faulty assumptions.

First, the Proposed Framework incorrectly assumes M855 ammunition uses an armor-piercing projectile requiring a sporting purposes exemption that under 18 U.S.C. § 921 (a)(17)(B)(i). This part of the statute states (emphasis added):

> (B) The term "armor piercing ammunition" means— (i) a projectile or projectile core which may be used in a handgun and which is constructed ***entirely*** (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper or depleted uranium

The core of the M855 projectile, however, is ***not*** constructed entirely of steel, iron, brass, bronze, beryllium copper, or depleted uranium (hereafter "the Prohibited Metals"). Instead, M855's core is constructed of mostly lead, with a 10 grain mild steel insert. Because the core is not constructed "entirely" of steel, M855 does not meet the definition of "armor-piercing ammunition" as described in 18 U.S.C. § 921 (a)(17)(B)(i). Any other reading of the statute renders the word "entirely" superfluous. As a result, no exemption for M855 was or is appropriate or necessary in the first place, despite BATFE "granting" such an exemption in 1986. If the Proposed Framework bypasses this threshold step in its analysis, then it is so fundamentally flawed that it must be scrapped in its entirety as invalid.

BATFE incorrectly asserts that "[t]his ammunition meets the content requirement of the definition, but was previously not classified as 'armor piercing' under the statute because there were no handguns that could 'use' it." (p. 6). However, both prongs of that statement are incorrect. As explained above, the ammunition does ***not*** meet the content requirement of the definition and semi-automatic handguns that use 5.56mm ammunition predate the introduction of M855 by more than a decade (the Bushmaster Armpistol was a semi-automatic pistol chambered in 5.56mm, and so capable of firing M855, and offered for sale from 1976 through 1991). Moreover, had there been no handguns capable of using M855 in 1986, no exemption would

[1] Although not specifically addressed in the Proposed Framework, I must presume BATFE makes a distinction between M855 and M855A1 (lead free) projectiles and ammunition, which should not be conflated. The M855A1projectile is significantly different in metal content, was developed for use in military training exercises in countries where projectiles containing lead are prohibited, is significantly more expensive, and is not widely available or used in the United States. The undersigned expresses no opinion is as to whether a different analysis should or would apply to M855A1 ammunition.

have been necessary under the statute, even if M855 did have a core constructed entirely of steel. The fact that BATFE "granted" an exemption in 1986 is not determinative of and does not change either of these underlying facts.

In the Proposed Framework's discussion of the 1986 exemption, no reasoning with respect to either the content requirement or primary intended purpose from this prior ruling is disclosed. BATFE asserts it found, "it is well documented" that the respective ammunition "has been recognized as being suitable for target shooting with rifles due to its accuracy." (p. 14). Representing this to be a quotation from a prior document, presumably the 1986 "exemption," it includes the citation "*Id.*" No prior citation corresponding with such a document, however, is found in the Proposed Framework. This prior determination document, on which BATFE relies as support for its authority to now "revoke" an exemption, needs to be produced for public scrutiny.

The fact that BATFE previously "granted" an exemption for M855 ammunition is not, however, proof that such an exemption was proper or necessary. Moreover, the fact that nearly three decades have passed without this "exemption" or the purported bases for it being challenged carries no significance. There was no motivation for consumers or members of the industry to challenge the propriety of an agency determination that was of no practical effect.

The Proposed Framework Creates Definitions That Do Not Comport with the Statutory Language or Authority

18 U.S.C. § 921 (a)(17)(B) defines the term "armor piercing ammunition" in two distinct and independent ways:

> (B) The term "armor piercing ammunition" means—
> (i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or
> (ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

The first is based on whether it is capable of use in a handgun and the metallic content of the projectile or projectile core. This first clause is indifferent to intended use and whether a handgun is of a particular caliber, rimfire or centerfire, single shot, multi-shot, revolver, or semiautomatic. The second provides a definition specifying a projectile having a full jacket, a minimum caliber, intended use, and jacket-to-core weight ratio. This second clause is indifferent to the metallic composition of the projectile. The statute includes another provision, § 921(17)(C), expressly excluding certain types of ammunition from the scope of the law, including "a projectile which the Attorney General finds is primarily intended to be used for sporting purposes."

The Proposed Framework would have BATFE determine requests for exemption based on whether the ammunition falls into one of two categories (p. 16). Category I is specific to .22 caliber projectiles only. It states that a projectile will be considered to be "primarily intended to be used for sporting purposes" under § 921(a)(17)(C) if the projectile "weighs 40 grains or less AND is loaded into a rimfire cartridge." Since § 921(a)(17)(B)(ii) is specific to projectiles *larger* than .22 caliber, this category can only be applied to .22 caliber projectiles that would otherwise fall within the scope of subsection (i).

Category II relates to all other caliber projectiles. It states that a projectile that would otherwise be prohibited under either of the statutory definitions will be *presumed* to be "primarily intended to be used for sporting purposes" under § 921(a)(17)(C) only "if the projectile is loaded into a cartridge for which the only handgun that is readily available in the ordinary channels of commercial trade is a single shot handgun." It goes on to state "ATF nevertheless retains the discretion to deny any application for a "sporting purposes" exemption if substantial evidence exists that the ammunition is not primarily intended for such purposes." "Single shot handgun" is then further defined in the Proposed Framework as "a break-open or bolt action handgun that can accept only a single cartridge manually, and does not accept or use a magazine or other ammunition feeding device" and to specifically exclude "a pocket pistol or derringer-type firearm."

No evidence in support of these regulatory definitions, establishing that such criteria align with "sporting purposes" or primary intended uses, or that they would promote the intended purpose of the statute is provided in the BATFE memo. Were the agency to follow the

appropriate APA rulemaking procedure, supporting evidence would be required and subject to the public scrutiny of a full 90-day comment period. Without the required vetting, this criteria—regardless of the objective nature of the terms—is arbitrary and capricious.

Ramifications of the Proposed Framework Are Misrepresented

In its memo, the agency states: "ATF recognizes that this ammunition is widely available to the public. Because it is legally permissible to possess armor piercing ammunition under current law, withdrawing the exemption will not place individuals in criminal possession of armor piercing ammunition." (p.15). However, several states' statutes prohibiting the *possession* of armor-piercing ammunition rely on the federal definition to define "armor-piercing ammunition." *See*, for example, Mississippi State Code §97-37-31 (2013) and Conn. Gen. Stat. § 53-202l(a)(1). By adopting a Proposed Framework that erroneously reclassifies current, legally-owned projectiles as armor-piercing, BATFE will create instant criminals out of otherwise peaceful members of the community under analogous state laws.

Again, had the agency followed the appropriate APA rulemaking procedure, the public scrutiny it provides would have revealed integral flaws and unintended consequences of this type.

BATFE's Proposed Framework Cannot Withstand Any Level of Scrutiny

Apart from its specific application to M855 ammunition, on its face, BATFE's Proposed Framework establishes substantial burdens for peaceable firearm owners. These burdens include subjecting them to state laws prohibiting possession based on federal law, drastically limiting the availability of ammunition to sports the BATFE has recognized as legitimate firearms sports since 1968, and limiting the availability of environmentally-friendly non-lead alternative ammunition. In return for these burdens, BATFE asserts an unsubstantiated (and, in reality, non-existent) benefit to officer safety. The prohibited projectiles will be replaced by other non-prohibited projectiles that will also penetrate soft body armor. The Supreme Court has indicated

that rights implicating the Second Amendment face heightened scrutiny and rejected a rational basis test. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-2818 (2008).

Heightened Scrutiny requires that laws be narrowly tailored to serve a significant government interest (*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) or directly advance a substantial government interest and not be more burdensome than necessary to serve that interest (*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). BATFE's Proposed Framework turns the "primarily intended for sporting purposes" language used by Congress on its head—ignoring express threshold terms of the statute—and imposes significant burdens without directly advancing any legitimate statutory interest that 18 U.S.C. § 921 (a)(17) was intended to address.

For these reasons, the Proposed Framework is fatally flawed and must be withdrawn and abandoned.

Regards,

Glenn D. Bellamy

cc: Senator Rob Portman
Senator Sherrod Brown
Congressman Steve Chabot