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December 31, 2012
By email to APAComments@atf.gov

Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Avenue, N.E.
Room 5S 144
Washington, DC 20226

Re: Gun Owners of America, Inc. and Gun Owners Foundation
Comments on: "Requests to Exempt Certain Projectiles from Regulation as "Armor Piercing" Ammunition

Dear Sirs:

Our firm represents Gun Owners of America, Inc. ("GOA") and Gun Owners Foundation ("GOF"), which hereby submit these joint comments pursuant to the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") request for comments on the use of the "sporting purposes" exemption for "certain projectiles from regulation as 'armor piercing' ammunition."[1]

1. Identity of Commenters.

GOA is a national membership educational and lobbying social welfare organization, devoted to protecting and defending firearms rights across the country. GOA was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOF is an educational and legal defense organization defending the Second Amendment of the U.S. Constitution. GOF was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC section 501(c)(3). GOA and GOF are headquartered in northern Virginia. GOA and GOF appreciate that ATF has provided this opportunity to comment on this topic.

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[1] http://atf.gov/firearms/industry/

2. Background.

18 U.S.C. Section 922(a)(7) states that "[i]t shall be unlawful for any person to manufacture or import armor piercing ammunition…" and Section 922(a)(8) makes it unlawful "for any manufacturer or importer to sell or deliver armor piercing ammunition.…" 18 U.S.C. Section 921(a)(17)(B) defines "armor piercing" ("AP") ammunition, as **either** (i) a projectile which is made **entirely** of certain metals and **may** be used in a handgun, **or** (ii) a projectile whose jacket is more than **25 percent** of its weight and is **designed and intended** to be used in a handgun. The former definition was enacted as part of the Law Enforcement Officers Protection Act of 1985,[2] Pub. L. 99-408, while the latter was added as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322.

Section 921(a)(17)(C) contains four exemptions from the AP prohibition: (1) shotgun shot; (2) frangible projectiles; (3) those projectiles that are "primarily intended to be used for **sporting purposes**" (emphasis added); and (4) industrial purposes. ATF now seeks comments on the third exemption — sporting purposes.

ATF apparently does not plan to enact new regulations on the topic; indeed, ATF currently has no regulations clarifying how it interprets the language "sporting purposes" when deciding whether to permit the manufacture and sale of certain ammunition. Rather, ATF appears to seek general guidance on how it should classify certain projectiles when they are submitted for examination by members of the industry.

GOA and GOF believe that ATF's past interpretations of Section 921(a)(17) have been erroneous, and are contrary to the clear intent of Congress. Thus, ATF's understanding of what constitutes AP ammunition should be revised.

3. ATF Would Add Its Own Language to the Statute, in an Effort to Further Restrict Armor Piercing Ammunition.

ATF seeks input on the "sporting purposes" exemption to Section 921(a)(17)(C), asking"whether these projectiles or projectile cores pose a threat to public safety and law enforcement **or** are, primarily intended to be used for sporting purposes and therefore **may** be exempted.…"

First, if a certain projectile is primarily intended for sporting purposes, it **must** be exempted — not **may** be exempted as ATF asserts. The statute specifies that AP ammunition

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[2] Gun Owners of America, Inc. was the only Second Amendment group to oppose the ban.

"**does not** include" qualifying projectiles — it does not say "may, **in the discretion of ATF**, not include…." ATF assumes more authority than the statute grants.[3]

Second, ATF mischaracterizes the requirements of the statute. As written, the statute dictates that ATF **must** exempt certain ammunition **if it is** primarily intended … for sporting purposes." Section 921(a)(17)(C) does not, however, contain any language about balancing the sporting interest of shooters against an alleged threat posed to law enforcement, which is what ATF purports to do. Projectiles do not suddenly become "intended primarily for sporting purposes" **only if** they do not pose a theoretical threat to law enforcement. Rather, the only statutory requirement for exemption is that a projectile be "intended primarily for sporting purposes."

4. ATF Has Misinterpreted the Language of Section 921(a)(17) in an Overly-Restrictive Manner.

Additionally, ATF's misinterpretation of Section 921(a)(17) goes beyond ATF's interpretation of the "sporting purposes" exception. ATF acknowledges that, over the years, "the development of large caliber handguns" has led to ATF to reclassify "numerous calibers that were traditional rifle calibers" as AP ammunition. Indeed, even though certain calibers (such as the .308 Winchester or the .30-06 Springfield) are known to be rifle calibers, ATF continues to consider them pistol calibers, simply because there exists some peculiar pistol(s), specially or individually made, that chamber(s) such calibers.[4] By reclassifying an increasing number of rifle rounds as pistol rounds, ATF has rendered almost all AP ammunition illegal to manufacture or sell.

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[3] This is not the first time that ATF has claimed an authority it does not possess. *See* Section I.A of Gun Owners Foundation Comments to the Bureau of Alcohol, Tobacco, Firearms and Explosives in Response to ATF's January 2011 "Study on the Importability of Certain Shotguns" (Thus, section 925(d), as amended, **requires** the Attorney General to find a firearm importable if it meets the **statutory criteria**, even though that firearm does not meet that statutory criteria to the Attorney General's **personal** "**satisfaction**.").

[4] Indeed, the only reason such bullets as the SS109 load in the 5.56 caliber, and the M2AP load in the .30-06 caliber are available is because "[h]istorically, ATF has used th[e] sporting test to exempt [such] projectiles." ATF Presentation, pp. 2-3, http://www.atf.gov/firearms/industry/dad-richardson-opening-statement-at-ap-ammunition-listening-meeting.pdf. In fact, ATF has exempted the M2AP **bullet** only in the .30-06 **cartridge**. Taking that exact same **bullet**, and loading it into either a .308 Winchester or 7.5x55 Swiss **cartridge** would suddenly make the round AP, even though those calibers are less powerful than.30-06.

ATF's position, that AP ammunition may be outlawed if there is **any** pistol that chambers the caliber, is clearly erroneous. If Congress intended to ban AP ammunition in all calibers, it could have simply done so, with no need for the second clause of Section 921(a)(17)(B)(i). However, the subsection as written contains two components, both of which are required: (1) composed entirely of certain elements, **and** (2) "may be used in a handgun." The words in the second clause, "may be used in a handgun," are words of limitation. Congress understood that there must be at least **some** types of ammunition which are outside its scope (*i.e.*, those that may **not** be used in a handgun), and which cannot be considered AP for purposes of Section 921(a)(17).

Moreover, the language "a handgun" cannot reasonably mean a single handgun. For example, if someone were to manufacture in his garage one "handgun" that chambers the .50 BMG cartridge,[5] that caliber does not simply transform into a handgun cartridge, making AP rounds in that caliber illegal. The word "a" is an indefinite article, and it cannot possibly mean "just one." Rather, it must be construed in a way that meaningfully limits the scope of Section 921(a)(17)(B)(i) to something less than everything. Contextually, "a handgun" must mean some type of more common or more readily available handguns. The way ATF has interpreted the language, the second clause "may be used in a handgun" has essentially been read out of the statute, resulting in new production AP ammunition being outlawed in virtually every caliber.

5. Many Typical Rifle Calibers Are Capable of Defeating the Soft Body Armor, Regardless of Whether They Are Armor Piercing.

The typical law enforcement professional in the United States who uses any body armor wears soft body armor. Soft body armor is classified and rated by the National Institute of Justice as either Type I, Type IIA, Type II, or Type IIIA.[6] The highest soft armor rating, Type IIIA, is rated to stop up to the .357 Sig and .44 Magnum caliber handgun rounds. *Id.* There is **no** soft body armor that is rated to stop rifle rounds. *Id.* Only Type III and Type IV armor, consisting of "rifle plates," is rated to stop rifle rounds. Moreover, Type IV armor is rated to stop even AP rifle rounds, such as the M2AP .30 caliber bullet. *Id.*

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[5] 18 U.S.C. Section 921(a)(29) defines "handgun" as "a firearm which has a short stock and is designed to be held and fired by the use of a single hand…."

[6] "Ballistic Resistance of Body Armor NIJ Standard-0101.06," National Institute of Justice, July 2008, pp. 3-4, https://www.ncjrs.gov/pdffiles1/nij/223054.pdf.

It is difficult to find any reasonable explanation for ATF's prohibiting AP ammunition in rifle calibers, based on theoretical "threat" to law enforcement.[7] As explained above, the body armor typically worn by law enforcement is either rated to protect them against most rifle projectiles, including AP ones — or none at all. Thus, AP ammunition in rifle calibers presents no additional threat to law enforcement.[8] If Congress' intent was to protect law enforcement, it would not have intended to ban AP ammunition that does not pose any greater threat than other ammunition, which is why it limited Section 921(a)(17) to handgun ammunition. ATF should limit itself to the statutory authority it was given regarding handgun ammunition, and leave rifle ammunition alone.

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[7] Of course, ATF itself reported in 1986, prior to the passage of the AP ammunition statute, that "No law enforcement officer in the United States has died as a result of a round of armor piercing ammunition, as defined, having been fired from a handgun, subsequently penetrating an officer's protective body armor causing lethal injuries." D. Kopel, "The Return of a Legislative Legend: Debating 'cop-killers,'" *National Review*, March 1, 2004, http://www.nationalreview.com/articles/209704/return-legislative-legend.

[8] In a hearing before Congress in 1985, David Baker, the secretary-treasurer of the International Union of Police Associations, AFL-CIO testified that, when it comes to rifle ammunition, all rounds have the capability to penetrate armor: "In the rare instance when a police department is confronted with a need for an armor-piercing capability, standard rifle ammunition will fill this need." 1985 Hearing, p. 91.

6. Conclusion.

ATF has implemented its authority under this statute in an arbitrary and capricious manner.[9] Hopefully, ATF will reconsider its past approach in interpreting the statutory language, and revise its approach to classifying AP ammunition.

Sincerely yours,

/s/

William J. Olson

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[9] On July 9, 2011, ATF carried out a raid on the offices of Elite Ammunition. R. Farago, "ATF Elite Ammunition Raid Revealed," TheTruthAboutGuns.com, August 5, 2011, http://www.thetruthaboutguns.com/2011/08/robert-farago/atf-raid-elite-ammunition-confiscate-armor-piercing-brass-bullets/. Armed with fully automatic weapons and a search warrant, ATF agents confiscated Elite's entire inventory of .223, 6.5 Grendel, and 6.8 SPC caliber copper projectiles (along with Elite's customer databases), claiming them to be armor-piercing ammunition. Apparently, it was later brought to light that ATF had "reclassified" the 6.5 and 6.8 rounds as "pistol" rounds **in secret, just one day before** the raid. *Id.* Aside from basing its raid upon a classification of which it alone had knowledge, ATF also ignored the fact that Elite's rounds were specifically designed to **fragment** upon impact, specifically for **hog hunting**. *Id.* This clearly exempted Elite's rounds from any "AP" status under not one, but **two, provisions** of 18 U.S.C. Section 921(a)(17) (frangible projectiles and sporting purposes).