RECOMMENDED ACTION MEMO

Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Ban the Importation of Certain Semi-Automatic Weapons
Date: November 2020

Recommendation: Issue new criteria to enforce the sporting-purposes requirement under the Gun Control Act and ban the importation of semi-automatic assault rifles and handguns.

I. Summary

Description of recommended executive action

The Gun Control Act of 1968 (GCA) gives the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) the authority to control the importation of firearms into the United States.[1] Specifically, the GCA provides that the ATF "shall" authorize an application for firearm importation if the firearm model is "generally recognized as particularly suitable for or readily adaptable to sporting purposes."[2] Known as the sporting purposes test, this requirement tasks the ATF with periodically evaluating firearm models for their potential uses. The GCA provides little explicit guidance about what constitutes a "sporting purpose." Instead, the law delegates this definitional task to the ATF.[3]

Despite the rapid development of new firearms, the ATF has not conducted a comprehensive review of semi-automatic assault rifles and handguns under the sporting purposes test since the Clinton administration examined the question over 20 years ago. According to a 2011 report by three US Senators, "Since the Clinton Administration's efforts, the Gun Control Act of 1968's prohibition against non-sporting firearms has not been aggressively enforced, and many military-style, non-sporting rifles have flowed into the US civilian market."[4]

In order to update guidance on semi-automatic assault rifles and handguns, the next administration should conduct an updated examination of the sporting purposes test and issue new criteria to enforce the sporting purposes requirement. As with similar examinations in the

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[1] This authority has been delegated to the Director of the ATF by the Attorney General. Prior to ATF's transfer from the Department of the Treasury to the Department of Justice on January 24, 2003, the authority resided with the Treasury Secretary. *See Springfield, Inc. v. Buckles*, 292 F.3d 813, 815 (D.C. Cir. 2002).

[2] 18 U.S.C. § 925(d)(3).

[3] *See* S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968) (stating that the GCA affords the Secretary of the Treasury "fairly broad discretion in defining and administering the import prohibition.").

[4] Senators Dianne Feinstein, Charles Schumer & Sheldon Whitehouse, "Halting U.S. Firearms Trafficking to Mexico," Report to the U.S. Senate Caucus on Int'l Narcotics Control, June 2011, https://www.feinstein.senate.gov/public/_cache/files/b/e/beaff893-63c1-4941-9903-67a0dc739b9d/E735381490CD5962A57DE3BB6DDBBE6C.061011firearmstraffickingreport.pdf.

past, the administration should order that all pending and future applications for importation of these rifles and handguns not be acted upon until completion of the review, and that outstanding permits for importation of the rifles be suspended for the duration of the review period.

Overview of process and time to enactment

As in the past, the ATF should establish a working group to conduct the evaluation. The study should take roughly 90–120 days, during which time importation of the rifles being evaluated should be suspended. Neither the temporary suspension nor the issuance of new criteria would constitute a rulemaking, and as such, the ATF will not need to go through the Administrative Procedure Act's (APA) notice-and-comment rulemaking (NCRM) proceedings.

To comply with best practices for agency guidance, the ATF should acknowledge that such criteria does not have legislative authority, and should include details on how the public may submit a complaint seeking the rescission or modification of the guidance. Once finalized, the document should be published on the ATF's website.

II. Current state

The sporting purposes test and early ATF applications

The sporting purposes test was created as part of the GCA of 1968.[5] The test provides that the ATF "shall" authorize an application for firearm importation into the United States if the firearm model is "generally recognized as particularly suitable for or readily adaptable to sporting purposes."[6] The purpose of this provision was to allow for the importation of quality sporting firearms, while banning the importation of firearms that were the "greatest aggravation to big city crime."[7]

The GCA did not provide a definition of what constitutes a sporting purpose; instead, it gave the secretary of the treasury (now the attorney general) broad discretion to determine what firearms have such a purpose.[8]

Following enactment of the GCA, the Treasury secretary established a firearms evaluation panel to provide guidelines for implementation of the sporting purposes test. This panel was composed of representatives from the military, law enforcement, and the firearms industry. The panel focused its attention on handguns and recommended the adoption of factoring criteria to evaluate the various types of handguns. These factoring criteria are based upon such considerations as overall length of the firearm, caliber, safety features, and frame construction.

[5] Gun Control Act of 1968 (P.L. 90-618, 82 Stat. 1213).
[6] 18 U.S.C. § 925(d)(3).
[7] S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968).
[8] *Id.*

An evaluation sheet (ATF Form 4590) was developed thereafter by the ATF and put into use for evaluating handguns pursuant to the "sporting purposes" test.[9]

The 1968 Firearms Evaluation Panel did not propose criteria for evaluating rifles and shotguns. Other than surplus military firearms, which Congress addressed separately, long guns being imported prior to 1968 were generally conventional rifles and shotguns specifically intended for sporting purposes. Thus, in 1968, there was no cause to develop criteria for evaluating the sporting purposes of rifles and shotguns.

The first time the ATF undertook a meaningful analysis under the sporting purposes test was in 1984. At that time, the ATF was faced with a new breed of imported shotgun. It was clear that the historical assumption that all shotguns were sporting was no longer viable. Specifically, the ATF sought to determine whether the Striker-12 shotgun was suitable for sporting purposes. This shotgun is a military/law enforcement weapon initially designed and manufactured in South Africa for riot control. When the importer was asked to provide evidence of sporting purposes for the weapon, the ATF was provided information that the weapon was suitable for police/combat style competitions. The ATF determined that this type of competition did not constitute sporting purposes under the statute, and that this shotgun was not suitable for traditional sporting purposes, such as hunting, and trap and skeet shooting. Accordingly, importation was denied.[10]

Thereafter, in 1986, the Gilbert Equipment Company requested the USAS-12 shotgun be classified as a sporting firearm. After examination and testing of the weapon, the ATF found it was a semi-automatic version of a selective-fire military-type assault shotgun. In this case, the ATF determined that, due to its weight, size, bulk, designed magazine capacity, configuration, and other factors, the USAS-12 was not particularly suitable for or readily adaptable to sporting purposes. Again, the ATF refused to recognize police/combat competitions as sporting purposes. The shotgun was reviewed on the basis of its suitability for traditional shotgun sports of hunting, and trap and skeet shooting, and its importation was denied. This decision was upheld in federal court.[11]

1989 ATF study

In 1989, following the killing of five children in a California schoolyard by a gunman with a semi-automatic weapon, President George H. W. Bush announced he would conduct a review to determine whether "semiautomatic assault rifles" met the sporting-purposes test.[12]

Before conducting the review, on March 14, 1989, the ATF announced it was "suspending, effective immediately, the importation of several makes of assault-type rifles, pending a decision as to whether these weapons meet the statutory test that they are of a type generally

[9] Daniel Black, "Report and Recommendation on the Importability of Certain Semiautomatic Rifles," ATF, July 6, 1989, https://www.atf.gov/file/61761/download.
[10] *Id.*
[11] *Gilbert Equipment Company, Inc. v. Higgins,* 709 F. Supp. 1071 (S.D. Ala. 1989).
[12] ATF 1989 report supra note 9.

recognized as particularly suitable for or readily adaptable to sporting purposes."[13] The announcement stated the ATF would not approve, until further notice, the importation of AKS-type weapons, Uzi carbines, FN/FAL-type weapons, FN/FNC-type weapons and Steyr Aug semi-automatic weapons. On April 5, 1989, the suspension was expanded to include all similar assault-type rifles.[14]

On July 6, 1989, the ATF completed its study of semi-automatic assault rifles and determined that:

> [S]emiautomatic assault rifles were designed and intended to be particularly suitable for combat rather than sporting applications. While these weapons can be used, and indeed may be used by some, for hunting and target shooting, we believe it is clear that they are not generally recognized as particularly suitable for these purposes...Therefore, it is the finding of the working group that the semiautomatic assault rifle is not a type of firearm generally recognized as particularly suitable for or readily adaptable to sporting purposes and that importation of these rifles should not be authorized under 18 U.S.C. § 925(d)(3).[15]

In the study, the ATF deemed eight physical features "military configurations":

- folding/telescoping stocks
- separate pistol grips
- ability to accept a bayonet
- flash suppressors
- bipods
- grenade launchers
- night sights
- detachable magazines

The ATF took the position that any of these military configuration features, other than the ability to accept a detachable magazine, would make a semiautomatic rifle not importable. Based on this finding, President Bush permanently banned importation of the 43 guns analyzed by the ATF.

1998 ATF study

In response to the report, gun manufacturers removed many of the military-style features from the weapons examined in 1989 (except for the ability to accept detachable magazines).[16] Once

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] ATF, "Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles," April 1998, https://www.atf.gov/resource-center/docs/guide/department-treasury-study-sporting-suitability-modified-semiautomatic/download.

these designs were modified, the ATF allowed for the importation of these rifles.[17] Significantly, most of the modified rifles not only still had the ability to accept a detachable magazine but, more specifically, still had the ability to accept a detachable large capacity magazine that was originally designed and produced for the military assault rifles from which they were derived.

In 1998, in response to gun manufacturers increasingly exploiting these loopholes, the Clinton administration examined 58 semi-automatic assault rifles under the sporting purposes test—this time focusing on the modified rifles that were a product of the 1989 report.[18]

While the study was conducted, the ATF put in place a 120-day temporary suspension on the importation of modified semi-automatic rifles. The 1998 study affirmed the findings of the 1989 study in agreeing with the seven disqualifying features the ATF had previously identified. However, the review also found that "the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989."[19] Based on these updated criteria, the Clinton administration banned the import of additional firearms.

2011 ATF study

In 2011, the ATF conducted another study to assess whether certain shotguns were importable under the sporting purposes test.[20] Past studies focused primarily on automatic rifles, and as a result, there was relatively limited guidance available to the public about which shotguns could not be imported under the GCA. The 2011 report aimed to fill that gap.[21]

The 2011 report first affirmed the 1998 and 1989 reports' long-standing conclusion that *sporting purposes* should be interpreted narrowly.[22] As the report noted:

> Firearms are prohibited from importation (section 922(l)), with four specific exceptions (section 925(d)). A broad interpretation permitting a firearm to be imported because someone may wish to use it in some lawful shooting activity would render the general prohibition of section 922(l) meaningless.[23]

The 2011 report then identified 10 firearm features that would render a shotgun not importable:

- folding, telescoping, or collapsible stocks
- bayonet lugs

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] ATF, "Study on the Importability of Certain Shotguns," U.S. Department of Justice, January 2011, https://www.atf.gov/resource-center/docs/january-2011-importability-certain-shotgunspdf/download.
[21] *Id.*
[22] *Id.*
[23] *Id.*

- flash suppressors
- magazines over five rounds or a drum magazine
- grenade-launcher mounts
- integrated rail systems (other than on top of the receiver or barrel)
- light-enhancing devices
- excessive weight (greater than 10 pounds for 12 gauge or smaller)
- excessive bulk (greater than three inches in width and/or greater than four inches in depth)
- forward pistol grips or other protruding parts designed or used for gripping the shotgun with the shooter's extended hand[24]

These features, while not exhaustive, were singled out because the report concluded they were most appropriate for law enforcement or military use, and therefore not particularly suitable for nor readily adaptable to generally recognized sporting purposes.[25]

Enactment of the shotgun rider

In response to the 2011 study, Congress included a rider in its yearly appropriations bill to nullify the 2011 report and enable the importation of various military-style shotguns that the 2011 report prohibited.[26] The rider provided that:

> None of the funds made available by this Act may be used to pay the salaries or expenses of personnel to deny, or fail to act on, an application for the importation of any model of shotgun if: (1) all other requirements of law with respect to the proposed importation are met; and (2) no application for the importation of such model of shotgun, in the same configuration, had been denied by the Attorney General prior to January 1, 2011, on the basis that the shotgun was not particularly suitable for or readily adaptable to sporting purposes.[27]

Since the rider was first introduced, it has been added to appropriations bills in subsequent years. It can be read as preventing the ATF from using the sporting purposes test to prohibit the importation of military-style shotguns.[28] However, the limitation does not apply to rifles or handguns.

III. Proposed action

[24] *Id.*
[25] *Id.*
[26] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 541, 125 Stat. 552, 639 (2011).
[27] *Id.*
[28] *See e.g.,* Consolidated Appropriations Act, 2020, Public Law 116–93 (2020), tit. V, § 539. Future budgets should attempt to remove this dangerous rider.

Despite the rapid development of new firearms, the ATF has not conducted a comprehensive review of semi-automatic assault rifles or handguns under the sporting purposes test since the Clinton administration examined the question over 20 years ago. According to a 2011 report by three US Senators, "Since the Clinton Administration's efforts, the Gun Control Act of 1968's prohibition against non-sporting firearms has not been aggressively enforced, and many military-style, non-sporting rifles have flowed into the U.S. civilian market."[29]

In order to update guidance on semi-automatic assault rifles and handguns, the next administration should conduct an updated examination of the sporting purposes test and issue new criteria to enforce the sporting purposes requirement. As with similar examinations in the past, the administration should order that all pending and future applications for importation of these rifles and handguns not be acted upon until completion of the review, and that outstanding permits for importation of the firearms be suspended for the duration of the review period.

A. Substance and scope of review

The ATF should identify updated criteria for determining whether semi-automatic assault rifles and handguns have a "sporting purpose" and apply these criteria to the firearms under examination. In conducting such a study, there are several important foundational questions the ATF must first address.

- **Meaning of "sporting purpose"*:*** The meaning of the term "sporting purpose" will necessarily impact the "sporting" classification of any rifle features. For example, military rifles, or rifles with common military features that are unsuitable for traditional shooting sports, may be considered "particularly suitable for or readily adaptable to sporting purposes" if military shooting competitions are considered a generally recognized sporting purpose. As such, the ATF must first examine the meaning of the term. In doing so, the ATF should consider the historical context of "sporting purpose" and that Congress originally intended a narrow interpretation of sporting purpose under § 925(d)(3).

- **Types of weapons:** The ATF should consider all semi-automatic assault rifles and handguns in determining which firearms to study. At the very least, the study should examine all semi-automatic firearms based on the AK47, FN-FAL, HK 91 and 93, Uzi, and SIG SG550 designs, as was the case in 1998.[30]

- **New criteria:** The ATF should update the criteria that would render a semi-automatic assault rifle or handgun not importable. The criteria should consist of the following:

[29] Senators Dianne Feinstein, Charles Schumer & Sheldon Whitehouse, "Halting U.S. Firearms Trafficking to Mexico," Report to the U.S. Senate Caucus on Int'l Narcotics Control, June 2011, https://www.feinstein.senate.gov/public/_cache/files/b/e/beaff893-63c1-4941-9903-67a0dc739b9d/E735381490CD5962A57DE3BB6DDBBE6C.061011firearmstraffickingreport.pdf.
[30] ATF 1998 Report supra note 16.

- originally designed for military combat or law enforcement
- commonly used in the deadliest mass shootings in America[31]
- customizable to accommodate military features, including forward trigger grips
- functionally equivalent to weapons that have failed the sporting purposes test
- closely associated with gun and drug trafficking and other serious crimes, as reflected in ATF trace data, including international trace data
- marketed as equivalent or virtually equivalent to makes and models suitable for military and/or law enforcement

Crafted this way, rather than as a feature-focused list from previous reports, the proposed new criteria should be less circumventable by the gun industry. Following the 1989 report, many of the problematic military-style features identified were removed from the design of the firearms.[32] This, however, did not make the firearms fit for sporting purposes, and nine years later, the ATF again had to prohibit the importation of the modified firearms.[33] The new criteria outlined above are framed in purpose-based language to try to avoid these problems from recurring in this iteration of the sporting purposes test.

B. Process

Temporary suspension

A court is likely to uphold a temporary suspension of firearm imports while the ATF reassesses its sporting purpose test. In the past, courts have held this temporary suspension does not constitute a rulemaking, and as such, the NCRM process is not necessary.[34]

However, it is possible that the length of the suspension could raise issues if it is too long. In other contexts, courts have found that while an agency can reconsider a prior decision, it must do so within a "reasonable time."[35] In the present context, the Eleventh Circuit in *Gun South*

[31] An analysis of public mass shootings resulting in four or more deaths found that more than 85 percent of such fatalities were caused by assault rifles. *See* Charles DiMaggio et al., "Changes in US Mass Shooting Deaths Associated with the 1994–2004 Federal Assault Weapons Ban: Analysis of Open–source Data," *Journal of Trauma and Acute Care Surgery* 86, no. 1 (2019).
[32] ATF 1998 Report supra note 16.
[33] *Id.*
[34] *See Gun S., Inc. v. Brady,* 877 F.2d 858, 865 (11th Cir. 1989).
[35] *See e.g., Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193–94 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions . . . . [H]owever, an agency may undertake such reconsideration only if it does so within a reasonable time period . . . ."); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("Quite consistently, we have held that absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period."); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 612–13 (N.D. Cal. 1992) ("The determination of "a short and reasonable period of time" depends on the balancing the desirability of finality in an agency's decision against the public interest in reaching a proper result. What is a short and reasonable period will vary with each case, but absent unusual circumstances, the time period would be measured in weeks, not years.").

found a 90-day temporary suspension acceptable.[36] Further, in November 1997, President Clinton directed the secretary of the Treasury to conduct an expedited review of certain modified semi-automatic assault-type rifles, and temporarily suspend licenses for such firearms for a period of 120 days while doing so. Based on our review, there were no challenges to this 120-day temporary suspension. Given these precedents, it is likely that a court will uphold a temporary suspension of at least 90 to 120 days.

Permanent suspension

Similarly, the issuance of new criteria to implement the sporting purposes test in the context of semi-automatic assault rifles and handguns may appropriately be considered an interpretive rule, because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[37] The APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute provides otherwise.[38]

Unlike notice-and-comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."[39] Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

Agencies should also consider the recommendations of the administrative conference, most recently updated on June 13, 2019.[40] The most relevant recommendations concern transparency and public participation. These include: (1) providing "members of the public a fair

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[36] *Gun S., Inc. v. Brady,* 877 F.2d 858, 859 (11th Cir. 1989).

[37] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

[38] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

[39] Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents.

[40] Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.

opportunity to argue for modification, rescission, or waiver of an interpretive rule," (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint, and (3) avoiding the use of mandatory language (such as "shall" or "must") to accurately reflect the non-legislative nature of the guidance.[41]

C. Legal justification

Pursuant to 18 U.S.C. § 925(d), the GCA creates four narrow categories of firearms that the attorney general must authorize for importation. Under one such category, subsection 925(d)(3), the attorney general shall approve applications for importation when the firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes.

Recognizing the difficulty in implementing this section, Congress gave the secretary of the Treasury (now the attorney general) the discretion to determine a weapon's suitability for sporting purposes. This authority was ultimately delegated to what is now the ATF.[42] As explained in the 1968 Senate report for the GCA, "[t]he difficulty of defining weapons characteristics to meet this target [of eliminating the importation of weapons used in crime], without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition."[43]

Indeed, Congress granted this discretion to the secretary, even though some expressed concern with its breadth:

> [t]he proposed import restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adaptable to, sporting purposes. If this authority means anything, it permits Federal officials to differ with the judgment of sportsmen expressed through consumer preference in the marketplace…"[44]

IV. Risk analysis

Both the ATF's temporary suspension of certain firearms imports and the agency's issuance of new criteria can be judicially challenged for not following rulemaking procedures, or constituting arbitrary or capricious agency action.[45] As in the past, such challenges will likely fail.

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[41] *Id.* at 7.
[42] *See Springfield, Inc. v. Buckles*, 292 F.3d 813, 815 (D.C. Cir. 2002).
[43] S. Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968).
[44] S. Rep. No. 1097, 90th Cong. 2d. Sess. 2155 (1968) (views of Senators Dirksen, Hruska, Thurmond, and Burdick). In *Gun South, Inc. v. Brady,* 877 F.2d 858, 863 (11th Cir. 1989), the court, based on legislative history, found that the GCA gives the Secretary "unusually broad discretion in applying section 925(d)(3)."
[45] 5 U.S.C. § 706.

A. Procedural challenges

As noted above, the APA's NCRM requirement "does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" unless another statute provides otherwise.[46] However, the NCRM requirement does apply to legislative rules. Courts are commonly asked to determine whether interpretive rules, such as guidance documents, are legislative rules in disguise, and the gun industry will likely challenge the ATF's new criteria under this theory.

An interpretive rule "describes the agency's view of the meaning of an existing statute or regulation."[47] A court's inquiry is "whether the new rule effects a substantive regulatory change to the statutory or regulatory regime."[48] Interpretive rules "are those that clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required."[49] In other words, to be interpretive, a rule "must derive a proposition from an existing document whose meaning compels or logically justifies the proposition."[50] By contrast, a rule is legislative "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy."[51]

Temporary suspension

As noted above, a court will likely find the temporary suspension of certain firearm imports does not constitute a legislative rule under the APA. As the 11th Circuit held in *Gun South* when evaluating the ATF's temporary suspension of firearm imports:

> The Bureau has not engaged in rulemaking, but has merely suspended certain firearms from importation while it individually reassesses several permit determinations. These activities which involve applying the law to the facts of an individual case, do not approach the function of rulemaking...Such a determination is more analogous to making a licensing decision which the APA classifies as an "order" rather than a "rule."[52]

Permanent denial

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[46] 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. *See* Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules.
[47] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).
[48] *Id*.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Gun S., Inc. v. Brady*, 877 F.2d 858, 863 (11th Cir. 1989).

The gun industry may also attempt to challenge the new criteria as being a legislative rule that must go through NCRM. The ATF has a strong argument in response: that the guidance is interpretive in nature.

In the preceding three decades, the DC Circuit has focused its inquiry on whether a rule has "binding effects," in which case it is legislative.[53] There are multiple indicia of "binding effects."

- A rule is more likely to be legislative if it repeatedly includes mandatory language[54] or characterizes itself as a regulation,[55] notwithstanding boilerplate disclaimers to the contrary.[56] Conversely, a rule is less likely to be legislative if it is "replete with words of suggestion," such as speculation that an agency "may" or "might" act in a particular fashion depending on specific facts.[57]

- Regardless of the rule's text, "[t]he most important factor" [58] in identifying legislative rules is its actual legal effects, [59] e.g., the creation of new substantive law and/or consistent on-the-ground application in permitting or enforcement decisions.[60] A rule is not legislative merely because it is *cited* in downstream adjudications, though dispositive *reliance* on the rule in those adjudications may reveal the rule to be legislative.[61]

- A rule is less likely to be legislative if its author has no statutory or regulatory authority (including delegated authority) to bind the agency.[62]

- A rule is likely to be legislative if it is explicitly contemplated by the organic statute.[63]

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[53] *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017).
[54] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).
[55] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).
[56] *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).
[57] *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (crediting statements in guidance that regulators "retain their discretion" based on "specific conditions"). *See also Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); *cf. The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (government duties described in guidance were unenforceable because, though they occasionally used mandatory language, they were generally "imprecise").
[58] *Nat'l Min. Ass'n*, 758 at 252 (no legal effect where EPA merely recommended that state agencies entrusted with administration of the Clean Water Act pay closer attention to water quality, such that "state permitting authorities and permit applicants [could] ignore EPA's Final Guidance without facing any legal consequences").
[59] *Appalachian Power Co.*, 208 F.3d at 1028 (guidance imposing testing requirements for power plants under the Clean Air Act was legislative rule where it delegated authority to states in ways not explicitly contemplated in underlying rulemaking); *Mendoza*, 754 F.3d at 1009 (D.C. Cir. 2014) (letters explaining visa requirements were legislative where they "impose[d] different minimum wage requirements and provide[d] lower standards for employer-provided housing" than underlying regulations).
[60] *Gen. Elec.*, 290 F.3d at 385 (rejecting EPA's argument that guidance was not binding as a practical matter where EPA did not identify examples of deviation from the guidance); *cf. Sierra Club v. EPA*, 955 at 65 (warning, in finality context, of guidance that "impose[s] obligations by chicanery") (citation omitted).
[61] *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (Roberts, J.).
[62] *Id.*; *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d at 1256 (D.C. Cir. 1996).
[63] *Am. Min. Cong.*, 995 F.2d at 1109.

In the context of the sporting purposes test, the ATF will not be bound by the new criteria established by the study outlined above. Rather, the criteria will serve as guidance to the public and the ATF in making future decisions regarding applications for firearms important.

B. Arbitrary or Capricious challenge

On substantive grounds, the temporary suspension and the ATF's new criteria will likely be challenged on the basis that they are both arbitrary and capricious under the APA. This is especially true in situations where the ATF reverses a previous position, either by temporarily denying importation of a firearm previously allowed to be imported into the United States, or by establishing new criteria that was previously rejected by the ATF.

If faced with such challenges, the ATF has a strong counter argument, provided that any such determination is thoroughly explained in the administrative record. When the ATF has revised its sporting purposes test in the past, courts have dismissed claims that the change in position was arbitrary and capricious in both the temporary suspension and the permanent denial contexts.

Temporary suspension

In *Gun South, Inc. v. Brady*, the Eleventh Circuit was asked to consider whether the ATF can temporarily suspend the ability of gun manufacturers to import firearms while the agency reevaluates its sporting purposes criteria. In that case, the ATF gave Gun South permission to import AUG-SA rifles. But shortly thereafter, the agency decided it would reevaluate its definition of the sporting purposes test, and began the inquiry that produced the 1989 report. While the report was being prepared, the ATF temporarily suspended Gun South's ability to import AUG-SA rifles for 90 days. Gun South then challenged this suspension as being arbitrary and capricious in violation of the APA.

The Eleventh Circuit concluded that the temporary suspension was permissible. The court found it was within the powers of the ATF to establish criteria to apply the sporting-purposes test to firearms, and that it was reasonable for the agency to periodically review the application of its test to firearms. While Gun South argued the suspension was arbitrary because the rifle itself had not changed, the court explained the sporting purpose inquiry requires an examination of the firearm's actual use, which may change over time. Moreover, the court emphasized that it was clearly within the agency's authority to review determinations and correct any errors:

> [W]e conclude that the Bureau must necessarily retain the power to correct the erroneous approval of firearms import applications. As discussed above, the Act strictly limits the importation of firearms to those that satisfy one of the four exceptions. To accomplish this task, the Bureau inherently must possess the corollary power to temporarily suspend the importation of firearms under permits that the Bureau may have erroneously granted. Otherwise, gun companies could legally inundate the country with

> rifles that Congress intended to forbid from entering our borders. We decline to interpret the Act in a way, which produces such a nonsensical result.[64]

As long as the ATF is appropriately justifying its temporary suspension of a given importation license and is reviewing the importation applications in an efficient manner,[65] it is within the ATF's discretion to temporarily suspend the importation of certain firearms while it reviews the sporting purposes determinations. As a result, the ATF has a strong response, should a gun manufacturer challenge the temporary suspension under the APA.

Permanent denial

Gun manufacturers may also argue the new criteria are arbitrary and capricious, particularly given the ATF would be changing its criteria. However, agencies can shift their policies so long as certain conditions are met according to *FCC v. Fox Television Stations, Inc.,* in which the Supreme Court stated that:

> While [a]n agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books . . . it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is [1] permissible under the statute, [2] that there are good reasons for it, and [3] that the agency believes it to be better, which the conscious change of course adequately indicates.[66]

In this situation, the new criteria would satisfy the Supreme Court's test. It is well-established that the ATF director can define what it means for a firearm to have a sporting purpose under the GCA.[67] And there are good reasons for it, including the lack of uniform guidance for industry and the prevalence of gun violence associated with military-style firearms.

The DC Circuit reached the same conclusion when a gun manufacturer challenged the ATF's decision to revoke its importation license following the 1998 report. In *Springfield, Inc. v. Buckles*, the ATF changed its position on the importability of Springfield's SAR8 Sporter and SAR4800 Sporter rifles. Prior to the 1998 report, the ATF allowed the modified, high-capacity, semi-automatic rifle to be imported into the United States. However, following the 1998 report's conclusion that rifles that have the ability to accept large, military-style magazines have no sporting purpose (arguably a reversal from its position in 1989), the ATF refused to allow Springfield to import those rifles into the country. Springfield argued that this change in position was arbitrary and capricious, and therefore violated the APA.

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[64] *Gun S., Inc. v. Brady*, 877 F.2d 858, 863 (11th Cir. 1989).
[65] The *Gun S.* court found that a 90-day suspension was appropriate. While the 1998 report was being prepared, the ATF suspended importation licenses for 120 days. As a result, a two- to three-month suspension is likely what a court would consider a reasonable length for a temporary suspension.
[66] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[67] *See* Part II.

The DC Circuit rejected this argument, explaining that the ATF can change its views as long as it fully explains why it did so in the administrative record. In the case, the court concluded the ATF "fully explained why it has now decided that this particular military feature found in Springfield's rifles is of considerable significance."

V. Other considerations

As previously discussed, Congress has consistently passed appropriations bills with a provision that limits the enforceability of the sporting purposes test in the context of shotguns:

> None of the funds made available by this Act may be used to pay the salaries or expenses of personnel to deny, or fail to act on, an application for the importation of any model of shotgun if: (1) all other requirements of law with respect to the proposed importation are met; and (2) no application for the importation of such model of shotgun, in the same configuration, had been denied by the Attorney General prior to January 1, 2011, on the basis that the shotgun was not particularly suitable for or readily adaptable to sporting purposes.[68]

This rider only applies to shotguns, not rifles or other forms of firearms. Therefore, the new criteria outlined above would be effective at preventing the importation of firearms that are not shotguns and have no legitimate sporting purpose.

[68] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 541, 125 Stat. 552, 639 (2011).