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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 51P; AG Order No. 3411-2014]

RIN 1140-AA47

Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution” (2010R-21P)

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice proposes amending Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations to clarify definitions of two categories of persons who are prohibited from receiving, possessing, shipping, or transporting firearms under the Gun Control Act of 1968. The proposed rule would clarify that the statutory term “adjudicated as a mental defective” includes persons who are found incompetent to stand trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity, and that the term includes persons found guilty but mentally ill. The Department recognizes that the term “mental defective” is outdated, but it is included in the statute and cannot be amended by regulation. The proposed amendments would further clarify that federal, state, local, and military courts are recognized lawful authorities that can find persons incompetent to stand trial or find them

not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity. The proposed rule seeks public comments regarding whether the statutory term “adjudicated as a mental defective” includes an adjudication that occurred when the person was under the age of 18. This proposed rulemaking would also amend ATF regulations to clarify that the statutory term “committed to a mental institution” applies to involuntary inpatient or outpatient treatment. The proposed rule seeks public comments regarding whether the statutory term “committed to a mental institution” includes an involuntary commitment that occurred when the person was under the age of 18.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [Insert date 90 days after date of publication in the FEDERAL REGISTER]. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Standard Time on the last day of the comment period.

ADDRESSES: You may submit comments, identified by docket number ATF 51P, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 648-9741.
- Mail or Hand Delivery/Courier: George M. Fodor, Room 6.N-523, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE, Washington, DC, 20226.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to the Federal eRulemaking portal, <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: George M. Fodor, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE, Washington, DC, 20226; telephone: (202) 648-7070.

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General has delegated to the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) the authority to enforce provisions of the Gun Control Act of 1968 (GCA), codified in chapter 44 of title 18, United States Code (U.S.C.), subject to the direction of the Attorney General and Deputy Attorney General. 28 CFR 0.130(a). Regulations in 27 CFR part 478 implement provisions of the GCA.

Section 922(g) of the GCA prohibits certain persons from shipping or transporting any firearm or ammunition in interstate or foreign commerce, possessing a firearm or ammunition in or affecting commerce, or receiving a firearm or ammunition that has traveled in interstate or foreign commerce. These prohibitions apply to any person who:

- (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- (2) Is a fugitive from justice;
- (3) Is an unlawful user of or addicted to any controlled substance;
- (4) Has been adjudicated as a mental defective or committed to a mental institution;
- (5) Is an alien illegally or unlawfully in the United States or admitted to the United States under a nonimmigrant visa;
- (6) Has been discharged from the Armed Forces under dishonorable conditions;
- (7) Having been a citizen of the United States, has renounced U.S. citizenship;
- (8) Is subject to certain types of court-issued protective orders; or
- (9) Has been convicted in any court of a misdemeanor crime of domestic violence.

On September 6, 1996, ATF published in the **Federal Register** a notice of proposed rulemaking (NPRM) in which it proposed definitions for the terms “adjudicated as a mental defective” and “committed to a mental institution” as used in 18 U.S.C. 922(g)(4) (Notice No. 839; 61 FR 47095). The proposed definition of “adjudicated as a mental defective” published at 61 FR 47098 included determinations by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease is a danger to himself or to others or lacks the mental capacity to contract or manage his own affairs. The proposed definition also included a finding of insanity by a court in a criminal case..

In response to the 1996 NRPM, ATF received a number of comments from the public and from federal and state agencies. Some comments suggested additional language to clarify the definition of “adjudicated as a mental defective” or included

information not originally considered by ATF. Among the comments ATF received was a recommendation from the Department of Defense (DOD) that the definition of “adjudicated as a mental defective” be amended to specifically include “those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b [*sic*] of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.” DOD suggested this addition to conform to the National Defense Authorization Act for 1996, Public Law 104-106, 110 Stat. 186, which amended subchapter IX of the Uniform Code of Military Justice (UCMJ) to include procedures for the commitment of military personnel for reason of a lack of mental responsibility (See Notice No. 839; 62 FR 34634 (June 27, 1997)).

ATF incorporated DOD’s suggestion into its final rule published in the **Federal Register** on June 27, 1997 (Notice No. 839; 62 FR 34634). The 1997 final rule defines “adjudicated as a mental defective” as codified at 27 CFR 478.11.

The proposed definition in the 1996 NPRM of “committed to a mental institution” read as published at 61 FR 47098. No comments were received regarding this proposed definition, and the final rule contained this definition without change. *See* 27 CFR 478.11.

Congress amended the GCA in 2008 to provide that federal departments or agencies may not provide records of individuals “adjudicated as a mental defective” or “committed to a mental institution” to the Attorney General for inclusion in the National Instant Criminal Background Check System (NICS) if:

- (a) The adjudication or commitment was set aside or expunged, or the person was fully released or discharged from all mandatory treatment, supervision, or monitoring;
- (b) The person was found by a court, board, commission, or other lawful authority to no longer suffer from the mental health condition that served as the basis of the initial adjudication or commitment, or was found to be rehabilitated; or
- (c) The adjudication or commitment was based solely on a medical finding of disability, without any opportunity for a hearing by a court, board, commission, or other lawful authority, and the person has not otherwise been adjudicated as a mental defective under 18 U.S.C. 922(g)(4).

NICS Improvement Amendments Act of 2007, Public Law 110-180, tit. I, sec. 101(c)(1), 121 Stat. 2559, 2562-63 (2008). A person who falls in one of these exemptions is not prohibited from shipping, transporting, possessing, or receiving a firearm or ammunition that has traveled in interstate or foreign commerce. These exemptions do not apply to any person adjudicated, in any criminal case or under the UCMJ, to be not guilty by reason of insanity or based on lack of mental responsibility, or found incompetent to stand trial. *Id.*

Persons granted relief from disabilities under 18 U.S.C. 925(c) or under a federal or state relief program described in section 101(c)(2)(A) or section 105 of the NICS Improvement Amendments Act of 2007 (18 U.S.C. 922 note) are not considered to have been adjudicated as a mental defective or committed to a mental institution.

II. Proposed Rule

The Department proposes amending the definition of “adjudicated as a mental defective” in 27 CFR 478.11 to clarify that persons found not guilty by reason of mental disease or defect are included in the definition of “adjudicated as a mental defective.” The legislative history of the Gun Control Act indicates that Congress intended that the prohibition against the receipt and possession of firearms would apply broadly to “mentally unstable” or “irresponsible” persons. *See, e.g.*, 114 Cong. Rec. 21780 (1968) (statement of Rep. Sikes); *id.* at 21832 (statement of Rep. Corman); *id.* at 22270 (statement of Rep. Fino); *see also, e.g., id.* at 21791 (statement of Rep. Thompson). This proposed amendment would clarify the application of the definition and specifically identifies those persons found not guilty by reason of mental disease or defect as included within the definition of “adjudicated as a mental defective.”

The Department also proposes amending the definition of “adjudicated as a mental defective” in 27 CFR 478.11 by removing the reference to articles 50a and 72b of the UCMJ and adding “by a court in a criminal case” to clarify that the term includes federal, state, local and military courts that can find persons incompetent to stand trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity. This proposal would clarify, rather than alter, the current meaning of the term.

As in the military judicial system, courts in the federal, state, and local judicial systems are responsible for finding individuals incompetent to stand trial or not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility. Federal courts have authority to determine competency to stand trial as well as to issue special verdicts on the basis of a person’s mental capacity at the time of the alleged crime. 18 U.S.C. 4241, 4242. Most states also have laws authorizing state courts to find a person

either incompetent to stand trial or not guilty by reason of insanity. *See* Bureau of Justice Statistics, *State Court Organization* (2004), pp. 199-202. This proposed amendment would clarify that being found incompetent to stand trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity by federal, state, local, or military courts constitutes “adjudicat[ion] as a mental defective.”

The Department also proposes amending the definition of “adjudicated as a mental defective” in 27 CFR 478.11 to clarify that the term includes those persons found guilty but mentally ill by a court in a criminal case in a jurisdiction that provides for such a finding. This addition to the definition would acknowledge the States that extend the guilty but mentally ill option to defendants who do not meet criteria for a plea of not guilty by reason of insanity. *E.g.*, Alaska, AS § 12.47.030; Georgia, O.C.G.A. § 17-7-131.

State practices have varied regarding whether, for purposes of a NICS background check, commitments of persons under the age of 18 are treated as qualifying commitments to a mental institution and whether the term “adjudicated as a mental defective” includes an adjudication that occurred when the person was under the age of 18. Some States make these records available to the NICS database and others not. In addition, ATF has received inquiries from States seeking greater clarity as to whether these adjudications and commitments qualify. Therefore, we are seeking comment regarding whether individuals “adjudicated as a mental defective” or “committed to a mental institution” and therefore prohibited from receiving, possessing, shipping, or transporting firearms under the Gun Control Act of 1968 includes commitments or

adjudications as a mental defective that occurred when the person was under the age of 18.

In addition, the Department proposes amending the definition of “committed to a mental institution” to clarify that involuntary commitment to a mental institution includes both inpatient and outpatient treatment. ATF has received inquiries as to whether the definition applies to involuntary outpatient treatment. Although the term “committed to a mental institution” is not defined in 18 U.S.C. 922, the plain language of the statute incorporates both inpatient and outpatient commitments as the statute requires commitment *to* a mental institution, not commitment *in* a mental institution. See *United States v. B.H.*, 466 F. Supp. 2d 1139, 1147 (N.D. Iowa 2006). Mental institutions include mental health facilities and the auxiliary mental health services provided through those facilities.

Furthermore, ATF has received inquiries as to whether commitments of persons under the age of 18 are qualifying commitments to a mental institution. ATF is considering clarifying whether the term “committed to a mental institution” includes a commitment that occurred when the person was under the age of 18. ATF seeks comments on this option and solicits recommendations for other approaches.

Persons are not considered to have been “committed to a mental institution” as a result of a voluntary admission to a mental institution or a temporary admission for observation unless the temporary admission for observation turns into a qualifying commitment as a result of a formal commitment by a court, board, commission, or other lawful authority. As previously noted, the NICS Improvement Amendments Act of 2007

provides that adjudications and commitments by a federal agency may not be reported to NICS when the adjudication or commitment is expunged, or when other criteria are met.

Furthermore, persons granted relief from disabilities under 18 U.S.C. 925(c) or under a federal or state relief program described in section 101(c)(2)(A) or section 105 of the NICS Improvement Amendments Act of 2007 (18 U.S.C. 922 note) are not considered to have been adjudicated as a mental defective or committed to a mental institution.

III. Statutory and Executive Order Reviews

A. Executive Order 12866 and Executive Order 13563

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866 (“Regulatory Planning and Review”), section 1(b) (“The Principles of Regulation”), and Executive Order 13563 (“Improving Regulation and Regulatory Review”). The Department has determined that this proposed rule is a “significant regulatory action” under section 3(f) of Executive Order 12866, and accordingly this proposed rule has been reviewed by the Office of Management and Budget. However, this proposed rule would not have an annual effect on the economy of \$100 million or more, nor would it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Accordingly, this proposed rule is not an economically significant rulemaking action as defined by Executive Order 12866.

Further, the Department has assessed both costs and benefits of this proposed rule as required by Executive Order 12866, section 1(b)(6), and has made a reasoned determination that the benefits of this proposed rule would justify the costs. The

Department believes that the costs that would be associated with compliance with this proposed rule are minimal. A few States may incur added costs to provide the additional records to NICS. However, the proposed rule helpfully would clarify the statutory terms “adjudicated as a mental defective” and “committed to a mental institution” to prevent the unlawful possession or transfer of firearms to prohibited persons. In addition, as stated above, the Department is seeking comment regarding whether the terms “adjudicated as a mental defective” or “committed to a mental institution” includes adjudications as a mental defective or commitments that occurred when the person was under the age of 18. Explicitly including such adjudications or commitments within the definitions of these terms may result in state entities providing additional records to the NICS that may affect future NICS background checks and may have public safety benefits. The Department seeks input from the public for assessing the costs and benefits of explicitly including such adjudications or commitments within the definitions of these terms.

B. Executive Order 13132

The proposed rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (“Federalism”), the Attorney General has determined that the proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

The proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (“Civil Justice Reform”).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. 5 U.S.C. 601. The Attorney General has reviewed this proposed rule and, by approving it, certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This proposed rule would not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This proposed rule would not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore,

no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act

This proposed rule does not contain any new or revisions to existing “collection[s] of information” as defined by the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

Public Participation

A. Comments Sought

ATF requests comments on the proposed rule from all interested persons. ATF asks specifically for comments on the clarity of this proposed rule and how it may be made easier to understand. All comments must reference this document docket number (ATF 51P), be legible, and include the commenter’s name and complete mailing address. ATF will treat all comments as originals and will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

Comments, whether submitted electronically or on paper, will be available for public viewing at ATF and on the Internet as part of the eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their names or other personal identifying information posted on the Internet should submit their comment by mail or facsimile, along with a separate cover sheet that contains their

personal identifying information. Both the cover sheet and comment must reference this docket number (ATF 51P). Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comments that contains material that is confidential under law (*e.g.*, trade secrets, processes). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked “confidential” at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Submit comments in one of three ways:

- *Mail or Hand Delivery/Courier:* Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments may be of any length and must appear in a minimum 12 point type (.17 inches), include a complete mailing address, and be signed.

- *Facsimile:* You may submit comments by facsimile transmission to (202) 648-9741. Faxed comments must:

- (1) Be legible and appear in a minimum 12 point type (.17 inches);

- (2) Be on 8½" x 11" paper;
- (3) Contain a legible, written signature; and
- (4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

- *Federal eRulemaking Portal:* To submit comments to ATF via the Federal eRulemaking portal, visit <http://www.regulations.gov> and follow the instructions for submitting comments.

D. Request for Hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this proposed rule and the comments received will be available for public inspection through the Federal eGovernment portal, <http://www.regulations.gov>, or by appointment during normal business hours at the ATF Reading Room, Room 1E-062, 99 New York Avenue, NE, Washington, DC, 20226; telephone: (202) 648-8740.

Drafting Information

The author of this document is George M. Fodor, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and ammunition, Authority delegations, Customs duties and inspection, Domestic violence, Exports, Imports, Law enforcement personnel, Military personnel, Nonimmigrant aliens, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, and Transportation.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 478 is proposed to be amended as follows:

PART 478--COMMERCE IN FIREARMS AND AMMUNITION

1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921-931; 44 U.S.C. 3504(h).

2. Revise the definitions of “Adjudicated as a mental defective” and “Committed to a mental institution” in § 478.11 to read as follows:

§ 478.11 Meaning of terms.

* * * * *

Adjudicated as a mental defective.

(a) A determination, order, or similar finding by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) Is a danger to self or others; or

(2) Lacks the mental capacity to contract or manage his or her own affairs.

(b) The term shall include—

(1) Those persons found not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility by a court in a criminal case;

(2) Those persons found guilty but mentally ill by a court in a criminal case in a jurisdiction that provides for such a finding; and

(3) Those persons found incompetent to stand trial by a court in a criminal case.

(c) The term shall not include —

(1) Any person adjudicated by a department or agency of the Federal

Government, if any of the conditions of section 101(c)(1) of the NICS Improvement Amendments Act of 2007 apply; or

(2) Any person who has been adjudicated and subsequently received relief from disabilities under 18 U.S.C. 925(c) or under a program authorized by section 101(c)(2) or section 105(a) of the NICS Improvement Amendments Act of 2007.

* * * * *

Committed to a mental institution.

(a) A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes an involuntary commitment to a mental institution for inpatient or outpatient treatment. The term includes an involuntary commitment for mental defectiveness, *i.e.*, mental illness, to a mental institution. It also includes a commitment to a mental institution for other reasons, such as for drug use.

(b) The term does not include a person in a mental institution solely for observation or evaluation, a voluntary admission to a mental institution, or voluntary

outpatient treatment. The term shall not include any person so committed by a department or agency of the Federal Government, if any of the conditions of section 101(c)(1) of the NICS Improvement Amendments Act of 2007 apply, or any person who has received relief from disabilities under a program authorized by section 101(c)(2) or section 105(a) of that Act or under 18 U.S.C. 925(c).

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January 2, 2014
Date

Eric H. Holder, Jr.
Attorney General

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