

NATIONAL RIFLE ASSOCIATION OF AMERICA  
INSTITUTE FOR LEGISLATIVE ACTION  
11250 WAPLES MILL ROAD  
FAIRFAX, VIRGINIA 22030



March 13, 2015

Denise Brown  
Mailstop 6N-602  
Office of Regulatory Affairs, Enforcement Programs and Services  
Bureau of Alcohol, Tobacco, Firearms and Explosives  
99 New York Ave, NE  
Washington, D.C. 20226

ATTN: **AP Ammo Comments**

Dear Ms. Brown:

I am writing on behalf of the National Rifle Association (“NRA”) to provide my organization’s comments on the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (“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)” (the “Framework”). Preliminarily, the Framework was not properly promulgated under the Administrative Procedures Act (“APA”), and is therefore void. Moreover, the Framework is contrary to the language and intent of the Law Enforcement Officers Protection Act’s (LEOPA) regulation of “armor piercing ammunition,” is based on a flawed interpretation of Supreme Court case law, and would ban many types of ammunition commonly used for “sporting purposes.” The National Rifle Association opposes the proposed Framework’s approach to interpreting LEOPA’s “sporting purposes” exemption and recommends that the Framework be rescinded in favor of a formal rulemaking on this important issue of law.

As NRA noted when commenting on this issue to ATF in January 2013, we stand second to none in our support for officer safety. Yet Congress did not, with LEOPA, vest ATF with the general authority to ban whatever ammunition it determines may pose a threat to the law enforcement community. Instead, the law focuses narrowly on the specific concern of projectiles that are purposely designed to penetrate bullet resistant armor when fired from a handgun, rather than those that are incidentally capable of doing so because of their design for some other legitimate purpose. Understanding this difference is key to correctly interpreting LEOPA.

## **I. The Promulgation of the ATF Framework Violates the Notice and Comment Provisions of the Administrative Procedures Act.**

On February 27, 2015, by way of a “special advisory,” the ATF publicized the Framework to the public and characterized it as a scheme “to guide its determinations” on what ammunition is “primarily intended for sporting purposes,” pursuant to the exemption in 18 U.S.C. § 921(a)(17)(C). (The Framework has also been available on the ATF website at least since February 13, 2015.) In announcing the Framework, ATF stated, it “is not a final determination; ATF will accept comments for 30 days, and will finalize the framework after considering those comments and making any appropriate adjustments.” Special Advisory, ATF, *Armor Piercing Ammunition Exemption Framework* (February 27, 2015), <https://www.atf.gov/press/releases/2015-02-022715-atf-advisory-armor-piercing-ammunition-exemption-framework.html>. To date, ATF has failed to publish the Framework in the Federal Register.

According to a news report, Ms. Brown, you advised that the ATF Framework will “not actually be a [regulatory] change, more of a policy along those lines,” and that ATF’s decision not to publish the Framework and solicit comments in the Federal Register was based on an exemption provision in the Administrative Procedures Act. You were quoted as stating that the Framework was a notice only and intended for “information gathering” prior to a final determination and therefore did not need to be published in the Federal Register. David Codrea, *ATF claims Administrative Procedures Act exemption for proposed ammo ban notice*, examiner.com, February 18, 2015, <http://www.examiner.com/article/atf-claims-administrative-procedures-act-exemption-for-proposed-ammo-ban-notice>.

Nevertheless, however ATF chooses to describe it, the Framework in legal effect proposes a rule that (1) withdraws existing exemptions, and (2) eliminates agency discretion regarding the types of ammunition to be categorized as “primarily intended to be used for sporting purposes” in pending and future applications for exemptions.

The Administrative Procedures Act (APA), 5 U.S.C. §§ 500 *et seq.*, establishes the formal procedures which a federal agency must follow when formulating rules or engaging in rule-making. The ATF is an “agency” under the APA. 5 U.S.C. § 551(1). Generally, an agency can issue a “rule” only after following the procedures in the APA. In seeking to promulgate the Framework, the ATF failed to comply with the applicable procedural requirements.

The APA defines “rule making” as an “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). A “rule” includes agency statements “of general or particular applicability and future effect designed to... implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). The APA permits agencies to “bypass the established procedures only under certain express circumstances,” and the APA’s rule-making exemptions are to be “narrowly construed.” *United States v. Picciotto*, 875 F.2d 345, 346-47 (D.C. Cir. 1989) (the APA’s “direct mandate requires notice and comment procedures for any rule that does not fall within certain express exceptions.”). “A rule which is subject to the APA’s procedural requirements, but was adopted without them, is invalid.” *Id.* at 346. Moreover, the APA contains no mechanism through which an agency can unilaterally substitute its own informal or

alternative rule-making process in lieu of the required process of agency rule-making established by the APA.

Regarding the process of agency rule-making, 5 U.S.C. § 553 provides that “[g]eneral notice of proposed rule-making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof.” 5 U.S.C. § 553(b). If notice is required pursuant to that section, the agency, after giving such notice, “shall give interested persons an opportunity to participate in the rule-making through submission of written [comments]” and shall consider those comments before promulgating the rule. 5 U.S.C. § 553(c). The agency must then publish a final decision after it considers the relevant public input.

The APA’s three-step process is subject to an exception for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(3)(A). “General statements of policy” and “interpretive rules” are not defined by the APA itself.

The distinction between a rule (a so-called “legislative rule”) that is subject to the APA’s rule-making process and an “interpretive rule,” which is not, is that an “interpretative rule simply states what the administrative agency thinks the statute means, and only ‘reminds affected parties of existing duties.’ ... On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.” *Fertilizer Inst. v. United States E.P.A.*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991). Put more simply, the distinction “turns ... on the prior existence or non-existence of legal duties and rights.” *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993). A “rule should be promulgated legislatively if it attempts to impose binding obligations or standards not already established by existing legislation.” Robert A. Anthony, “*Interpretive*” Rules, “*Legislative*” Rules and “*Spurious*” Rules: *Lifting the Smog*, 8 Admin. L.J. Am. U. 1, 20 (1994). “A rule made by an agency with delegated authority should be considered legislative if the agency applies the rule as if it has the force of law. Such a rule then must have been made through APA rulemaking procedures.” 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice & Procedure* § 8155 (1st ed.).

A rule that supplies the necessary information or elements for an enforcement action has “the force of law” and is a “legislative rule.” *Am. Mining Congress*, 995 F.2d at 1109. One test in this respect is whether the agency has a sufficient legislative basis for bringing an enforcement action even in the absence of the new or disputed rule. *Id.* at 1112.

“Interpretive rules,” on the other hand, lack a binding intent and effect and do not add to already-existing substantive law. “[T]he 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.’ ” *Perez v. Mortgage Bankers Ass’n*, 575 U. S. \_\_\_\_ (2015), 2015 WL 998535 at \*4 (citing *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995)). An interpretive rule “cannot be applied or relied upon as law because a statement of policy merely proclaims what an agency seeks to establish as policy.” *Texas v. United States*, No. 14-254, 2015 WL 648579 at \*53 (S.D. Tex. Feb. 16, 2015), appeal pending, No. 15-40238 (5th Cir.). A rule is

“interpretative” and exempt from the APA rule-making requirements if it leaves agency decision-makers free to exercise their discretion as to its application. *Id.* (“The rule’s effect on agency discretion is the primary determinant in characterizing a rule as substantive or nonsubstantive.”).

An agency cannot bypass the requirements of the APA by characterizing its rule as an exempt policy guideline. The agency’s label as “interpretive” or “policy” is not conclusive in determining a rule’s character or intended effect, and the APA prohibits agencies from avoiding its requirements by calling a substantive regulatory change an interpretative rule. *United States v. Picciotto*, 875 F.2d 345, 346, 346-47 (D.C. Cir. 1989).

In a related vein, an agency cannot use the pretext of existing regulations or legislative rules – laws that have been established through the APA’s notice-and-comment process – as justification or authority for “interpretive rules” that impose new substantive restrictions on the public. *Id.* at 348 (language in regulation allowed Park Service only to attach specific limitations to individual permits as part of its permit-granting procedure, not to adopt new rules applicable to the general public).

In summary, although the APA does not require notice-and-comment rulemaking in formulating an interpretive rule, the Framework, as explained below, proposes a legislative rule, not an interpretive rule or policy. The ATF is required to follow the APA rule-making procedures unless another exemption applies, and here none does.

In this case, there is little existing authority for the agency to “interpret.” The terms “sporting purposes” or “primarily intended to be used for sporting purposes” are undefined. As noted elsewhere in this submission, the definition of “sporting purposes” adopted by ATF has no basis in LEOPA. Nothing in the applicable statute or regulation establishes a meaning for “primarily intended to be used for sporting purposes,” and apart from the use of this phrase, nothing in the statute or regulation mentions or contains the standards, classifications, restrictions and prohibitions found in the Framework. The Framework neither clarifies nor explains the existing law or ATF’s existing interpretations of it, but instead effectively establishes entirely new law and rules that must be used in making agency determinations regarding the exception for “primarily intended to be used for sporting purposes.” This is not a case where an agency pulls together the various threads of statute and regulation to weave a more comprehensible and comprehensive whole. Instead, the ATF with the Framework has created its standards and classifications out of whole cloth. This falls as far from an “interpretive” role as possible.

The ATF Framework is intended to have the force of law. Projectiles defined as “armor piercing ammunition” that do not meet the “sporting purposes” exemption, as established in the Framework, are subject to statutory restrictions and penalties. A person who violates the prohibition on the sale or delivery of armor-piercing ammunition in 18 U.S.C. § 922(a)(8) is liable to fines or imprisonment of up to five years, or both. 18 U.S.C. § 924(a)(1)(D). The same penalty applies to offenses relating to the manufacture or importation of armor-piercing ammunition in 18 U.S.C. § 922(a)(7). The Framework directs, for example, with respect to certain cartridges previously covered by an exemption the Framework would withdraw: “Except

as provided by law, no person may manufacture or import such ammunition, and manufacturers or importers may not sell or deliver such ammunition.” Framework at 17.

The Framework exerts a considerable effect on the rights and liabilities of manufacturers, importers and the public. It withdraws existing exemptions. It creates new classifications, restrictions and prohibitions. The ATF frankly anticipates the Framework causing “disruption to the ammunition and firearm industry,” noting that, “with few exceptions, manufacturers will be unable to produce [the withdrawn exemption] armor piercing ammunition, importers will be unable to import such ammunition, and manufacturers and importers will be prohibited from selling or distributing the ammunition.” Framework at 15. Further, the Framework acknowledges the affected “ammunition is widely available to the public.” *Id.* The effect, and intended effect, of the ATF Framework is a far cry from a merely informational guideline or an interpretation of existing law that simply refines standards already in place without impose binding obligations.

The touchstone of interpretive rules is discretion. The Framework unequivocally restricts ATF’s future exercise of discretion in making determinations whether projectiles qualify for exemption. The Framework establishes a rule recognizing two categories of projectiles. The first qualify for the “sporting purpose” exemption, the second qualify only if loaded into a cartridge for which the only available handgun, generally, is a single-shot handgun. To the extent that agency staff retain any discretion in making determinations, it is the discretion to deny a potentially qualifying application. Even this is a constrained discretion that may be exercised only if the specific requirements listed in the Framework are met. Framework at 16.

The Framework’s own language underscores that the document is not merely a non-binding policy statement. It “will apply” to “requests seeking a determination that certain projectiles qualify for this ‘sporting purpose’ exemption.” ATF Framework at 1. The ATF states it “intends” to apply the ATF Framework when considering requests pursuant to 27 C.F.R. 478.148. ATF Framework at 16. These statements are not phrased as guidelines, guidance, or as other interpretive principles that do not impede or restrict the exercise of agency discretion. By its terms, the Framework would not become *a* means of considering exemption requests but *the* means for doing so.

Consistent with the elimination of agency discretion, the Framework mandates that the ATF withdraw existing exemptions: “[U]pon 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.” ATF Framework at 15 (emphasis added). Similarly, the Framework implies that all pending exemption requests already before the agency, as well as those that are subsequently received, must be dealt with in accordance with the terms of the Framework. It states that the “more than 30 requests received pursuant to [27 C.F.R. § 478.148] that remain pending” will only by determined once the Framework itself is finalized. ATF Framework at 16.

Despite ATF’s characterization that the Framework is “more of a policy,” the agency’s labeling of its action as interpretive or non-binding is not determinative. Regardless of what the action is called, the test is whether it amounts to a legislative rule by creating new law, rights or duties; imposes binding obligations or standards not already established by existing legislation;

or is intended to and has the force of law. Clearly, the Framework meets all those standards and is accordingly subject to the formal notice and comment provisions of the APA. Moreover, regardless of how carefully considered any alternative public input process is, the ATF's informal, non-APA compliant consultative procedures (ATF Framework at 7, 17) cannot supersede the statutory requirements laid down for federal agencies in the APA. ATF has not cured its noncompliance with its "special advisory" or brief comment period, and if adopted, the Framework would therefore be void.

Notably, ATF has published recent notices in the Federal Register on matters such as ATF Adjunct Instructor Data Form ATF F 6140.3 (78 FR 77494), Training Registration Request for Non-ATF Employees (78 FR 45275), Proposed eCollection eComments Requested; Employee Possessor Questionnaire (79 FR 75178), Proposed eCollection eComments Requested; Report of Multiple Sale or Other Disposition of Pistols and Revolvers (80 FR 8347) and Proposed eCollection eComments Requested; Firearms Disabilities for Nonimmigrant Aliens (80 FR 3253), among others.

These, like the Framework, seek "written comments and suggestions from the public and affected agencies." Unlike what has been done with the Framework, however, ATF has sought the comments and public input through publication and notice in the Federal Register.

## **II. The History of LEOPA and the Intent of Its Prohibition on "Armor Piercing Ammunition" Demonstrates That It Was Not Intended to Prohibit Rifle Projectiles or Ammunition.**

LEOPA was passed by Congress in 1986. The purpose of the legislation was "to protect the nation's law enforcement officers from death or injury by armor piercing ammunition." House Judiciary Committee Report on Public Law 99-408, H.R. Rep. No. 99-360 at 1 (1985) ("House Report"). To understand how the ATF Framework has strayed from the path set by Congress, a brief history of LEOPA is in order.

In 1968, a company called KTW, Inc., created ammunition that was designed to be fired from a handgun and more effectively penetrate barriers "with the intention of aiding law enforcement officer in specialized situations." House Report at 2. In the early 1970s, law enforcement agencies around the country began to adopt soft bullet-resistant armor as standard equipment for patrol officers. House Report at 2-3. In the late 1970s, law enforcement officer associations became concerned about the potential for criminals to use KTW ammunition against their officers, and the New York Patrolmen's Benevolent Association worked with Rep. Mario Biaggi to craft federal legislation prohibiting the manufacture and sale of "armor piercing" handgun ammunition. House Report at 4-5. That effort, however, did not immediately produce enacted law.

Thereafter, various bills addressing the issue of "armor piercing" handgun ammunition were considered and rejected; these bills, and the hearings held to consider them, are critical to understanding the intent behind LEOPA.

In 1982, Rep. Biaggi introduced H.R. 5437, which would have “prohibited manufacturers, importers or dealers licensed under chapter 44 of title 18, United States Code, from manufacturing, importing or dealing in ‘restricted handgun bullets.’” House Report at 4. Congress heard testimony from numerous individuals and organizations, including the National Rifle Association, in considering whether H.R. 5437 should be enacted. In the course of conducting such hearings, it became apparent that there was a serious flaw in H.R. 5437’s definition of “restricted handgun bullet,” in that it was based on a performance test that disregarded legitimate uses of common ammunition. This flaw rendered the legislation “unacceptable:”

Associate Attorney General Rudolph W. Giuliani observed that, “we cannot justify legislation banning all ammunition capable of penetrating the type of soft body armor worn by law enforcement officials.” This objection was based on the problem of interchangability [sic] of ammunition between long guns and handguns. *If all ammunition which could be fired from a handgun, which would penetrate soft body armor under the test condition, were to be banned from manufacture, importation and sale, it would include many types of sporting ammunition as well. Such a definition was unacceptable.*

House Report at 5 (emphasis added). The earliest iteration of LEOPA that was considered – and rejected – by Congress would have resulted in the prohibition of all rifle ammunition capable of penetrating soft body armor whenever such ammunition could be fired from a handgun. Congress deemed such a result “unacceptable.”

Rep. Biaggi and Sen. Patrick Moynihan spent the next few years working to refine the legislation prohibiting “armor piercing” handgun ammunition so that it would not also prohibit rifle ammunition. In drafting LEOPA, Sen. Moynihan made clear that the intention of the legislation was “to exempt ammunition originally designed for use in rifles, even if there were handguns on the market that technically could chamber the rifle ammunition.” *Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers, Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 98th Cong. 30-31 (1984) (statement of Sen. Moynihan)*. Rep. Biaggi explicitly confirmed this fact, stating that the Act “does not seek to affect in any way ammunition made originally or primarily for rifle use.” *Id.* at 50. As Senator Moynihan recognized, “[t]ime and again, Congressman Biaggi and I stressed that only bullets capable of penetrating body armor and designed to be fired from a handgun would be banned; *rifle ammunition would not be covered.*” *Id.* at 30-31 (emphasis added)

With Rep. Biaggi’s and Sen. Moynihan’s promises in mind, Congress passed LEOPA, restricting handgun projectiles constructed entirely from certain hard metals. Understanding that there may be occasions in which handgun projectiles that technically meet the standards for regulation under LEOPA are used primarily for sporting purposes, Congress included a safety valve that permits such projectiles to be exempted by the Attorney General.

Attempting to refute this clear legislative intent, ATF in the Framework claims that Rep. Biaggi and Sen. Moynihan were referring to prior versions of LEOPA that included a specific requirement that “the manufacturer of the ammunition ‘designed [it] to be fired from a

handgun.” Framework at 3. The claim hinges on the inclusion of a “design” standard in the prior versions of the bills that was allegedly rejected in favor of the “may be used” standard in the final version of LEOPA. *Id.* at 3-4. This claim, however, is simply untrue. The bills that Sen. Moynihan and Rep. Biaggi were referring to incorporated a definition that applied to “a bullet that, as determined by the Secretary of the Treasury, when fired from a handgun with a barrel five inches or less in length, is capable of penetrating body armor.” H.R. 641, 98th Cong. (1st Sess. 1984).

The history of LEOPA makes clear that Congress’ intent with the legislation was to restrict only projectiles that are designed with handguns in mind, are designed with certain technical features as specified in LEOPA, and are not used primarily for sporting purposes. It also is clear from Congress’ rejection of H.R. 5437 that LEOPA was not intended to capture all “armor piercing ammunition” that can be fired by a handgun, because that specific problem was the cause of the bill’s rejection. The exemption for sporting purposes, on its face, even allows for “armor piercing ammunition” that is designed and intended to be fired from a handgun to be manufactured, imported, and distributed if it is “primarily intended to be used for sporting purposes.” To be sure, LEOPA’s text and legislative history make clear that ammunition designed to be fired from a rifle should not be prohibited, even if it can be fired from a handgun.

### **III. LEOPA’s “Sporting Purposes” Exemption Was Intended to Apply to All Sporting Purposes, Including Non-Competitive Target Shooting, and ATF’s Assertions to the Contrary are Without Merit.**

LEOPA’s “sporting purposes” exemption states, “The term ‘armor piercing ammunition’” does not include “a projectile which the Attorney General finds is primarily intended to be used for sporting purposes.” 18 U.S.C. § 921(a)(17)(C). The term “sporting purposes” is undefined by statute. To justify the exceedingly narrow reading it gives of that phrase in the Framework, ATF claims that it has “consistently interpreted ‘sporting purposes’ to include the traditional sports of hunting, competitive target shooting, and skeet and trap shooting.” Framework at 5. In making this claim, however, ATF is referring to other uses of that phrase in federal law that do not focus on ammunition. Moreover, ATF’s claim that it has consistently interpreted the term “sporting purposes” is simply incorrect.

Prior to 1989, ATF considered the use of a projectile in a rifle to be, in and of itself, a sporting purpose, and on that basis exempted M855 from the “armor piercing ammunition” law. That changed in 1989. ATF, to justify banning the importation of 43 makes and models of semi-automatic rifles that it had previously approved for importation, reinterpreted “sporting purposes” that year to exclude all forms of target shooting other than “organized marksmanship competitions.” It went even further by interpreting “organized marksmanship competitions” to exclude competitions based upon defensive firearm skills, which it termed “combat” type. These conclusions were firmly at odds with the will of Congress, as expressed in its promotion of competitions and training derived from the military applications of rifles. In 1903, Congress authorized the National Matches, “organized marksmanship competitions” which then and ever since have used courses of fire developed by the Army’s National Board for the Promotion of Rifle Practice, to prepare civilians for military service. In 1905, Congress authorized the sale of military surplus ammunition to private citizens and shooting clubs involved in target practice for



such competitions, an authorization which remains in effect to this day. ATF's exclusion of competitions based upon defensive firearm skills is also at odds with modern reality, in that rifle and handgun marksmanship competitions of that type are by far the most popular today.

In 1993, ATF reinterpreted sporting purposes again, this time to disregard its long-standing Handgun Factoring Criteria – then and since *otherwise* used to determine the eligibility of handguns for importation as firearms “particularly suitable for or readily adaptable to sporting purposes.” Once again, this reinterpretation served the purposes of a ban, this time on handguns ATF had previously approved for importation.

In 1994, ATF reinterpreted “sporting purposes” yet again, to ban certain shotguns. Four years later, it reinterpreted “sporting purposes” still again, to ban the importation of rifles made expressly to comply with the agency's 1989 reinterpretation of “sporting purposes.”

ATF's inconsistent interpretation of the term “sporting purposes” is possibly best exemplified by the agency's differing interpretation of the term as it applies to “destructive devices” and to firearms importation. Under federal law, firearms of greater than .50 caliber are generally considered “destructive devices,” and therefore subject to the provisions of the National Firearms Act. This classification, however, does not apply to “a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes....” 26 U.S.C.A. § 5845(f). For importation, the Attorney General must, in most cases, approve an application to import a firearm that “is generally recognized as particularly suitable for or readily adaptable to sporting purposes ....” 18 U.S.C.A. § 925(d)(3). The inclusion of “readily adaptable” in the importation test would seem to create a much broader exemption. Nevertheless, ATF has, without explanation, interpreted the importation exemption more narrowly than the “destructive device” exemption by prohibiting the importation of shotguns with a magazine capacity that exceeds five rounds, even though such shotguns are not considered “destructive devices.” *See* Letters from the Bureau of Alcohol, Tobacco, Firearms and Explosives' Firearm and Technology Branch dated June 1, 2006, October 25, 2006, and July 24, 2009 (on file with author).

As the preceding discussion demonstrates, the only thing that is consistent about ATF's interpretation of the term “sporting purposes” is that the agency has consistently narrowed its interpretation of the term over the years to ban ever more firearms and ammunition.

The definition of “sporting purposes” adopted by ATF for purposes of the Framework fares no better. It has no basis in LEOPA, and among other things improperly excludes the sport of non-competitive target shooting. Millions of Americans engage in this lawful sporting purpose each year, including millions of members of the National Rifle Association. Besides being the most popular use of firearms in America, target practice is a necessary step in the process of engaging in the competitive target shooting that even ATF deigns to recognize as “sporting.” From a practical standpoint, however, there is absolutely no difference in terms of “sporting purposes” between an individual shooting at a target and being scored by an official (competitive shooting) and one shooting at a target without being officially scored. In either case, the objectives are to progress, to develop one's skills, and to enjoy the experience. ATF's position is

tantamount to the claim that NBA or NCAA basketball is a “sport,” but a regular pick-up game between friends, neighbors, or co-workers is not.

An excellent example of the sporting aspects of informal target practice is the Winchester/NRA Marksmanship Qualification Program. As described on a webpage devoted to the program (<http://mqp.nra.org>):

Qualification shooting is an informal, year-round recreational shooting activity that provides incentive awards for developing and improving marksmanship skills. It's a drill. We set the standards; you meet the challenge! Progression is self-paced and scores are challenging but attainable. Performance is measured against established par scores and any shooter who meets or exceeds those scores is entitled to the corresponding recognition awards for that rating. It's an honor system!

Surely, Congress could not have intended with LEOPA to dismiss the benefits such programs provide to the public, including promotion of the safe use and handling of firearms, skill and familiarity with arms that contribute to national readiness and defense, and enjoyment of Second Amendment rights.

ATF's own correspondence confirms this point. In 1987, Edward M. Owen, Jr., Chief of the Firearms Technology Branch, wrote a letter to a corporate officer at the Olin Corporation regarding the classification of the M855 round. In this letter, ATF stated that M855 ammunition was exempt from regulation as “armor piercing ammunition,” noting that “domestic manufacturers of firearms are producing sporting rifles having barrels rifled specifically for the M855 cartridge. Therefore, the ammunition was felt to be particularly suitable for sporting purposes.” Clearly, ATF's concern at that time was not the specific form that the sporting use of the ammunition would take; rather, the controlling inquiry was more generally whether ammunition was used in firearms that have sporting applications. That was and is the correct consideration.

#### **IV. The ATF Framework Is Premised on a Flawed Interpretation of Supreme Court Precedent and a Flawed Understanding of the Relevant Community for Determining Whether Ammunition Is “Primarily Intended to Be Used for Sporting Purposes.”**

Apart from certain .22 caliber projectiles loaded into rimfire cartridges, the Framework's standard for determining whether ammunition comes within the purview of the “sporting purposes” exception is whether “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.” Framework at 12. Even then, ATF “retains discretion” to deny an application for an exemption. *Id.* The standard set forth by ATF has no basis in the law, imposes considerable restrictions upon law-abiding sportsmen, and does not promote ATF's asserted justification of protecting the law enforcement community.

By shifting LEOPA's requirement that *ammunition* be "primarily intended to be used for sporting purposes" to the Framework's requirement that *handguns* in which the ammunition is used be "primarily intended to be used for sporting purposes," ATF has fundamentally misinterpreted the text and intent of the legislation adopted by Congress. Nowhere in LEOPA does it indicate that the relevant test for sporting purposes should turn on the type of handgun in which ammunition can be used. In fact, as made clear above, the intent of LEOPA was to presumptively exempt projectiles designed with rifle use in mind. ATF acknowledged this when it wrote that the reason M855 ammunition was entitled to a "sporting purposes" exception was because "domestic manufacturers of firearms are producing sporting rifles having barrels rifled specifically for the M855 cartridge."

Because the type of handgun in which "armor piercing ammunition" can be used is not a relevant concern, ATF's assertion that "it is not possible to conclude that revolvers and semi-automatic handguns as a class are 'primarily intended' for use in sporting purposes," ATF Framework at 13, wholly misses the point. Worse yet is ATF's utterly incorrect assertion that "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." Framework at 11.

To be sure, the Supreme Court, in *District of Columbia v. Heller*, recognized that defensive uses are at the "core" of the Second Amendment, and handguns are protected "arms" because they are overwhelmingly chosen by Americans for that purpose. The NRA certainly agrees with those conclusions. Yet even if many revolvers and handguns are designed and bought with defense in mind, the primary purposes for which Americans actually fire their handguns are the sporting purposes of target practice and competition, including events or activities with practical or military derivations. Properly understood, "sporting purposes" are completely complementary to "core" Second Amendment concerns, because they help instill the skills and attributes of a responsible, prepared gun owner.

As a result of this, the nation's most popular handgun competitions for more than a century have been those in which revolvers and semi-automatic handguns are used, numerous projectiles have been invented for such handguns for purely sporting purposes – e.g., wadcutters for bullseye target competition. Likewise, because revolvers in particular are routinely used for hunting, manufacturers have developed many controlled-expansion hunting projectiles for revolvers. It is for these unquestionably sporting purposes that many manufacturers have sought to produce alternative projectiles made of metals other than lead—a development that will likely be curtailed by the Framework. It is therefore anything but reasonable to infer that ammunition designed for repeating handguns is non-sporting.

ATF attempts to ground its decision to examine the types of handguns in which "armor piercing ammunition" can be used in the fact that criminals are most likely to use easily concealable, repeating handguns. This foundation cannot bear the weight ATF places upon it. The universe of "uses" within the community that must be evaluated to determine if a particular ammunition is primarily intended for sporting purposes must include all uses, not only handgun uses, and certainly not only criminal uses of a certain type of handgun. Such contorted rationalization can only be explained in reference to a predetermined goal. In this case, that goal

is manifestly to eliminate significant categories of ammunition commonly used by the law-abiding public, and by extension, the firearms in which that ammunition is used.

ATF relies on the Supreme Court's decision in *Posters 'N' Things v. United States*, 511 U.S. 513 (1994) ("*Posters*"), to support its position, Framework at 10-11, but that case actually demonstrates fundamental flaws in the Framework's approach. In *Posters*, the Supreme Court was called upon to determine whether the federal prohibition on marketing and selling paraphernalia associated with the consumption of illegal drugs contained a *scienter* requirement. 511 U.S. at 514. The Court first noted that the statute did not have an explicit *scienter* requirement, and proceeded to analyze whether the phrase "primarily intended . . . for use" implied such a requirement. *Id.* at 517-18. The Court ultimately concluded that the phrase "primarily intended . . . for use" is an objective standard that "refers generally to an item's likely use" rather than a subjective standard that focuses on the intent of a seller. *Id.* at 521-22. In so holding, the Court explicitly stated that the statute's use of the phrase "primarily intended for use with drugs" indicated that "it is the likely use of customers generally, *not any particular customer*, that can render a multiple-use item drug paraphernalia." *Id.* at 521 n.11 (emphasis added). This statement by the Court makes clear that in the absence of a clear statement otherwise by Congress, the proper focus in determining whether an item is "primarily intended" for a particular purpose is on the general community's use of the item, not any particular customer's use.

Instead of properly applying the Supreme Court's decision, however, the Framework distorts it by focusing not on the community that uses a particular type of ammunition generally, but only on the community that uses it in handgun. Even more problematically, ATF focuses excessively on the theoretical misuse of ammunition in handguns by criminals and completely ignores how it is more likely to be used for law-abiding purposes by the general public.

ATF's treatment of M855/SS109 ammunition exemplifies this flawed approach. Simple math makes the point. Since LEOPA's enactment in 1986, a staggering amount of M855/SS109 ammunition has been bought and used by the general public, likely in the hundreds of millions of rounds. Yet ATF fails to produce any evidence whatsoever of its use against law enforcement officers in handguns, much less any support for the proposition that this is "the likely use of customers generally" of that cartridge. Indeed, for the 38 years for which FBI data are available, no handgun capable of firing M855 ammunition has been used to kill a law enforcement officer, even though semiautomatic pistols (like the Bushmaster Auto Pistol) and multi-shot derringers that can use M855 have been available since at least the early 1980s.

This fact is echoed in the statements of numerous law enforcement groups that have submitted their own letters or comments in opposition to the Framework, including the International Law Enforcement Educators and Trainers Association, the National Law Enforcement Firearm Instructors Association, and the National Patrol Rifle Conference. Some of these groups make the point that banning M855/SS109 ammunition could *negatively* affect officer safety by constricting the availability of 5.56 x 45 mm ammunition generally, thereby raising its price and reducing opportunities for police officers to train with their patrol rifles. Moreover, James Pasco, executive director of the Washington Office of the Fraternal Order of Police, stated to the media with respect to ATF's proposed ban on M855 ammunition, "Any

ammunition is of concern to police in the wrong hands, but this specific round has historically not posed a law enforcement problem.”

Moreover, ATF incorrectly portrays the availability of AR-15 pistols as a recent development that requires a change a change in policy for the protection of law enforcement officers. AR-15-type pistols have been available to the public since at least the 1990s. They are not, moreover, “the relatively small, concealable firearms” that ATF claims “implicate[] the officer safety concern LEOPA was designed to address.” As noted on the company’s website (<http://www.bushmaster.com/firearms/pistols.asp>), Bushmaster’s AR pistols range in unloaded weight from 4.9 to 5.7 pounds and in length from 23.5 to 26.5 inches. Needless to say, they would become even heavier and less concealable when equipped with a fully-loaded standard capacity magazine. Again, the point is made by a police officer of 17 years who told the media, regarding ATF’s proposed ban on M855 (*see* article at <http://www.news-leader.com/story/news/local/ozarks/2015/02/21/ban-armor-piercing-bullets/23816437/>), “As a police officer, I'm not worried about AR pistols because you can see them. It's the small gun in a guy's hand you can't see that kills you.”

Needless to say, for M855/SS109 and other rifle ammunition that can be fired from handguns, the relevant general community of users for the *Posters 'N' Things* analysis is all purchasers of such ammunition (both handgun and rifle users). And as discussed above, whether its ultimate use is in a rifle or a handgun, the general community of users of rifle caliber ammunition predominantly use it for sporting purposes. Thus, had ATF applied the correct analysis, it would have concluded that M855/SS109 is “primarily intended to be used for sporting purposes,” as ATF has in fact historically understood it to be.

The ATF Framework therefore does not credibly represent an attempt to clarify an unclear law or to provide objective standards for determining whether certain ammunition qualifies for an exception. Rather, it appears designed to do nothing so much as greatly restrict access to ammunition in common use in the nation’s most popular rifles, which happen to be highly unpopular with the incumbent presidential administration.

## **V. M855/SS109 Ammunition Is Not “Armor Piercing” Under LEOPA.**

The ATF Framework concludes with a section explaining why ATF would revoke the exemption granted to M855/SS109 ammunition almost 30 years ago. This section of the Framework is rife with misinformation and misinterpretation of federal law. Ironically, this “exception” was never necessary, because the projectiles in these cartridges do not satisfy LEOPA’s requirements for being classified as “armor piercing ammunition” in the first place.

In pertinent part, LEOPA defines “armor piercing ammunition” as “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 . . . .” 18 U.S.C. § 921(a)(17)(B)(i).

Congress clearly intended LEOPA to cover only projectiles that are constructed “entirely . . . from one or a combination of” the listed materials. The M855 projectile has a lead core and a

steel tip. Because the primary component in the M855 projectile is lead, it does not meet the statutory requirement of “a projectile or projectile core ... which is constructed *entirely* ... from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper or depleted uranium.” 18 U.S.C. § 921(a)(17)(B)(i) (emphasis added).

Thus, ATF’s focus on whether M855 should be “exempt” under the terms of LEOPA ignores the more fundamental point that it should never have been considered “armor piercing ammunition” under that statute in the first place.

## **VI. The Framework Would Effectively Criminalize Behavior Undertaken Lawfully and Good Faith Under the Laws of Several States.**

Regarding revocation of the longstanding exemption for M855/SS109 ammunition, ATF claims, “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.” ATF Framework at 15. That statement is untrue. While federal law does not prohibit possession of “armor piercing ammunition,” numerous state laws that incorporate LEOPA’s standards and exemptions *do* criminalize possession of “armor piercing ammunition.” For example, Maine prohibits possessing “armor piercing ammunition”, which is defined in the same manner as it is in LEOPA, except that the Maine definition excludes “any projectile or projectile core found by the [the federal official charged with administering LEOPA] to be primarily intended to be used for sporting purposes.” Me. Rev. Stat. tit. 17-A, § 1056(2). Thus, the Framework would create criminals out of each law-abiding citizen of Maine who possesses M855/SS109 ammunition. Similar problems could arise, for example, under the laws of Connecticut, the District of Columbia, Illinois, and Mississippi. D.C. Code §§ 7-2501.01, - 2506.01; Conn. Gen. Stat. Ann. § 53-202i; 720 Ill. Comp. Stat. Ann. 5/24-2.1; Miss. Code. Ann. § 97-37-31.

## Conclusion

The National Rifle Association appreciates the legitimate concerns that arise from the potential criminal misuse of specially-designed “armor piercing” handgun ammunition. A reasonable interpretation of LEOPA, including the one ATF took in the early days of the law, can be responsive to this concern without trenching on the Second Amendment rights of law-abiding Americans. Unfortunately, ATF’s proposed Framework is not only unreasonable, it ignores the APA, effectively rewrites LEOPA, and extends the law far beyond its congressional intent. The Framework therefore must be withdrawn. Any further attempts to enact a rule of this sort should be undertaken in compliance with the APA and with honest recognition of LEOPA’s limited scope and the importance those limitation play in protecting the rights of law-abiding Americans. Should that happen, the NRA will remain available to assist.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Chris W. Cox". The signature is written in a cursive, flowing style.

Chris W. Cox  
NRA-ILA Executive Director