RECOMMENDED ACTION MEMO
Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives
Topic: Ban on Armor Piercing Ammunition
Date: November 2020

<u>Recommendation:</u> Finalize an Obama-era proposal by issuing a framework to fully ban armor-piercing ammunition.

I. Summary

Description of recommended executive action

Armor-piercing ammunition is made of specific metals and is capable of piercing soft body armor when fired from a handgun—creating substantial risks for law enforcement officers. This type of ammunition is banned under the Law Enforcement Officers Protection Act of 1986 (LEOPA); however, the law includes an exemption for ammunition that meets the armor-piercing design criteria if the ammunition is "primarily used for sporting purposes."[1]

ATF is responsible for evaluating different types of ammunition to determine whether it qualifies as armor-piercing under current law and, if so, whether it falls into the sporting purposes exemption. For the first two decades of the ban, ATF received a limited number of requests to make this determination; however, as firearm and ammunition technology has evolved, there has been a substantial increase in the number of semi-automatic handguns that are capable of firing rifle rounds, meaning that many more types of ammunition potentially meet the definition of armor-piercing and should be banned under LEOPA. Despite the new risks of this highly dangerous ammunition, ATF has largely failed to implement a meaningful approach that would ensure that LEOPA is being faithfully enforced. This failure has resulted in a wide variety of armor-piercing ammunition being available for sale in the civilian market.

ATF should implement a framework, first proposed in 2015, to better regulate armor-piercing ammunition and help ensure the safety of law enforcement officers and the community at large. This framework would provide much-needed structure over these determinations and provide additional guidance to the gun industry regarding what types of ammunition may be made available for sale in consumer markets.

Overview of process and time to enactment

Implementing the Armor Piercing Ammunition Exemption Framework[2] would be an interpretative rule under the Administrative Procedure Act,[3] because while it will be applicable generally across ammunition designs and will have a future effect on the meaning of what qualifies under the "sporting purposes" exemption, it does not create a new rule. Notably, this framework will not repeal or amend any existing ATF regulations; rather, this framework clarifies the existing regulation, creating a more transparent rationale for what ammunition qualifies as "primarily

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[1] 18 U.S. Code § 921.
[2] ATF, "Armor Piercing Ammunition Exemption Framework," February 27, 2015, https://www.atf.gov/news/pr/armor-piercing-ammunition-exemption-framework.
[3] 5 U.S. Code § 551.

used for sporting purposes." The framework would inform how ATF implements its authority to regulate armor-piercing ammunition.[4]

This change in ATF policy would not require notice and comment rulemaking under the Administrative Procedure Act. However, for consistency with past actions and to reduce the risk of possible litigation, ATF should consider the following steps: the proposed framework should be published on the ATF website as a special advisory, and ATF should open a second public comment period. Following the closure of the comment period, ATF should finalize the framework, publishing the final rule online in accordance to past practice. Implementation of the framework should then begin.

II. Current state

Regulatory background

Currently, the ban on armor-piercing ammunition is unevenly implemented, with certain rounds of ammunition continuing to be sold on the commercial market, despite meeting the "armor piercing" criteria under federal law. The Gun Control Act of 1968 (GCA or "Act"), as amended, prohibits the import, manufacture, and distribution of "armor piercing ammunition."[5] The statute defines "armor piercing ammunition" as:

> (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
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> (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,
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> [except that] [t]he term 'armor piercing ammunition' does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projection designed for target shooting, ***a projectile which the Attorney General finds is primarily intended to be used for sporting purposes***, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.[6]

As this definition makes clear, "armor piercing ammunition" covers two independent categories of ammunition. The first is defined by its material composition and whether it "may be used" in a handgun; the second is defined by its size, jacket weight, and whether it is "designed and intended for use in a handgun." For purposes of this definition, "handgun" is defined as "any firearm including a pistol or revolver designed to be fired by the use of a single hand."[7]

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4 *Guardian Fed. Sav. & Loans Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978); *see also,*
e.g., *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015)

5 18 U.S.C. § 922(a)(7)-(8).

6 *Id.* § 921(a)(17)(B)-(C) (emphasis added).

7 § 10, Pub. L. 99-408, 100 Stat. 920 (1986)

The ability for this specific type of ammunition to pierce through soft body armor poses particular risks to law enforcement officers and threatens the safety of the public. The use of these bullets in an active shooting setting, for example, would hinder the effectivness of officers responding to the scene if they are hit by armor-piercing bullets. On July 18, 1984, for example, the nation witnessed the worst mass shooting at that point in its history at the San Ysidro McDonalds. A man armed with multiple firearms and hundreds of rounds of ammunition, including armor-piercing ammunition, opened fire inside the McDonalds, killing 21 people and injuring 19 others.[8] The statutory provisions that define and govern "armor piercing ammunition" were originally enacted in the Law Enforcement Officers Protection Act of 1986 (LEOPA).[9] The purpose of this law was to protect police officers from the criminal use of handgun ammunition capable of penetrating bullet-resistant soft body armor.[10] The members of Congress who introduced and championed the subsequent Law Enforcement Officers Protection Act of 1986 noted that the lives of police responding to the scene of the shooting in San Ysidro were at considerably higher risk than if conventional ammunition were being fired.[11]

When the 1986 ban on armor-piercing ammunition was first implemented, ATF did not see a large number of requests for review of ammunition design. However, since the early 2000s, the agency has seen a significant increase in classification requests from the gun industry seeking exemption from the ban under the "sporting purpose" exemption. There appear to be two primary reasons for this increase. First, the firearms industry has developed commercially available handguns that are designed to use conventional rifle ammunition (such as AR-15 pistols).[12] As a result, some ammunition that previously could be used only in rifles now may be used in certain handguns as well. Second, pressure on the ammunition industry to develop suitable alternatives to lead ammunition has increased due to the problem of environmental lead contamination attributable to hunting. Lead ammunition cannot be "armor piercing" under the first definitional category, but many of the available substitute metals, such as steel or tungsten, are included in the definition.

Obama administration efforts

The influx of exemption requests led ATF, starting in 2012, to seek input from industry, law enforcement, and the public regarding how it should apply the "sporting purposes" exemption. In 2015, in an effort to address the issue of armor-piercing ammunition classification and to effectively determine whether a specific type of ammunition meets the "sporting purpose" exemption, ATF released a draft framework to evaluate ammunition. Under this framework, the "sporting purpose" exemption would only apply to rifle ammunition capable of being fired only by single-shot handguns. Any rifle ammunition capable of being fired from a semi-automatic handgun would be classified as armor-piercing and banned. The framework would apply not

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[8] "21 die in San Ysidro massacre," *The San Diego Union-Tribune*, July 19, 1984, https://www.sandiegouniontribune.com/sdut-21-die-san-ysidro-massacre-1984jul19-story.html.

[9] *See* Pub. L. 99-408.

[10] *See* H. Rep. 98-996 at 1-2.

[11] Margasak, "House Hears Debate Over Armor-Piercing Bullets"; Law Enforcement Officers Protection Act of 1985, H.R. 3132, 99th Cong., 2nd sess. (August 28, 1986), https://www.govtrack.us/congress/bills/99/hr3132; "President Gets Bill Banning Most Armor-Piercing Bullets," *The New York Times,* August 16, 1986, https://www.nytimes.com/1986/08/16/us/president-gets-bill-banning-most-armor-piercing-bullets.html.

[12] *See* ATF, "Framework for Determining Whether Certain Projectiles Are "Primarily Intended for Sporting Purposes" Within the Meaning of 18 U.S.C. 921(a)(17)(C)," accessed October 1, 2020, 5, https://www.atf.gov/resource-center/docs-0/download. ("Framework").

only to new ammunition designs but would have also applied retroactively to ammunition previously approved for sale on the commercial market. For example, under the proposed framework, M855 or "green tip" rifle ammunition, a popular rifle round compatible with the AR-15 rifle as well as semi-automatic pistols, would be banned under the framework because of its use in semi-automatic style handguns.

ATF's proposed framework represented its first attempt to provide significant guidance on its understanding of the "sporting purposes" exemption. In its announcement, ATF explained that its guiding principle in creating the new framework was that the "sporting purposes" exemption should apply when the attorney general "determine[s] that a specific type of armor piercing projectile does not pose a significant threat to law enforcement officers because the projectile at issue is 'primarily intended' for use in shooting sports, and is therefore unlikely to be encountered by law enforcement officers on the streets."[13] ATF further noted that, in applying this guiding principle and interpreting the statute's reference to ammunition "primarily intended" for sporting purposes, a key question is "*whose* intent should control the analysis."[14] Rejecting the notion that the analysis should focus solely on the intent of the ammunition manufacturer, ATF proposed that the relevant inquiry "must primarily be based on objective criteria, not the subjective intentions of any particular group."[15] In other words, whether a particular ammunition is "primarily intended" for sporting use should focus on its likely use in the general community. According to ATF, this question in turn "necessarily involves examination of the cartridges in which the armor piercing projectiles can be loaded, and the handguns that are readily available to accept those cartridges."[16] Specifically, "the characteristics of the handgun or handguns in which a specific armor piercing projectile may be used will generally determine that projectile's 'likely use' in the general community."[17] When a handgun's "objective design is not limited to primarily sporting purposes, such as handguns designed to be carried and concealed, it may be reasonably inferred that ammunition capable of use in such handguns is unlikely to be used primarily for sporting purposes."[18]

ATF's proposal was not published in the Federal Register. The Administrative Procedure Act (APA) normally requires agencies to follow certain procedures when they engage in rulemaking: publication of a notice of proposed rulemaking in the Federal Register, followed by an opportunity for public comment.[19] In particular, a "legislative rule"—that is, a rule that carries the force and effect of law—must be promulgated through the APA's rulemaking procedures.[20] Other types of rules, including "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," are exempt from these procedural requirements under 5 U.S.C. § 553(b)(A). ATF did not explain why it considered the proposed framework to be exempt from the APA's notice and comment procedures. But it can be surmised that ATF must have concluded that the proposed framework was a non-legislative rule that fell within the § 553(b)(A) exception.

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13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 5 U.S.C. § 553.

20 *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

ATF published the draft framework online and opened a comment period for feedback. The framework received strong opposition from the gun lobby,[21] with coordinated campaigns resulting in ATF receiving over 80,000 comments largely pushing against the framework.[22] As a result, ATF announced that it would not implement any final framework until it had "further evaluate[d]" the issues raised in the comments and provided "additional open and transparent process."[23]

III. Proposed action

ATF should implement the Armor Piercing Ammunition Exemption Framework and limit the "sporting purpose" exemption to rifle ammunition that is only capable of being fired from single-shot handguns. Implementing this framework would enable ATF to evaluate ammunition currently on the commercial market as well as future designs to determine whether they qualify as armor-piercing under federal law.

The framework would require ATF to specifically classify which kinds of rifle ammunition qualify as armor-piercing ammunition, and therefore are banned under federal law, by determining whether the rifle ammunition is capable of being fired from a semi-automatic handgun; these specific handguns are not considered primarily for sporting purposes. According to ATF, although "the design of most single shot handguns shows that they are *primarily* intended to be used for sporting purposes, this is not necessarily the case [for] handguns with larger ammunition capacities."[24]

The proposed framework divides armor piercing ammunition into two categories:

- The first category, encompassing .22 caliber projectiles that weigh 40 grains or less and are loaded into rimfire cartridges, would presumptively fall within the "sporting purposes" exemption. Such ammunition, ATF explained, is "generally suitable only for use against small game and at short distances," and ATF has long recognized that .22 rimfire firearms and ammunition are primarily intended for sporting use.[25]
- All other projectiles would presumptively fall within the "sporting purposes" exemption *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."[26]

According to ATF, although "the design of most single shot handguns shows that they are *primarily* intended to be used for sporting purposes, this is not necessarily the case [for] handguns with larger ammunition capacities."[27] Because "[t]he likely use of revolvers and semi-automatic handguns in the community varies, and the projectiles they use are, in many cases, interchangeable among models designed to use the same or similar calibers," ATF posited that

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[21] NRA-ILA, "BAFTE To Ban Common AR-15 Ammo," February 14, 2015, https://www.nraila.org/articles/20150213/batfe-to-ban-common-ar-15-ammo.

[22] ATF, "Notice to those Commenting on the Armor Piercing Ammunition Exemption Framework," March 10, 2015, https://www.atf.gov/news/pr/notice-those-commenting-armor-piercing-ammunition-exemption-framework.

[23] *Id*.

[24] ATF, "Armor Piercing Ammunition Exemption Framework."

[25] *Id.*

[26] *Id.*

[27] *Id.*

"it is not possible to conclude that revolvers and semi-automatic handguns as a class are 'primarily intended' for use in sporting purposes."[28]

IV. Legal justification

The GCA expressly gives the attorney general the discretion to "find" whether a projectile is primarily intended for sporting purposes.[29] The attorney general has, in turn, delegated this authority to ATF.[30] To the extent that the meaning of the statutory exception "primarily intended to be used for sporting purposes" is ambiguous, a court would conclude that Congress delegated authority to interpret that term to the attorney general (and therefore ATF).[31] Agencies are free to issue "interpretative rules" to advise the public of the agency's construction of a statute that it administers.[32] Agencies are likewise free to issue "general statements of policy" to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.[33] ATF's issuance of a "framework" explaining how it interprets this "sporting purposes" exemption and how it intends to exercise its discretion in granting exemptions based on that interpretation are therefore legally justified. Assuming that the framework is a final agency action reviewable under the APA, a court could not set it aside unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[34]

As an initial matter, the "sporting purposes" framework is likely a "rule" as defined by the APA. The APA defines "rule" broadly, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy describing the organization, procedure, or practice requirements of an agency."[35] The "sporting purposes" framework is a statement of "general" applicability and "future effect" that "interpret[s]" the meaning of the statutory "sporting purposes" exemption, and explains the substantive bases on which ATF will, going forward, "implement" its responsibility to administer that exemption and process requests for determinations whether particular ammunition qualifies for the exemption.[36]

The APA establishes a procedure for agency rulemaking (publication of a notice of proposed rulemaking in the Federal Register, followed by an opportunity for public comment; collectively, "§ 553 procedures") that agencies must follow, unless the rule in question falls within certain exceptions, including an exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[37] The proposed framework interprets the statutory "sporting purposes" exemption and specifies how ATF will exercise its discretion in implementing that exception. It does not repeal or amend any of ATF's existing regulations,

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[28] *Id.*

[29] 18 U.S.C. § 921.

[30] 28 C.F.R. § 0.130(a).

[31] *See Chevron*, 467 U.S. at 843-44.

[32] *See Perez*, 135 S. Ct. at 1204.

[33] *See Guardian Fed. Sav. & Loans Ass'n*, 589 F.2d at 666. [34] 5 U.S.C. § 706(2).

[35] 5 U.S.C. § 551(4).

[36] ATF, *Armor Piercing Ammunition Exemption Framework.* [37] 5 U.S.C. § 553(b)(A).

which, as relevant, simply state: "The Director may exempt certain armor piercing ammunition from the requirements of this part."[38] Rather, it explains and clarifies how ATF will exercise its existing authority, including by setting forth presumptions that certain categories of ammunition will receive a "sporting purposes" exemption. There is thus a credible argument that the "sporting purposes" framework is merely an interpretive rule or general statement of policy issued to "advise the public prospectively of the manner in which [it] proposes to exercise a discretionary power," and is therefore exempt from the APA's procedural rulemaking requirements.[39]

Because ATF opened a 30-day comment period when proposing this framework in 2015 and indicated that it would further evaluate the issues raised in the comments that had been submitted, the agency needs to consider whether to reopen the proposal for additional comments before finalizing it. As noted above, the agency has already committed to "process[ing] the comments received" and providing "additional open and transparent process (for example, through additional proposals and opportunities for comment) before proceeding with any framework." Although ATF is free to change course and finalize the framework without taking these steps, it would likely need to explain why its decision to abandon the promise of additional procedures was not arbitrary or capricious.[40] In other words, while ATF may reduce its litigation risk by following the open process to which it previously committed, it is not bound to do so as long as it can articulate a reason why part or all of that process should be dispensed with. That said, a reviewing court might understandably raise an eyebrow at a choice to proceed with *less* transparency or input from interested parties; and regulated parties might be understandably upset that the agency went back on its word.

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[38] 27 C.F.R. § 478.148.

[39] *Guardian Fed. Sav. & Loans Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978); *see also, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) ("the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers'" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

[40] *See, e.g.*, *Am. Wild Horse Preservation Campaign v. Purdue*, 873 F.3d 914, 928 (D.C. Cir. 2017) (an agency is free to change a policy if doing so is reasonable, but "it must acknowledge that it is actually changing course and explain its reasons for doing so") (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *Standing Rock Sioux Tribe v. U.S. Army Corps. of Eng'rs*, 255 F. Supp. 3d 101, 142 (D.D.C. 2017) (collecting cases suggesting that this standard applies whenever the agency changes an "official policy," even if the original policy was not articulated in a final agency action).