RECOMMENDED ACTION MEMO

Agency: Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)

Topic: Updating Definition of "Frame or Receiver" to Close Loopholes Related to "Unfinished Frames and Receivers" and "Split Receivers"

Date: November 2020

Recommendation: Update the definition of "frame or receiver" through rulemaking to address the proliferation of untraceable firearms or "ghost guns."

I. Summary

Description of recommended executive action

Modern firearms are a highly modular product; components can be swapped out, and firearms can be assembled from individually purchased components. Only one component on a firearm is regulated under federal law. This component is called the "frame" on a handgun and the "receiver" on a rifle.

Beginning in the Bush administration, the ATF began issuing guidance about the classification of a "frame" or "receiver" that allowed for nearly-completed versions of these components, called "80%" or "unfinished" frames and receivers, to evade classification as "firearms."

The result has been a proliferation of untraceable firearms, or "ghost guns," so called because they evade federal serialization and documentation requirements that enable the tracing system used by law enforcement to link a recovered firearm back to its owner. What's more, this industry sells its wares without conducting a background check: they sell products that are intended to be used, and indeed can only be used to produce firearms, without knowing whether their customers are legally allowed to possess firearms.

The ATF can resolve this issue by returning to a more sensible definition of "frame or receiver" that captures these products, which are clearly designed for the single purpose of evading federal firearm laws, and should do so by changing the regulatory definition through notice and comment rulemaking.

This new definition would also resolve a second, increasingly grave issue. A number of modern firearms, including AR-15-style assault rifles, do not have a single "receiver" in the traditional sense, but instead a "split receiver" that includes an "upper receiver" and a "lower receiver." The ATF has long characterized the lower receiver as the "receiver" on these types of weapons for regulatory purposes, but some courts have recently rejected that characterization. The consequences could be dire, frustrating prosecutions of federal firearm laws, and potentially opening the door for the ghost gun industry to drop the "unfinished" workaround and simply sell fully completed lower receivers.

Overview of process and time to enactment

The ATF can accomplish this change in regulatory definition through rulemaking under the Administrative Procedures Act (APA). This process begins with a Notice of Proposed Rulemaking listed in the Federal Register. After the 90-day public comment period,[1] the ATF would review these comments, and prepare a Final Rule that reflects and responds to the public comments, and which would also be published in the Federal Register. A rule may become effective as soon as 30 days after the Final Rule's publication.[2] This multi-phase process generally extends for a year.

II. Current state

Ghost guns

The statutory definition of a "firearm" includes the frame or receiver; this is the only component regulated as a firearm. There is no statutory definition of "frame or receiver," although a definition is included in the Code of Federal Regulations.

The ATF has issued guidance that the definition of "frame or receiver" does not reach certain products that it considers "unfinished." This has allowed for an explosion in companies exploiting this guidance and selling easy-to-finish "do it yourself" firearms, while evading statutory requirements for the sale of firearms, including background check, serialization, and documentation requirements.

The result has been the proliferation of "ghost guns," so called because they cannot be traced. Ghost guns are increasingly used in shootings, often by shooters who would be prohibited from obtaining a firearm through traditional means.[3] They are favored by traffickers: law enforcement

[1] 18 U.S.C. § 926(b) (requiring a 90-day comment period for ATF rule-making).

[2] Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10003.

[3] *E.g.,* John Beauge, "'Ghost Gun' Used in Shooting that Killed Two Outside Snyder County Restaurant," *Penn Live Patriot-News,* July 14, 2020, https://www.pennlive.com/crime/2020/07/ghost-gun-used-in-shooting-that-killed-two-outside-snyder-county-restaurant.html; Jeff Reinitz, "Untraceable 'Ghost Guns," Like One Used in Waterloo Shooting, Draw Attention of ATF," *The Courier*, January 19, 2020, https://wcfcourier.com/news/local/crime-and-courts/untraceable-ghost-guns-like-one-used-in-waterloo-shooting-draw-attention-of-atf/article_93b64b90-e777-557c-90a3-702419b30806.html; Richard Winton, "Santa Clarita Shooting: Weapon Used in Saugus High Attack a 'Ghost Gun,' Sheriff Says," *L.A. Times*, November 21, 2019, https://www.latimes.com/california/story/2019-11-21/santa-clarita-shooting-45-caliber-gun-saugus-high-attack-a-ghost-gun-sheriff-says.

busts of trafficking rings often find large cases of ghost guns,[4] and they are making up an increasing share of the number of crime guns recovered by law enforcement.[5]

Statutory law and Code of Federal Regulations

There are two general statutory regimes that regulate firearms at the federal level. The older of these regimes is the National Firearms Act of 1934 (NFA), 26 U.S.C. § 5801 *et seq.*, which primarily regulates a subset of firearms, including machine guns, silencers, short-barreled rifles and shotguns, and certain other weapons.[6] It imposes registration requirements and restrictions on the sale of covered weapons.

The second regime, the Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 *et seq.*, regulates firearms more generally. The GCA imposes serialization, documentation of sale, and background check requirements on firearms. It defines a firearm as "any weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive...[or] the frame or receiver of any such weapon."[7] A GCA "firearm," therefore, includes

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[4] *E.g.*, Bureau of Alcohol, Tobacco, Firearms & Explosives, "Man Sentenced to 15 Years for Trafficking "Ghost Guns" and Drugs," February 14, 2020, https://www.atf.gov/news/pr/man-sentenced-15-years-trafficking-ghost-guns-and-drugs; State of New Jersey Office of the Attorney General, "Indictment in "Operation Stone Wall" Charges Nine Alleged Members of Ring that Trafficked Untraceable "Ghost Gun" Assault Rifles & Cocaine," June 5, 2019, https://www.nj.gov/oag/newsreleases19/pr20190605a.html; "12 Arrested in Bust of Alleged Camden County 'Ghost Gun' Assault Rifle Ring," *Philadelphia Inquirer,* March 18, 2019, https://www.philly.com/news/new-jersey-ghost-guns-assault-rifles-pistol-gun-trafficking-camden-county-20190318.html; Emily Masters, "State Police: Downstate Cop Sold 'Ghost' Guns to Motorcycle Gang," *Times Union,* March 1, 2019, https://www.timesunion.com/news/article/State-Police-Downstate-cop-sold-ghost-guns-to-13656862.php; Zusha Elinson, "The Rise of Untraceable 'Ghost Guns,'" *Wall St. J.,* January 4, 2018, https://www.wsj.com/articles/the-rise-of-untraceable-ghost-guns-1515061800; U.S. Attorney's Office, Eastern District of California, "Eight Men Indicted for Manufacturing and Dealing AR-15 Type Rifles and Silencers Without a License," Dep't of Justice, October 15, 2015, https://www.justice.gov/usao-edca/pr/eight-men-indicted-manufacturing-and-dealing-ar-15-type-rifles-and-silencers-without; New York State Office of the Attorney General, "A.G. Schneiderman Announces Thirty-Two Count Indictment of Two Defendants Charged with Illegally Trafficking Untraceable 'Ghost Guns,'" September 21, 2015, https://web.archive.org/web/20171214094951/https://ag.ny.gov/press-release/ag-schneiderman-announes-thirty-two-count-indictment-two-defendants-charged-illegally.

[5] According to ATF, approximately 30% of the firearms recovered in California, and approximately 40% of those recovered in the Los Angeles area, are ghost guns. Alain Stephens, "Ghost Guns are Everywhere in California," *The Trace*, May 17, 2019, https://www.thetrace.org/2019/05/ghost-gun-california-crime/; Bradi Hitt, "'Ghost Guns' Investigation: Law Enforcement Seeing Unserialized Firearms on Daily Basis in SoCal," ABC 7 Eyewitness News, January 30, 2020, https://abc7.com/5893043/. Other municipalities are reporting significant increases in ghost gun recoveries. *E.g.*, Testimony of Robert Contee, Assistant Chief of Police, Metropolitan Police Department, Before the Committee on the Judiciary & Public Safety, Council of the District of Columbia, October 3, 2019, https://lims.dccouncil.us/downloads/LIMS/41601/Hearing_Record/B23-0018-HearingRecord2.pdf, 5, 35 ("Our colleagues at DPS have identified 75 untraceable ghost guns recovered so far in 2019, three times as many as the 25 recovered in all of 2018").

[6] *See* 26 U.S.C. § 5845; 27 C.F.R. § 479.11.

[7] 18 U.S.C. § 921(a)(3). The full definition is as follows: The term "firearm" means (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; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

an operational gun; a weapon that is designed to or may be readily converted into an operational gun; or a single component, the frame or receiver. Statutory law does not define a "frame" or a "receiver."

The regulatory definition of a "frame or receiver" is as follows:

> *Firearm frame or receiver*. That part of a firearm which provides housing for the hammer, bolt or breechblock and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.[8]

Classification letters by the ATF and the problem of ghost guns

Through its Firearms and Ammunition Technology Branch (FATB), the ATF regularly issues guidance, in the form of "letter rulings classifying firearms," to manufacturers that "may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws."[9] To receive a classification letter, a manufacturer submits a prototype to the FATB, along with a request for classification.

Since the 1980s, the FATB has opined in these classification letters about the stage of manufacture at which a product is legally classified as a frame or receiver. In 1983, the FATB evaluated an "unfinished AR-15 type firearm receiver" that was "basically complete" except that its "interior cavity [had] not been milled."[10] The FATB determined that "[a]pproximately 75 minutes time was required to make the receiver functional," and concluded that "the unfinished receiver as provided, is still a firearm subject to the provisions of the Gun Control Act of 1968." This approach analyzed the length of time and difficulty of the tasks required to "make the receiver functional"—that is, to complete it to the stage that it could be used to assemble a functional firearm. In subsequent classification letters, the FATB determined that various clearly identifiable, but not fully completed frames and receivers, "may be readily converted to function as the frame or receiver of a firearm," and accordingly provided guidance that the products were frames or receivers within the meaning of the Gun Control Act.[11]

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[8] 27 C.F.R. § 479.11.

[9] Bureau of Alcohol, Tobacco, Firearms & Explosives, "ATF National Firearms Act Handbook," April 2009, §§ 7.2.4, 7.2.4.1, https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download.

[10] "Letter from Edward M. Owen, Jr., Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, and Firearms, to Henry A. Roerich, General Manager, SGW, Inc.," May 3, 1983, *Cal. Rifle & Pistol Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosive*s, No. 1:14- CV-01211 (E.D. Cal. Jan. 9, 2015), ECF 23 (certified filing by ATF collecting ATF-issued determinations regarding unfinished frames and receivers) ("ATF Determinations Filing"), 60.

[11] "Letter from Edward M. Owen, Jr., Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, and Firearms, to Thomas C. Miller, Att'y," July 14, 1994, available at ATF Determinations Filing at 63–64; *see also* "Letter from Curtis H.A. Bartlett, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, and Firearms, to Lane Browne, Mega Machine Shop, Incorporated," December 27, 2002, available at ATF Determinations Filing at 65–66.

However, by 2004, the FATB had significantly altered its approach to this issue. In that year, the FATB began including guidance that went beyond analysis of the submitted product in its classification letters, and began providing a roadmap for producing receiver products that would not be classified as "firearms." In a classification letter opining that the submitted product was a firearm, the FATB described a hypothetical product, "a solid AR-15 type receiver casting, without having the critical internal areas machined (magazine well and central area for the fire control components) or crosspin holes drilled," and opined that such a product "would not constitute a 'firearm' as defined in the NFA."[12] By 2006, the FATB was providing more detailed advice in classification letters: at least twice, the FATB advised that "an AR-15 type receiver which has *no machining performed at all in the area of the trigger/hammer recess* might not be classified as a firearm... Such a receiver could have *all* other machining operations performed, including pivot pin and takedown pin hole(s) and clearance for the takedown pin lug, but must be completely solid and un-machined in the trigger-hammer recess area."[13] These letters even included an illustration providing instructions on what a product meeting this standard would look like.[14]

In 2009, the FATB issued a classification letter opining that a product that satisfied these standards was not a firearm:

> Our Branch has previously determined that if an AR-type receiver-blank possessed either pivot pin holes or indexing marks for the fire-control components (trigger group); or if any of the cavity for the trigger group had been milled, then the receiver-blank would have been finished to the point at which it could be recognized as a firearm frame or receiver. Your submitted sample does not contain any of these critical features. Based on our examination, FATB finds that this sample AR-15 type receiver-casting is not yet finished to the point at which it would be classified as a firearm. As such, it is not regulated by the Gun Control Act or the National Firearm Act.[15]

In a 2011 classification letter to a repeat submitter, the FATB noted that "a prior letter" had provided guidance that "an AR-15 type receiver which has *no machining of any kind performed in the area of the trigger/hammer (fire-control) recess* might not be classified as a firearm," and provided an acknowledgement: "You have submitted the current item for classification with the

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[12] "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Mark Malkowski, Continental Machine Tool Company, Inc.," January 29, 2004, available at ATF Determinations Filing at 68.

[13] "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Kevin Audibert," July 26, 2006, available at ATF Determinations Filing at 74–75; "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Justin Halford," April 24, 2006, available at ATF Determinations Filing at 78–79.

[14] "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Kevin Audibert," July 26, 2006, available at ATF Determinations Filing at 75; "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Justin Halford," April 24, 2006, available at ATF Determinations Filing at 79.

[15] "Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Chris Coad, Ultra-Tech, Inc.," May 20, 2009, available at ATF Determinations Filing at 135–38.

above qualifications in mind."[16] The letter concluded that the submitted product was not "completely solid and un-machined" because of a carefully described detail, and therefore had to be classified as a firearm, then concluded with additional detailed instructions to meet the hypothetical standard.[17]

In 2015, the ATF publicized this guidance on a section of the ATF website entitled "Receiver Blanks."[18] It includes specific guidance and instructions:

> ATF has long held that items such as receiver blanks, "castings" or "machined bodies" in which the fire-control cavity area is completely solid and un-machined have not reached the "stage of manufacture" which would result in the classification of a firearm according to the GCA.[19]

Having laid out clear directives for producing receiver products that the ATF would not regulate, these classification letters and public-facing guidance have laid the foundation for the ghost gun industry. The FATB has gone on to issue classification letters blessing a growing number of companies.[20]

These changes opened the door for an entire industry to grow up around this loophole, an industry that has moved as close to selling a gun as possible without crossing over the arbitrary line that the ATF has drawn. Firearm "kits," sold online and in brick-and-mortar stores, include nearly finished frames and receivers along with all the other components needed to assemble a firearm, including tools and instructions that enable the assembly of an operable firearm without any particular skill or experience. Firearm "kits" don't include background checks, licensing, serialization, or any of the other requirements triggered by firearms manufacture and sales.

In a court submission in litigation initiated by a company that received an unfavorable classification, the ATF provided the following explanation for this guidance:

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[16] "Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Kas McManus, Lancer Systems," March 16, 2011, available at ATF Determinations Filing at 74–75; "Letter from Sterling Nixon, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives, to Justin Halford," April 24, 2006, available at ATF Determinations Filing at 82.

[17] *Id.* at 82–83.

[18] "Receiver Blanks," Bureau of Alcohol, Tobacco, Firearms & Explosives, accessed October 14, 2020, https://www.atf.gov/qa-category/receiver-blanks; for 2015 index of the relevant pages, see Wayback Machine archive at https://web.archive.org/web/20150905071514/https://www.atf.gov/qa-category/receiver-blanks.

[19] "Are "80%" or "Unfinished" Receivers Illegal?," Bureau of Alcohol, Tobacco, Firearms & Explosives, accessed October 14, 2020, https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal; for 2015 index, see Wayback Machine archive at https://web.archive.org/web/20150905204055/https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal.

[20] One of the most prolific ghost gun companies, Polymer 80, hosts the classification letters it has received from FATB on its website: https://web.archive.org/web/20191221202320/https://www.polymer80.com/media/wysiwyg/porto/LegalDocs/P80_Product_Determination_Letters.pdf.

> For a casting to qualify as a receiver, it must have reached a certain advanced stage of manufacture. ATF makes this determination based upon the difficulty of the process (i.e., of machining and drilling), *the cost and availability of the tools required, the skill required, and the time it would take to fashion the blank into an item suitable for use as part of a functional weapon*. . . .
>
> ATF's technical experts have determined that for an AR-type receiver blank to remain outside the purview of the Act, its fire-control area must remain solid, viz., uncreated, unformed, and unmachined in any way. In order to ensure consistency, ATF created this uniformly applicable baseline standard, determining that the critical manufacturing process occurs when any step is taken toward completion of the critical area.[21]

This explanation purports to rely on markers of the ease of finishing the product into a receiver that can be used in assembling a functional firearm, but the bright line rule requiring specific areas remain "solid and unmachined" fails to adequately address whether these products are designed or readily convertible for use. Among other things, it fails to account for ancillary products that ghost gun companies now sell alongside the nearly finished frames or receivers, or sometimes in kits with them, which further simplify and expedite the machining process.

One such set of products, called "jigs," are three dimensional guides that fit over the receiver product, providing an easy template that shows what holes need to be drilled and what cavities milled.[22] Another set of still more sophisticated products are single-purpose CNC milling machines, sold under the brand "Ghost Gunner," that are designed specifically to finish machining nearly completed receiver products.[23] The sellers of the Ghost Gunner advertise the product as a machine that "automatically finds and aligns your 80% lower to get to work," and that it requires "no prior CNC knowledge or experience" to "manufacture unserialized rifles and pistols in the comfort and privacy of home."[24]

Courts overrule ATF classifications of an AR-15 component as a "receiver"

There is a second issue with the regulatory definition of "receiver" that has emerged in recent years, threatening to negate gun laws for highly dangerous weapons. The definition describes a single component providing "housing for the hammer, bolt or breechblock and firing mechanism."[25] Some models of rifles, including AR-15-style rifles, have a "split receiver" comprised of an "upper receiver" (sometimes referred to as an "upper assembly") and a "lower

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[21] "Memorandum in Support of Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment," *Cal. Rifle & Pistol Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:14-CV-01211 (E.D. Cal. Jan. 9, 2015), ECF 20-1, at 6–7 (emphasis added) (citations omitted).
[22] *See, e.g.,* 80% Lowers, "Builder's Guide to 80% Jigs (Drill & Mill vs. Router)," July 17, 2020, https://www.80-lower.com/blogs/80-lower-blog/builders-guide-to-80-jigs-drill-mill-vs-router/; 80% Arms, "80 Lower Jigs," accessed October 14, 2020, https://www.80percentarms.com/80-jigs/.
[23] *See* "Ghost Gunner," accessed October 14, 2020, https://ghostgunner.net/.
[24] *Id.*
[25] 27 C.F.R. § 479.11.

receiver," two separate components that together provide housing for the components listed in the definition. For these weapons, the ATF has characterized the "lower receiver" as a "receiver" and therefore definitionally a "firearm" subject to federal regulation (including serialization, documentation, and background check requirements), and federal prohibitions on the possession of firearms.

In recent cases involving federal prosecutions for gun crimes involving firearms with a split receiver, some courts have held that the "receiver" definition contained in the Code of Federal Regulations cannot be applied to a lower receiver, because a lower receiver alone does not house all of the components listed in the definition. This has led to several instances where prosecutions for violations of firearms laws based on the acquisition or possession of lower receivers have been dismissed.[26] Three of these cases are described below. If these rulings are accepted more broadly, particularly dangerous weapons could be exempted from firearm laws.

United States v. Jimenez

In a 2016 federal court case in California, a man prohibited from possessing firearms was charged after purchasing the lower receiver to an AR-15 style rifle, modified to accommodate automatic firing, during a sting operation.[27] Because the lower receiver was modified for automatic fire, he was charged with unlawful possession of a machine gun under both the GCA, 18 U.S.C. § 922(o), and the NFA, 26 U.S.C. § 5861(d). A "machine gun" is defined by statute as an automatic weapon, including "the frame or receiver of any such weapon."[28] The court noted that the statutory provisions at issue "criminalize the possession of a machinegun receiver, but neither statute says what a receiver is."[29]

The defendant's indictment was based on the theory that the lower receiver constituted a "machine gun" under this definition. He challenged his conviction on vagueness grounds, arguing that "nothing in the statutes or CFR gave him fair notice that possessing the lower receiver of an AR-15 rifle would count as the criminal possession of 'the receiver," because there is no statutory definition, and "the AR-15 lower receiver does not fit the CFR definition of a 'receiver' that is illegal under the gun laws."[30]

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[26] *See* generally Jake Bleiberg & Stefanie Dazio, "Design of AR-15 Could Derail Charges Tied to Popular Rifle," *Associated Press*, January 13, 2020, https://apnews.com/396bbedbf4963a28bda99e7793ee6366 (noting that "[s]ince 2015, at least five defendants have challenged the government and succeeded in getting some charges dropped").

[27] *United States v. Jimenez,* 191 F. Supp. 3d 1038 (N.D. Cal. 2016).

[28] The Gun Control Act provides that "[t]he term 'machinegun; has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b))." 18 U.S.C. § 921(a)(23). The full definition is as follows: Machinegun. The term "machinegun" means 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 term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. 26 U.S.C. § 5845(b).

[29] *Jimenez,* 191 F. Supp. 3d at 1040.

[30] *Id.* at 1040–41.

The government stipulated that "the lower receiver for which Jimenez was arrested and indicted houses only two of the required features—the hammer and the firing mechanism," but argued that notice was provided in sub-regulatory documents, including an IRS memorandum and letters issued by the ATF.[31] The court characterized this as "in effect, conced[ing] . . . that the plain language of the law does not answer the vagueness challenge," and overturned the conviction on vagueness grounds.[32]

United States v. Roh

In a subsequent prosecution, again involving AR-15 lower receivers, a court relied on *Jimenez*'s reasoning to hold that a lower receiver is not a "firearm" as defined under the GCA. The case, *United States v. Roh*, concerned a defendant who was charged with engaging in the business of manufacturing, importing, or dealing of firearms without a license.[33] The defendant had set up a business in which he would provide his customers with all of the parts for an AR-15 rifle, except for the lower receiver; his customer would then press a button to initiate a pre-programmed process that would manufacture the lower receiver from a receiver blank.[34] In a "tentative ruling" following the trial, the court found that "a finished AR-15 receiver does not contain a bolt or breechblock and is not threaded to receive the barrel," and therefore that it failed to satisfy the regulatory definition of "receiver."[35] The Government argued at trial that "ATF had 'classified' finished receivers as firearms" in determination letters. Because the court found it "clear that the ATF's classification of articles as firearm [sic] does not comply with the rule making process which brought into effect the public definition for firearm found in [27 C.F.R.] Section 478.11," it held that the defendant's activities "were not within the scope of the statute or the ATF regulatory definition," and therefore that the defendant "did not violate the law by manufacturing receivers."[36] The court also held that "when applied to include finished lower receivers, Section 478.11 is unconstitutionally vague."[37]

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[31] *Id.* at 1041.

[32] In an aside, the court commented on "an element of randomness in ATF's enforcement practices," noting that in some rifles with a split receiver, "the upper receiver is classified as a weapon but the lower receiver is legal to acquire." *Jimenez,* 191 F. Supp. 3d at 1043-44. "[T]he patchwork of enforcement practices," the court concluded, "is another strike against the Government's position." *Id.* at 1044.

[33] No. 8:14-CR-167-JVS (C.D. Cal.) The facts, reasoning, and quotations below are from a "tentative ruling" that the court issued at the conclusion of the trial. It was not initially published on the electronic docket, although a purported copy of the originally issued tentative ruling has also been uploaded by Second Amendment attorney Alan Beck (who was not council on the case), at https://www.scribd.com/document/429889179/Roh-Ruling-on-R-29-Motion; *see also* Alan Beck, "Here is the tentative ruling…" Facebook post, October 12, 2019, https://m.facebook.com/ABeckLaw/posts/682014588874800.

[34] *Id.* at 3–4.

[35] *Id.* at 4.

[36] *Id.* at 5, 6.

[37] *Id.* at 6. Subsequently, the court appended the "tentative ruling" document to a minute order granting the defendant's motion to vacate a previously entered guilty plea and the government's motion to dismiss, *United States v. Roh,* No. 8:14-CR-167-JVS (May 6, 2019), ECF No. 164. The pagination here refers to the document appended to the minute order. Substantively, the two documents are identical.

Following this tentative ruling, prosecutors agreed to dismiss the case. CNN later reported that "[f]ederal authorities preferred to let Roh go free rather than have the ruling become final and potentially create case law that could have a crippling effect on the enforcement of gun laws."[38]

United States v. Rowold

In December 2019, a federal court in Ohio issued a similar decision. In *United States v. Rowold*, the defendants were charged with making false statements in connection with the acquisition of firearms, and unlawful possession of firearms by a person with a felony conviction.[39] The "firearms" in question were AR-15-style lower receivers. The defendants moved to dismiss on the grounds that the lower receivers were not "firearms."

The court found, based on undisputed testimony of two witnesses, including an ATF agent, that:

> The upper receiver houses the bolt and enables insertion of the barrel. The lower receiver provides housing for the hammer and the firing mechanism. The...lower receiver at issue here is a container that would, in a fully assembled weapon, house only the hammer and the firing mechanism.[40]

After noting that there is no statutory definition of "receiver," the court referred to the regulatory definition in 27 C.F.R. § 478.11, which it characterized as a "gap-filling regulation," and concluded that the regulation is "unambiguous" and "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."[41] Based on this reading, the court held that the lower receivers at issue were not "firearms" because one of the three essential components, the bolt, is housed in the upper receiver, and dismissed the charges on that basis. The court noted that "ATF retains the authority — and has the duty — to fix the regulatory scheme and to regulate AR-15 lower receivers as firearms within the GCA."[42]

III. Proposed action

To address the dual problems of ghost guns and classification of split receivers, under the incoming administration, the ATF should initiate notice and comment rulemaking to formally replace the current definition of "frame or receiver" in 27 C.F.R. § 478.11 with the following:

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[38] Scott Glover, "He Sold Illegal AR-15s. Feds Agree to Let Him Go Free To Avoid Hurting Gun Control Efforts," CNN, October 11, 2019, https://www.cnn.com/2019/10/11/us/ar-15-guns-law-atf-invs/index.html.
[39] 429 F. Supp. 3d 469 (N.D. Ohio 2019). These counts were charged under 18 U.S.C. § 922(a)(6) and § 922(g)(1), respectively.
[40] *Rowold,* 429 F. Supp. 3d at 471 (internal citations omitted).
[41] Id. at 475–6.
[42] *Id.* at 476.

> *Firearm frame or receiver*. That part of a firearm that provides or is intended or designed to provide the housing for the trigger group, regardless of the stage of manufacture. It includes a blank, casting, or machined body that requires modification, such as machining, drilling, filing or molding, to be used as part of a functional firearm; provided, that it does not include a piece of material that has had its size or external shape altered solely to facilitate transportation or storage, or solely its chemical composition altered.

This change would have two key effects. First, it would clearly specify which part of a split receiver is the "receiver" for definitional purposes: it would be whichever part "provides . . . the housing for the trigger group." The lower receiver of an AR-15 would clearly fall within this definition, and because the definition specifies the housing for only a single element, the ambiguities and "patchwork of enforcement practices" decried in *Jimenez* would be resolved. Second, it would resolve the ghost gun problem by closing the loopholes that the industry has been exploiting. It would provide that products currently marketed as "unfinished" frames and receivers, which are intended to be used as frames and receivers, are subject to regulation as firearms. Sellers of "unfinished" frames and receivers would no longer be able to evade background check, serialization, and record-keeping requirements, shutting down the supply of ghost guns at its source.

In order to effect this change, the administration must go through the notice and comment rulemaking process under the APA.[43]

First, an agency must provide notice that it intends to promulgate a rule by publishing a Notice of Proposed Rulemaking in the *Federal Register*. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then the agency must accept public comments on the proposed rule for a period of at least 90 days.[44] Received comments must be reviewed, and the ATF must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the *Federal Register* along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

IV. Legal justification

After an administrative regulation is finalized, it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action.[45]

[43] 5 U.S.C. § 553.
[44] 18 U.S.C. § 926(b).
[45] 5 U.S.C. § 706.

ATF's statutory authority

Regulating ghost guns as firearms is clearly within the ATF's statutory authority and is unlikely to be challenged on such grounds.[46] Congress has invested the attorney general with the power to "prescribe only such rules and regulations as are necessary to carry out the provisions" of the GCA.[47] The attorney general has, in turn, delegated these authorities to the ATF.[48] Following the *Jimenez* decision, then-Attorney General Loretta Lynch notified the speaker of the House, calling attention to the case and conveying the Department of Justice's position that while administrative or regulatory action may be appropriate, an appeal of the decision was not:

> [T]he district court held that the regulatory definition of 'frame or receiver' did not provide the defendant with notice that his conduct violated the law. To the extent that the Bureau of Alcohol, Tobacco, Firearms and Explosives believes that the definition should encompass the lower receiver of an AR-15 or should otherwise be modified or clarified, the appropriate course is regulatory or administrative action, not an appeal of the district court's decision in this case.[49]

Furthermore, the rulings in which courts have rejected the ATF's classification of lower receivers as "receivers" for the purposes of the NFA and the GCA, have invited regulatory changes to bring the letter of the regulation into compliance with agency practice. The *Roh* court indicated that the defect with ATF determinations about lower receivers was the absence of APA rulemaking.[50] The *Jimenez* court had gone further, calling notice and comment rulemaking the "solution" to the fear that rejecting the ATF's classification would cripple enforcement of federal gun laws.[51] And in *Rowold*, the court went further still, calling a regulatory solution through rulemaking the ATF's "duty."[52]

Constitutional challenges

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[46] *See* 16 U.S.C. § 460(d) ("The water areas of all such projects shall be open to public use . . . all under such rules and regulations as the Secretary of the Army may deem necessary . . . .").
[47] 18 U.S.C. § 926(a).
[48] 28 C.F.R. § 0.130(a)(1); *see also Vineland Fireworks Co. v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 544 F.3d 509, 517 n. 12 (3rd Cir. 2008) (noting ATF's rulemaking authority deriving from a Congressional delegation to the Attorney General); *United States v. Flores,* 404 F.3d 320 (5th Cir. 2005) (noting Congress's delegation of authority to implement provisions in the GCA to ATF); *Garner v. Lambert,* 503 F. Supp. 2d 953, 957 (N.D. Ohio 2007) (affirming Congress's delegation of rulemaking authority for the GCA to ATF via 18 U.S.C. § 926).
[49]" Letter from Hon. Loretta E. Lynch, Att'y Gen., to Hon. Paul Ryan, Speaker H.R.," September 8, 2016, https://www.justice.gov/oip/foia-library/osg-530d-letters/9_8_2016/download.
[50] ECF No. 164 at 5.
[51] 191 F. Supp. 3d at 1044–45 ("The solution to the Government's worry is not to relax our constitutional protections but to give proper public notice and possibly revise the regulations to make plain that conduct like Jimenez's will result in criminal exposure.")
[52] 429 F. Supp. 3d at 476 ("ATF retains the authority — and has the duty — to fix the regulatory scheme and to regulate AR-15 lower receivers as firearms within the GCA.")

Opponents might claim the new "firearm frame or receiver" definition recommended above to replace the current definition in 27 C.F.R. § 478.11 infringes on their Second Amendment rights or is void for vagueness. However, the new definition will not be struck down as unconstitutional.

Federal law prohibits firearm possession by categories of individuals deemed dangerous or irresponsible. It is well established that laws designed to restrict gun ownership by persons who are high-risk are constitutional. The Supreme Court affirmed in *Heller* that "longstanding prohibitions on the possession of firearms by felons and the mentally ill" are presumptively lawful,[53] and the Third Circuit has found that such laws are consistent with the Second Amendment.[54] Similarly, numerous courts have upheld background checks, licensing, and permitting laws as consistent with the Second Amendment.[55] This new definition would limit the ability of disqualified persons from accessing firearms (including unfinished firearms or receivers), and as such, it is constitutional.

Federal law requires persons who engage in the business of dealing firearms to be licensed. Federal dealer licensing requirements are plainly constitutional. The Supreme Court stated in *Heller* that "laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful regulatory measures that do not offend the Second Amendment.[56] To the extent the new definition would require firearm dealers (including those who sell unfinished firearm frames or receivers) to be licensed to sell firearms, it is constitutional.

The new definition does not add any new burdens on conduct falling within the scope of the Second Amendment.[57] The new definition captures those "unfinished" frames or receivers that

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[53] 554 U.S. 570, 626 (2008).

[54] *United States v. Barton,* 633 F.3d 168 (3d Cir. 2011) (upholding federal felon prohibitor under the Second Amendment); *see also Binderup v. AG of United States,* 836 F.3d 336, 343 (3d Cir. 2016) (en banc) (recognizing that some "individuals" are "unprotected by the right to keep and bear arms").

[55] *See, e.g., Colo. Outfitters Ass'n v. Hickenlooper,* 24 F. Supp. 3d 1050 (D. Colo. 2014), vacated on other grounds, 823 F.3d 537 (10th Cir. 2016) (upholding Colorado background check law as applied to temporary gun transfers); *Libertarian Party of Erie v. Cuomo,* 300 F. Supp. 3d 424 (W.D.N.Y. 2018), appeal docketed, No. 18-386 (2d Cir. Feb. 8, 2018) (upholding New York license-to-possess and license-to-carry laws, finding that "licensing laws place no more than 'marginal, incremental, or even appreciable restraint on the right to keep and bear arms'"); *see also Cruz-Kerkado v. Puerto Rico,* No. 16-cv-2748, 2018 U.S. Dist. LEXIS 59290 (D. P.R. Apr. 5, 2018) (upholding Puerto Rico's permit-to-possess law); *Murphy v. Guerrero,* No. 1:14-CV-00026, 2016 U.S. Dist. LEXIS 135684 (D. N. Mar. I. Sep. 28, 2016) (upholding licensing law that functioned as a "universal background check" law in the Commonwealth of Northern Mariana Islands); *Gutierrez v. Ryan,* No. 14-CV-11995, 2015 U.S. Dist. LEXIS 145622 (D. Mass. Oct. 1, 2015) (Massachusetts' firearm license law does not violate the Second Amendment).

[56] 554 U.S. at 626-27. Two Circuit Courts have expressly upheld them under the Second Amendment, see *United States v. Focia,* 869 F.3d 1269 (11th Cir. 2017) (federal law prohibiting unlicensed dealing of firearms "'impos[es] conditions and qualifications on the commercial sale of arms'" so "qualifies as the kind of 'presumptively lawful regulatory measure[]' described in Heller"); *United States v. Hosford,* 843 F.3d 161, 166 (4th Cir. 2016) (federal law prohibiting unlicensed firearms dealing is a facially constitutional "longstanding condition or qualification on the commercial sale of arms"),

[57] Most circuits have adopted a two-step approach to evaluating Second Amendment challenges, in which they ask whether the regulation burdens conduct falling within the scope of the Second Amendment, and if so, applying traditional principles of heightened scrutiny to determine whether the

have evaded classification as a "firearm" and thus evaded federal firearm laws. As described above, the laws that would apply to these devices based on this new definition have been found constitutional. So any Second Amendment challenge associated with the new definition is likely to fail.

It is also highly unlikely that a court will hold the new definition to be unconstitutionally vague. To satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."[58] The void-for-vagueness doctrine embraces these requirements.

The new definition in the proposed regulation is sufficiently definite. Under this definition, whether conduct with regards to a particular firearms component would be subject to the laws that apply to firearms would depend on whether the part "provides or intended or designed to provide the housing for the trigger group." The definition further ensures against arbitrary and discriminatory enforcement by specifying that "the stage of manufacture" is irrelevant. It also specifies several examples and the exact circumstances in which they would be included in the definition ("a blank, casting, or machined body that requires modification, such as machining, drilling, filing or molding, to be used as part of a functional firearm"). Finally, it further defines outer parameters of the definition by specifying that "it does not include a piece of material that has had its size or external shape altered solely to facilitate transportation or storage, or solely its chemical composition altered." A court would probably note these features of the new definition in rejecting any claim that it is unconstitutionally vague.

Procedural challenges

By following the NCRM process outlined above, the next administration can ensure compliance with the APA's procedural requirements. At first glance, these requirements appear simple, but the jurisprudence reviewing agency action makes clear that these requirements are in fact relatively demanding, and require meaningful engagement with each phase of the process.[59]

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regulation nevertheless passes constitutional muster." *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) ("A two-step inquiry has emerged as the prevailing approach . . . ."); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (noting that the Second Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted the two-part test); *Gould v. Morgan,* 907 F.3d 659, 662 (1st Cir. 2018) (adopting the same test).

[58] *Kolender v. Lawson,* 461 U. S. 352, 357 (1983).

[59] *See* Louis J. Virelli III., "Deconstructing Arbitrary and Capricious Review," 92 N.C.L. Rev. 721, 737-38 (2014) (describing "first" and "second" order inquiries into an agency's decision making). *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring the agency to create an administrative record so the court could review what was before the agency at the time of the decision); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding an agency rule to be arbitrary because it failed to consider the benefits of an alternative airbag mechanism); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512-13 (2009), vacated, 567 U.S. 239 (2012) (affirming the agency's change in policy because it provided rational reasons for the change).

In particular, the ATF should take care to review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.[60] The agency must address the concerns raised in all non-frivolous and significant comments.[61] The final rule must be the "logical outgrowth" of the proposed rule and the feedback it elicited.[62]

Arbitrary or capricious challenge under the APA

A court will invalidate the regulation if the agency action or conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[63] The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency's choice.[64]

Where an agency fails to consider important facts or where its explanation is either unsupported or contradicted by the facts, it is grounds for the court to find the rule "arbitrary or capricious."[65]

Further, when a challenged rule reverses or rescinds an existing rule, an agency must provide a "reasoned analysis," in which it acknowledges a change in policy and provides a "good reason" for the proposed change.[66] However, the additional "reasoned analysis" requirement does not automatically subject rule reversals to a higher level of scrutiny.[67] There are some circumstances in which a justification must be more detailed for policy changes than for initial policies, such as when the new policy relies on factual findings contradicted by those underlying the existing policy.[68] The "reasoned analysis" does not require agencies to persuade the court that a new policy is superior to the one being reversed; it merely requires an agency to "display awareness that it is changing position" and demonstrate that "there are good reasons for it."[69]

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[60] 5 U.S.C. § 553(c).
[61] *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency's "statement of general purpose" inadequate because it did not provide the scientific evidence on which it was based, and the agency's consideration of relevant information inadequate because it did not respond to each comment specifically).
[62] *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the "logical outgrowth" of a proposed rule if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period." A final rule "fails the logical outgrowth test" if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.") (internal quotation marks and citations omitted).
[63] 5 U.S.C. § 706(2)(A).
[64] *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[65] *Id.* at 43.
[66] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[67] *Id.* at 515.
[68] *Id.* at 515-516.
[69] *Id.* at 515.

Therefore, to withstand a potential judicial challenge that the new regulation is an arbitrary and capricious action by the ATF, the agency must be able to demonstrate that it considered all factors pertinent to the issue in its decision-making, and provide a sufficient justification for its final decision. In order to clear these hurdles, the administrative record created during the rulemaking process should reflect two high-level items. First, it should contain a justification for the policy based on sound evidence, empirical or otherwise. Second, it should contain an acknowledgment of reliance interests, and address why these interests are outweighed by public safety factors.

1. *Evidence supporting a new policy*

The threat posed by ghost guns is clear. Federal law prohibits numerous categories of persons from purchasing firearms, laws which have protected many Americans from gun violence. However, persons prohibited can bypass their prohibition by purchasing unfinished frames or receivers, and completing the firearm without any background check. Thus, ghost guns attract individuals who are so prohibited, as well as traffickers, who can use these products to mass-produce untraceable guns without a paper trail or a need to recruit straw purchasers. And the industry caters to these traffickers, selling ten-packs of nearly completed receivers and four-figure dedicated milling machines that come pre-programmed to finish a receiver with the press of a button. Consequently, ghost guns are increasingly recovered after use in crime.

- In 2017, a man under prosecution for multiple crimes killed six people and injured 10 in Rancho Tehama Reserve, California, with two assault-style rifles he assembled using parts ordered online.
- In 2018, a man prohibited from accessing guns built his own ghost gun from parts ordered online and perpetrated a mass shooting at his workplace in Middleton, Wisconsin.
- In 2019, a man in Dallas, Texas, who was prohibited from possessing firearms due to a history of domestic violence, was arrested for possessing an AR-15-style rifle made with a 3D-printed receiver. When he was arrested, he was carrying a hit list with the names and addresses of several federal lawmakers.
- In late 2019, a 16-year-old used a ghost gun to kill two students and injure three others at Saugus High School in California. He was too young to legally purchase a gun.

A 2016 US Government Accountability Office report noted an "emerging reliance by criminal organizations on this source of weapons." Ghost guns allow gun traffickers to avoid the challenges and risks they would come up against if they attempted to purchase a traditional gun from a licensed dealer.[70]

[70] Giffords Law Center to Prevent Gun Violence, "Ghost Guns: How Untraceable Firearms Threaten Public Safety," May 21, 2020, https://giffords.org/lawcenter/report/ghost-guns-how-untraceable-firearms-threaten-public-safety/ (explaining the various steps a person prohibited from purchasing firearms would have to go through to purchase a traditional gun from a licensed dealer, including using a "straw

60 Minutes found that "at least 38 states and Washington DC have seen criminal cases involving ghost guns," including "at least four mass shootings, violent police shootouts, high-profile busts of gangs making and selling ghost guns on the street, and cases involving terrorism and white supremacists."[71] A review of 114 federal prosecutions involving ghost guns from 2010 to April 2020, connected 2,513 ghost guns to criminal activity, more than 1,300 of which were possessed, made, or sold by a person prohibited from purchasing and possessing firearms.[72] The review also found that more than half of the ghost guns connected to criminal activity were used or sold by criminal enterprises to facilitate gun trafficking, robbery, drug trafficking, terrorism, and murder.[73] The proliferation of the ghost gun has also increased the time and resources law enforcement must spend to solve and deter gun crimes.

The ATF considers firearms tracing "the single most important strategy in determining the sources of crime guns, linking suspects to firearms in criminal investigations, and determining strategies to address firearms-related violence."[74] Firearms tracing depends substantially on the serialization of all firearms manufactured and sold in the United States. However, ghost guns allow at-home "manufacturers" to make unserialized firearms that are entirely untraceable.

Due to the lack of serialization requirements, there is no way to know exactly how many ghost guns exist nationwide, but in some areas where concrete numbers do exist, the count is frighteningly high. For example, in Southern California, ghost guns now represent more than 40% of all crime guns recovered.[75]

The demand for guns in general—and ghost guns specifically—has spiked in the wake of the COVID-19 pandemic, with reports that at least 16 ghost gun companies have experienced such high demand that they have notified customers of delays.[76] Once ghost guns are completed, they are indistinguishable from guns purchased in a gun shop, except they do not have a serial number and thus cannot be traced, making it difficult, if not impossible, to determine the chain of custody of the gun itself.

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purchaser" who must pass a background check and be present to purchase the serialized firearm and fill out the paperwork that law enforcement can use to trace back to the initial sale).

[71] Bill Whitaker, "Ghost Guns: The Build-It-Yourself Firearms that Skirt Most Federal Laws and Are Virtually Untraceable," 60 Minutes, May 10, 2020, https://www.cbsnews.com/news/ghost-guns-untraceable-weapons-criminal-cases-60-minutes-2020-05-10/.

[72] Everytown for Gun Safety, "Preface to Untraceable: The Rising Specter of Ghost Guns," May 2020, https://everytownresearch.org/reports/untraceable-ghost-guns/.

[73] Everytown for Gun Safety, "Preface to Untraceable: The Rising Specter of Ghost Guns," May 2020, https://everytownresearch.org/reports/untraceable-ghost-guns/.

[74] *See* "ATF Firearms Tracing Guide: Tracing Firearms to Reduce Violent Crime," ATF Publication 3312.13, March 2012, https://www.atf.gov/file/58631/download.

[75] Brandi Hitt, "'Ghost Guns' Investigation: Law Enforcement Seeing Unserialized Firearms on Daily Basis in SoCal," ABC News 7, January 30, 2020, https://abc7.com/ghost-guns-california-gun-laws-kits/5893043/.

[76] Tess Own, "People Are Panic-Buying Untraceable 'Ghost Guns' Online in the Coronavirus Pandemic," VICE News, March 27, 2020, https:// www.vice.com/en_us/article/g5x9q3/people-are-panic-buying-untraceable-ghost-guns-online-in-the-coronavirus-pandemic.

The threat posed by the current regulatory definition of *frame or receiver* is evident in case law.

- In *Jimenez*, the court overturned the defendant's indictment for unlawful possession of a machine gun on vagueness grounds, because the lower receiver, which was modified for automatic fire, did not fall into the regulatory definition of a "receiver," and thus the definition did not provide the defendant (who was also prohibited from purchasing and possessing firearms) notice that his conduct was in violation of the law.
- In *Roh*, the court found that the defendant did not violate the law by manufacturing lower receivers, which he then sold to customers, to whom he also provided all of the other parts of an AR-15 to, because the lower receivers did not fall into the regulatory definition of a "receiver."
- In *Rowold*, the court overturned the defendants' indictment for making false statements in the acquisition of a firearm and the unlawful possession of a firearm by a person with a felony conviction, because the *fifty* lower receivers purchased did not fall into the regulatory definition of a "receiver."

2. Public safety factors outweigh reliance interests

Some people are engaged in the business of selling unfinished frames or receivers. Others may possess these devices with the intent to complete and then sell or transfer them to others. However, these groups' reliance on the ATF's current interpretation should be limited. As the ATF handbook makes clear, while "ATF letter rulings classifying firearms may generally be relied upon,...classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations."[77] The need to address the danger that ghost guns pose to public safety, as described above, clearly outweighs these groups' reliance interests.

V. Next steps

A change to the regulatory definition of "frame or receiver" is the clearest and most efficient way that the administration can resolve the dual problems of ghost guns and rejected classifications of lower receivers. As a more immediate step, which could be taken alongside the initiation of a rulemaking process, the ATF could issue new classification letters and other guidance regarding unfinished frames and receivers.

In addition, bills were introduced in the 115th and 116th Congress that would address these issues by creating a statutory definition of "frame or receiver." These bills include H.R. 6643 (115th Cong.), S. 3300 (115th Cong.), H.R. 3553 (116th Cong.) and S. 3743 (116th Cong.). These bills are substantially similar; the most refined language is in S. 3743, which would

[77] Bureau of Alcohol, Tobacco, Firearms & Explosives, "ATF National Firearms Act Handbook," April 2009, § 7.2.4.1, https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download.

establish a statutory definition of “frame or receiver” that closely tracks the proposed regulatory definition in Part III *infra*, and would address both ghost gun and split receiver issues.

Several states have enacted laws that partially address the problem of ghost guns. For example, California and Connecticut require individuals assembling firearms to apply for a serial number to be issued by the state, which must then be affixed to the firearm; and Hawaii and New Jersey prohibit the purchase of parts from which an unserialized firearm can be readily assembled. While additional state laws can mitigate the dangers of ghost guns, only federal action can adequately address this nationwide issue.