RECOMMENDED ACTION MEMO
Agency: Department of Justice; Bureau of Alcohol, Tobacco, Firearms, and Explosives
Topic: Reform NFA Determination Process
Date: November 2020

Recommendation: The ATF should reform the NFA determination process by (1) developing a new framework for reviewing NFA requests, (2) conducting a retroactive review of previous decision letters to determine compliance with the new framework, and (3) publishing the framework and all NFA decision letters on the ATF's website to increase transparency.

I. Summary

The ATF is currently employing a deferential approach to the gun industry when assessing whether firearms or firearm accessories fall within the parameters of the National Firearms Act (NFA), which makes them subject to heightened regulation. This imbalance between the ATF and the industry is enabling manufacturers to operate outside the parameters of the law, putting communities at risk for gun violence perpetrated by these uniquely dangerous firearms and accessories that have been subject to heightened regulation for nearly a century.

Description of recommended executive action

The next administration should direct the ATF to take the following steps to improve the NFA review process, provide better guidance to the gun industry, and increase transparency.

1. Develop a framework for reviewing NFA requests that involves an objective assessment of whether the firearm or accessory is intended to be used in a manner that would put it in one of the NFA categories that does not defer to the intended use stated by the manufacturer.
2. Conduct a retroactive review of NFA decision letters using the new framework, and provide revised guidance to manufacturers of firearms and accessories that qualify as NFA weapons upon secondary review.
3. Publish the framework and all NFA decision letters on the ATF's website to increase transparency and provide guidance to the industry.

Overview of process and time to enactment

To implement these changes, the ATF should publish the new NFA determination framework and open a notice-and-comment period, after which the ATF would finalize the framework, implement the new NFA determination framework, and publicize NFA decision letters. Similarly, the ATF should issue a public notice about the retroactive review process of NFA decision letters, and send communications about the retroactive review directly to manufacturers who may be impacted.

Finally, there are no statutory or regulatory limitations on the ATF's publishing NFA determinations on its website. Nothing in the NFA or ATF's regulations prevents the ATF from publishing its classification rulings or from seeking public input before issuing them. This change can be implemented as soon as the retroactive review has been completed and revised decision letters have been issued.

II. Current state

The National Firearms Act and the definition of covered firearms

The National Firearms Act, Pub. L. 73-474, was first enacted nearly a century ago, in 1934. It imposes registration requirements, manufacturing and transfer taxes, and other regulations on "firearms" that fall within the definition set forth in the act.[1] The NFA charges the ATF with administering and enforcing this law, and grants the ATF the authority to promulgate rules implementing the act.[2]

The NFA was not intended to provide comprehensive regulation of all firearms. Instead, Congress enacted the NFA to regulate certain firearms and accessories it perceived as posing the greatest danger to the public, and in particular the types of firearms frequently used at the time by criminal organizations.[3] As amended,[4] the NFA defines "firearm" as:

> (1) a shotgun having a barrel or barrels of less than 18 inches in length;
> (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length
> (3) a rifle having a barrel or barrels of less than 16 inches in length;
> (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;
> (5) any other weapon [narrowly defined to mean, with certain exceptions:
> - any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive,
> - a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, and
> - weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading];
> (6) a machinegun;
> (7) any silencer [as defined by statute]; and
> (8) a destructive device.[5]

The terms "shotgun," "rifle," "any other weapon," "machine-gun," "silencer," and "destructive device," in turn, have precise (and somewhat complicated) statutory definitions.[6] It bears noting

---

[1] *See* 26 U.S.C. § 5841 (registration in the National Firearms Registration and Transfer Record); *id.* §§ 5811 & 5821 (taxes).

[2] *See id.* §§ 7801(a)(2) & 7805(a); 28 C.F.R. § 0.130. In 2002, Congress transferred authority to implement gun control laws, including the NFA, from the Secretary of the Treasury to the Attorney General, and transferred ATF from the Treasury Department to the Department of Justice. *See United States v. Atandi*, 376 F.3d 1186, 1189 n.6 (10th Cir. 2004). Thus, NFA provisions that refer to "the Secretary" now mean the "Attorney General," who in turn has subdelegated authority to ATF.

[3] *See* 73 Cong. Rec. 11,400 (1934) (statement of Rep. Robert L. Doughton) ("For some time this country has been at the mercy of gangsters, racketeers, and professional criminals. The rapidity with which they can go across state lines has become a real menace to the law-abiding people of this country.").

[4] The NFA was amended by Title II of the Gun Control Act of 1968, Pub. L. 90-618, and by the Firearm Owners' Protection Act of 1986, Pub. L. 99-308.

[5] 26 U.S.C. § 5845(a).

[6] *Id.* § 5845(a)–(f).

that, despite the fact that the NFA has been amended over the years, its definition of "firearm" is under-inclusive in relation to its purpose and has not kept pace with advancing gun technology.

ATF regulations and letter rulings on "NFA firearms"

Pursuant to its authority to administer and enforce the NFA, the ATF has issued regulations on the "procedural and substantive requirements" applicable to NFA firearms.[7] These regulations incorporate the statutory definition of "firearm," with limited elaboration.[8] The ATF has also issued a lengthy guidance document called the National Firearms Act Handbook, which offers a primer on the covered categories of NFA firearms in relatively plain English.[9] The ATF's Firearms Technology Industry Services Branch (FTISB) serves as the technical authority that determines how firearms should be classified under federal law.[10]

The ATF has also adopted a practice of issuing "rulings" stating its position on whether particular weapons or devices are NFA firearms. It issues such rulings in two different ways: as published rulings available on its website, and as unpublished letter rulings that are sent only to the entity that requested the ruling, generally the manufacturer of the weapon or device in question.[11] The ATF has not offered any public explanation of how it determines whether to publish a particular NFA ruling. The NFA Handbook (last revised in 2009) includes an appendix of published rulings, and a complete list of published firearms rulings is available on the ATF's website.[12]

To a limited extent, the ATF's practice of issuing rulings on whether particular devices are covered by the NFA is grounded in the statute itself and corresponding ATF regulations. The NFA grants the ATF broad discretion to determine the meaning of two significant exceptions to the NFA's definition of "firearm," and the ATF exercises this discretion (at least in part) by issuing NFA "rulings." In particular, the NFA specifies that the term "firearm" "shall not include an antique firearm or any device (other than a machine-gun or destructive device) which, although designed as a weapon, the [ATF Director] finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon."[13] And the NFA's definition of "destructive device" specifies that the term "shall not include . . . any other device which the [ATF director] finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes."[14] Consistent with these provisions, the ATF's regulations establish a procedure by which a "person" can request: (1) a "ruling" from the ATF on whether a given device "is excluded from the definition of a destructive device,"[15] or (2) a "determination" from the ATF that a firearm

---

[7] *See* 27 C.F.R. § 479.1 *et seq.*

[8] *See id.* § 479.11.

[9] *See* ATF, "National Firearms Act Handbook," July 9, 2019, www.atf.gov/firearms/national-firearms-act-handbook ("NFA Handbook").

[10] *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet - Firearms and Ammunition Technology Division," June 2020, https://www.atf.gov/resource-center/fact-sheet/fact-sheet-firearms-and-ammunition-technology-division.

[11] *See* NFA Handbook at 2–3 (discussing published rulings); *id.* at 41 (discussing unpublished letter rulings).

[12] *See* ATF, "Firearms Rulings," June 2020, https://www.atf.gov/rules-and-regulations/firearms-rulings.

[13] 26 U.S.C. § 5845(a).

[14] *Id.* § 5845(f).

[15] *Id.* § 479.24.

or device, although originally designed as a weapon, is "primarily a collector's item and is not likely to be used as a weapon."[16]

Outside of the context of these two statutory grants of discretion to the ATF, the NFA does not specifically authorize or require the ATF to issue standalone rulings about whether a particular product falls within the definition of an NFA firearm (for example, whether a given product is a "machine-gun").[17] The NFA does implicitly authorize the ATF to interpret the meaning of the NFA definition of "firearm" in the course of administering and enforcing the NFA. This authority permits the ATF to issue regulations interpreting the NFA definition, and specifying whether particular weapons fall within it, as it has done on a few occasions (discussed in the next section of this memo). But there is no specific statutory obligation to issue such rules, or any other kind of standalone "ruling" addressed to particular weapons. And apart from the two specific procedures described above, the ATF regulations likewise do not establish any procedural mechanism for a person to obtain a determination from the agency on whether a given weapon or device is an "NFA firearm."

Despite this regulatory silence, however, the ATF has a practice of providing NFA "rulings" to any manufacturer who inquires about a product it plans to manufacture. The ATF describes this practice in its NFA Handbook guidance document:[18]

> **7.2.4 Do you know how ATF would classify your product?** There is no requirement in the law or regulations for a manufacturer to seek an ATF classification of its product prior to manufacture. Nevertheless, a firearms manufacturer is well advised to seek an ATF classification before going to the trouble and expense of producing it. Perhaps the manufacturer intends to produce a GCA firearm but not an NFA firearm. Submitting a prototype of the item to ATF's Firearms Technology Branch (FTB) for classification in advance of manufacture is a good business practice to avoid unintended classification and violations of the law. . . .
>
> **7.2.4.1 ATF classification letters.** ATF letter rulings classifying firearms may generally be relied upon by their recipients as the agency's official position concerning the status of their firearms under Federal firearms laws. Nevertheless, classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations. To make sure their classifications are current, [parties] should stay informed by periodically checking the information published on ATF's website, particularly amendments to the law or regulations, published ATF rulings, and "open letters" to industry members.

---

[16] *Id.* § 479.25.

[17] Congress did recognize the existence of ATF "rulings and interpretations" when it transferred authority to implement gun control laws, including the NFA, from the Secretary of the Treasury to the Attorney General, and transferred ATF from the Treasury Department to the Department of Justice. *See* 26 U.S.C. § 7801(a)(2)(B) ("Nothing in the Homeland Security Act of 2002 alters or repeals the rulings and interpretations of the Bureau of Alcohol, Tobacco, and Firearms in effect on the effective date of such Act, which concern the provisions of [the NFA].").

[18] "NFA Handbook," p. 41.

The recipients of these unpublished letter rulings sometimes publicize them,[19] but the agency itself does not make them available to the public.

The ATF has also, in rare instances, used its NFA-rulemaking authority to issue an actual rule, with the force of law, addressing whether certain types of products are "NFA firearms."[20] The ATF has issued such a rule only three times since 1998, but it is free to do so to specify—with the force of law—whether certain types of products are "NFA firearms."[21] Most recently, in the aftermath of the 2017 mass shooting in Las Vegas, the ATF revised its definitional rule to establish that "bump stock"-type devices are "machine-guns" as defined by the NFA, because they allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of a trigger.[22] Notably, before promulgating this rule, the ATF had issued several "private letter" determinations classifying bump stocks as unregulated firearms parts not subject to the NFA.[23] There are currently a few cases pending in the federal courts challenging this new rule.[24]

The ATF's current approach to making NFA determinations

The ATF's current approach to implementing the NFA gives far too much deference to gun manufacturers, and does not enable ATF to serve as a legitimate check on the gun industry. Instead, the ATF deploys a deferential approach to manufacturers when determining if a particular firearm or device should be classified under the NFA. This deferential approach creates an imbalance between the ATF and the industry that puts public safety at risk, and undermines both the text and the intent of the law.

For example, one common determination the ATF is asked to make relates to whether a new firearm design qualifies as a short-barreled shotgun or rifle, which are more stringently regulated under the NFA than regular shotguns and rifles. The impetus for enhanced regulation and restrictions of short-barreled long guns is tied both to the ease with which these weapons are concealable, and to the extent of damage these weapons are capable of inflicting when used to perpetrate a crime, given that they fire large-caliber ammunition capable of piercing the soft-body armor commonly worn by law enforcement officers.[25] Under federal law, both shotguns and rifles are, by definition, designed to be fired from the shoulder using two hands, and are not easily concealable; they are subject to minimum barrel length and overall length requirements.[26]

---

[19] *See e.g.*, Violence Policy Center, "ATF Opinion Letters on Devices to Increase the Rate of Fire of Semiautomatic Firearms," accessed October 27, 2020, https://vpc.org/regulating-the-gun-industry/bump-fires-and-similar-devices/ (collecting publicized ATF letter rulings on bump-fire devices); Violence Policy Center, "Read ATF Approval Letters for Pistol Braces," accessed October 27, 2020. https://vpc.org/regulating-the-gun-industry/pistol-braces-that-evade-federal-restrictions-on-short-barreled-rifles/ (collecting publicized ATF letter rulings for stabilizing brace devices).

[20] *See* 26 U.S.C. §§ 7801(a)(2) & 7805(a); 28 C.F.R. § 0.130.

[21] *See* 27 C.F.R. § 479.11 (rule addressing ATF's construction of "NFA firearms").

[22] *See id.* ("The term 'machine gun' includes a bump-stock-type device . . . ."); Final Rule: Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (December 26, 2018).

[23] *See* Proposed Rule: Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60,929, 60,930 (December 26, 2017).

[24] *See Gun Owners of Amer. v. Barr* (6th. Cir. No. 19-1298); *Modern Sportsman et al. v. United States* (Fed. Cir. No. 20-1107); companion case *McCutchen v. United States* (Fed. Cir. No. 20-1188).

[25] Giffords Law Center to Prevent Gun Violence, "Legal and Lethal: 9 Products that Could Be the Next Bump Stock" September 28, 2020, https://giffords.org/wp-content/uploads/2018/09/18.09-FACT-Legal-Lethal_Reboot_R4.pdf.

[26] Rifles must have a barrel length of at least 16 inches, shotguns must be 18 inches, and both must be at least 26 inches overall. Weapons with shorter barrels or overall lengths are subject to regulation under the National Firearms Act of 1934. *See* Bureau of

Example: Mossberg short-barreled shotguns

Despite the vital importance of ensuring that these dangerous weapons are not freely available in US communities, recent user-based classification decisions by the FTISB raise serious concerns about how the ATF is approaching this responsibility. An excellent example of the FTISB's failure to dutifully enforce the NFA is the line of Mossberg short-barreled shotguns. On March 2, 2017, the FTISB issued a letter to Mossberg regarding its new 12-gauge pump action firearm, model 590 "Shockwave." The letter specifically notes that the sample submitted by Mossberg has a 12-gauge, smooth-bore barrel that is approximately 14.4375 inches long, with a total length of 26.5 inches.[27] The FTISB determined that this firearm did not qualify as a short-barreled shotgun under the NFA, because it had a shotgun-style receiver but did not have a shoulder stock; instead, it had a "bird's head grip."[28] As a result, this gun can be purchased and possessed without any of the additional restrictions imposed by the NFA on short-barreled shotguns. However, the FTISB's determination came with a vital caveat. The FTISB letter stated, "Please note that if the subject firearm is concealed on a person, the classification with regard to the NFA may change."[29]

This caveat from the FTISB is deeply problematic, as it essentially notes that the NFA classification of the firearm is dependent on the actual use of the firearm in each specific instance, rather than the fact that the firearm's dimensions make it concealable, and thus a short-barreled shotgun, as defined by current ATF regulations. The FTISB's letter to Mossberg implies that as long as users do not conceal this firearm, it does not require registration as an NFA firearm. That is patently at odds with the ATF's responsibility to enforce the NFA, which requires determining whether firearms based on their design and dimensions could, in any circumstances, be classified as NFA firearms. The determination should not be reliant on the use of the firearm in specific circumstances but on the technical specifications of the firearm itself, regardless of any particular user's intent. Some in the gun enthusiast community responded with both surprise and delight at this apparent new workaround to the NFA.[30]

Example: pistol braces

The gun industry has also found another NFA dodge to create the functional equivalent of a short-barreled rifle that is not subject to heightened regulation or transfer tax: the pistol brace. Pistol braces are common firearms accessories, first produced in 2013. Their manufacturers claim that the intent was to help wounded and disabled veterans shoot AR-style pistols easier and more safely by enabling a user to rely only on one hand to control and stabilize the firearm

---

Alcohol, Tobacco, Firearms, and Explosives, "National Firearms Act," April 7, 2020, https://www.atf.gov/rules-and-regulations/national-firearms-act.

[27] Michael R. Curtis., "Letter to O.F. Mossberg & Sons Inc.," Bureau of Alcohol, Tobacco, Firearms and Explosives, March 2, 2017, https://www.mossberg.com/wp-content/uploads/2017/03/Shockwave-Letter-from-ATF-3-2-17.pdf.

[28] Id.

[29] Id.

[30] GunsAmerica Digest, a website used by gun enthusiasts to review firearms and firearm accessories, shared a review of the firearm shortly following the Firearms Technology Industry Services Branch's determination, detailing how Mossberg's firearm was able to circumvent NFA classification. GunsAmerica Digest, "A Non-NFA 14" Shotgun? The Mossberg Shockwave 12 Ga. – Full Review." April 19, 2020, https://www.gunsamerica.com/digest/non-nfa-14-shotgun-mossberg-shockwave-12-ga-full-review. A 2017 post on The Truth About Guns website highlights how Mossberg was able to evade NFA classification for "these pistol-gripped smoothbore self-defense basters." The Truth About Guns, "Mossberg 590 Shockwave, 'Non-NFA Firearms' Legal in Texas Beginning September 1," August 23, 2017, https://www.thetruthaboutguns.com/mossberg-590-shockwave-weapons-legal-texas-beginning-september-1.

when using the brace, rather than on both hands.[31] In 2011, the company Shockwave Technologies submitted a new model of pistol brace to the FTISB for a determination of whether it would require registration under the NFA. The ATF reviewed the Shockwave Blade AR pistol brace, and determined that the brace would not turn a firearm into an NFA-classified firearm when used as a forearm brace, and was therefore not subject to the requirements of the NFA. However, the letter of determination also included a crucial caveat, noting the brace "is not a 'firearm' as defined by the NFA provided the Blade AR Pistol Stabilizer is used as originally designed and NOT used as a shoulder stock.[emphasis in source]"[32] Again, the ATF grounded its determination in the specific use of the accessory in each individual instance, rather than the potential uses based on its design, given that the brace can be used to "convert a complete weapon into … an NFA firearm."[33] The FTISB's decision was so unorthodox that it seemed to take gun enthusiasts by surprise, with *The Truth About Guns* blog posting an article on the decision stating, "The astute among you will notice that this device looks strikingly similar to a stock," as well as linking to the determination letter with the words, "The reply was a bit surprising."[34]

This decision led to a proliferation of pistol braces that received similar decision letters from ATF, indicating that the industry seized on the opportunity to innovate around the NFA using the reasoning provided by the ATF in the Shockwave letter.[35] However, the FTISB's decisions on stabilizing braces were so unusual that the agency began to receive multiple inquiries from gun owners seeking clarification.[36] On January 16, 2015, the ATF issued an open letter specifically on the "proper use of devices recently marketed as 'stabilizing braces'." In the letter, the ATF advised that the agency's determination that these devices are not subject to the NFA "is based upon the use of the device as designed," and that if a pistol brace "is redesigned for use as a shoulder stock on a handgun with a rifled barrel under 16 inches in length," the resulting firearm does constitute an NFA weapon.[37] The open letter advised that "any person who intends to use a handgun stabilizing brace as a shoulder stock on a pistol (having a rifled barrel under 16

---

[31] Jacki Billings, "How Pistol Stabilizing Braces Differ From Short-Barreled Rifles," Guns.com, March 20, 2017, https://www.guns.com/news/2017/03/20/how-pistol-stabilizing-braces-differ-from-sbrs.

[32] Shockwave Technologies, "Shockwave Blade is ATF Approved," accessed October 27, 2020, http://shockwavetechnologies.com/shockwave-blade-is-atf-approved.

[33] Bureau of Alcohol, Tobacco, Firearms, and Explosives, "ATF Rul. 2011-4," July 25, 2011, https://www.atf.gov/file/55526/download.

[34] Nick Leghorn, "ATF Rules on 'Shockwave Blade' AR Pistol Brace…But Adds a Warning," The Truth About Guns, December 22, 2014, https://www.thetruthaboutguns.com/atf-rules-on-shockwave-blade-ar-pistol-brace-but-adds-a-warning.

[35] SB Tactical, "BATFE Approval Letter: Pistol Stabilizing Brace," accessed May 2020, https://www.sb-tactical.com/resources/batfe-approval-letter-pistol-stabilizing-brace; Michael R. Curtis, "Letter to Paul Reavis," Bureau of Alcohol, Tobacco, Firearms and Explosives, January 1, 2017, https://gearheadworks.com/wp-content/uploads/2018/12/Mod-1-Approval-Letter.pdf; Michael R. Curtis, "Letter to Paul Reavis," Bureau of Alcohol, Tobacco, Firearms and Explosives, October 3, 2016, https://gearheadworks.com/wp-content/uploads/2018/12/Mod-2-Approval-Letter.pdf; Maxim Defense, "Maxim CQB Pistol: PDW Brace for AR15," accessed October 27, 2020, https://www.maximdefense.com/product/maxim-cqb-pistol-pdw-brace-for-ar15; Laura Burgess, "Micro Roni Stabilizer Brace Conversion Kit Now Perfectly Legal," Ammoland, May 1, 2017, https://www.ammoland.com/2017/05/micro-roni-stabilizer-brace-conversion-kit-perfectly-legal/#axzz600Q52B4I; Brownells, "Command Arms ACC – Roni Recon Stock w/Stabilizer Brace for Glock 17,19, 22, 23," accessed May 15, 2020, https://www.brownells.com/handgun-parts/grip-parts/grips/roni-recon-stock-w-stabilizer-brace-for-glock-17-19-22-23-prod87358.aspx?avad=avant&aid=7645&cm_mmc=affiliate-_-Itwine-Avantlink-_-app&utm_medium=affiliate&utm_source=Avantlink&utm_content=NA&utm_campaign=Itwine; Jacki Billings, "How Pistol Stabilizing Braces Differ From Short-Barreled Rifles." Guns.com, March 20, 2017, https://www.guns.com/news/2017/03/20/how-pistol-stabilizing-braces-differ-from-sbrs.

[36] Nick Leghorn, "YES, It Is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace," The Truth About Guns, April 24, 2017, https://www.thetruthaboutguns.com/atf-its-legal-to-shoulder-an-ar-15-pistol-equipped-with-an-sb-tactical-arm-brace.

[37] Max M. Kingery, "Open Letter on the Redesign of 'Stabilizing Braces," Bureau of Alcohol, Tobacco, Firearms and Explosives, accessed May 15, 2020, http://vpc.org/wp-content/uploads/2019/08/Pistol-brace-ATF-Open-Letter-2015.pdf.

inches in length or a smooth bore firearm with a barrel under 18 inches in length) must first file an ATF Form 1 and pay the applicable tax because the resulting firearm will be subject to all provisions of the NFA."[38]

The open letter appears to have caused confusion among people who were purchasing pistol braces, with many questioning whether the use of a brace required formal licensing under the NFA.[39] SB Tactical, the creator of the original pistol brace, challenged the open letter's claims that using the brace and firing from the shoulder would create an NFA-classified firearm.[40] The FTISB responded by reiterating that the agency deemed these braces to be legal provided they are used as forearm braces and not used as a shoulder stock.[41] Alarmingly, the letter actually went further, stating, "ATF has concluded that attaching the brace to a handgun as a forearm brace does not 'make' a short-barreled rifle because in the configuration as submitted to and approved by FATD [ATF's Firearms and Ammunition Technology Division in which the FTISB sits], it is not intended to be and cannot comfortably be fired from the shoulder." Additionally, according to the letter, if a user of a firearm equipped with a stabilizing brace does fire the weapon from the shoulder, it still doesn't constitute creating an NFA firearm unless the user explicitly "redesigned the firearm for purposes of the NFA."[42] Therefore, the ATF's official determination on pistol braces is that AR-15 pistols can in fact be equipped with a brace and fired from the shoulder without creating an NFA-classified short-barrel rifle, unless the brace is deliberately redesigned to become a stock, a clarification that was relished by gun forums, with The Truth About Guns writing a post detailing the decision with the title "YES, It is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace."[43]

Honey Badger pistols

A recent NFA determination by the ATF suggests that the agency may be reconsidering how it approaches these firearms. In August 2020, the ATF issued a cease-and-desist letter to the manufacturer of the Honey Badger pistol, alerting the manufacturer that the ATF determined that this model is a "firearm" under the NFA because it meets the definition of a short-barreled rifle.[44] In this letter, the ATF explained: "The Honey Badger Pistol is equipped with a proprietary 'pistol stabilizing brace" accessory made by SB Tactical. The firearm has an overall length of approximately 20–25 inches and a barrel length of approximately seven inches. The objective design features of the Honey Badger firearm, configured with the subject stabilizing brace, indicate the firearm is designed and intended to be fired from the shoulder. Since this firearm also contains a rifled barrel, it meets the definition of a 'rifle.' Further, since it has a barrel of less than 16 inches in length, this firearm also meets the definition of a 'short-barreled rifle" under the GCA and NFA."[45] The ATF warned the manufacturer that two additional models advertised on

---

[38] *Id.*

[39] Leghorn, "YES, It Is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace."

[40] Marvin G. Richardson, "Letter to Mark Barnes," Bureau of Alcohol, Tobacco, Firearms and Explosives, March 21, 2017, https://www.sigsauer.com/wp-content/uploads/2017/04/atf-letter-march-21-2017.pdf.

[41] *Id.*

[42] Marvin Richardson, Assistant Director of Enforcement Programs and Services, ATF, "Re: Reversal of ATF Open Letter on the Redesign of 'Stabilizing Braces'," March 21, 2017, https://cdn0.thetruthaboutguns.com/wp-content/uploads/2017/04/Barnes-Stabilizing-Brace-Letter-Final-3.21.17.pdf.

[43] Leghorn, "YES, It Is Legal to Shoulder an AR-15 Pistol Equipped with an Arm Brace."

[44] Kelly Brady, Special Agent in Charge, Boston Field Division, ATF, "In Re: Cease and Desist – "Honey Badger" Firearm," August 3, 2020, https://mcusercontent.com/557cc802f23161a8ffe100a66/files/dd6aa903-36c2-4d14-9de5-91aa62215cd2/Q_LLC_6_02_02814_Cease_Desist_Letter.pdf.

[45] *Id.*

its website may receive a similar classification, and directed the manufacturer to provide samples of these models for official review.[46] The ATF directed the manufacturer to either cease manufacturing and selling the Honey Badger pistol, or come into compliance with the NFA requirements; and to develop a plan for addressing those firearms already distributed.[47]

However, following pushback by the manufacturer and others in the gun industry that raised both substantive and procedural concerns,[48] on October 9, 2020, the ATF's chief counsel sent another letter to the manufacturer, stating that it was imposing a 60-day suspension on the cease-and-desist letter "to allow the United States Department of Justice to further review the applicability of the National Firearms Act to the manufacture and transfer" of the Honey Badger pistol.[49]

III. Proposed action

A. Substance of proposed action

The next administration should direct the ATF to take the following steps to improve the NFA review process, provide better guidance to the gun industry, and increase transparency.

1. Develop a framework for reviewing NFA requests that involves an objective assessment of whether the firearm or accessory is intended to be used in a manner that would put it in one of the NFA categories that does not defer to the intended use stated by the manufacturer.
2. Conduct a retroactive review of NFA decision letters using the new framework, and provide revised guidance to manufacturers of firearms and accessories that qualify as NFA weapons upon secondary review.
3. Publish the framework and all NFA decision letters on the ATF's website to increase transparency and provide guidance to the industry.

One crucial aspect of the new framework must be a retreat from the deference that the ATF has given to gun manufacturers' explanation of the intended use of a particular firearm or device. The ATF is required to consider a weapon's "intended" use only to the extent that the concept is incorporated into the statutory definitions:

- Both "shotgun" and "rifle" are defined as "a weapon designed or redesigned, made or remade, and *intended* to be fired from the shoulder," among other limitations that do not refer to "intent."[50]
- By regulation, the ATF has also defined "pistol" (a term used within the statutory definition of "any other weapon") as "[a] weapon originally designed, made, and *intended* to fire a projectile (bullet) from one or more barrels when held in one hand."[51]

---

[46] *Id*.

[47] *Id*.

[48] Megan L. Brown, Wiley Rein LLP, "Re: In Response to "Cease and Desist–'Honey Badger' Firearm," September 2, 2020, https://mcusercontent.com/557cc802f23161a8ffe100a66/files/68d5e173-ad14-44dd-86f5-7ee60ff78d3a/Q_C_D_Response_9_2_20_1_.pdf.

[49] Max Slowik, "Honey Badger SBR Decision Put on Pause, A Possible Reason for Classification," October 15, 2020, https://www.gunsamerica.com/digest/honey-badger-sbr-decision-put-on-pause-a-possible-reason-for-classification/.

[50] 26 U.S.C. § 5845(c)–(d) (emphasis added).

[51] 27 C.F.R. § 479.11 (emphasis added).

- The definition of "machine-gun" also includes an "intent"-based component: it is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," but "shall also include the frame or receiver of any such weapon, any part designed *and intended* solely and exclusively, or combination of parts designed and intended, *for use in converting a weapon into a machinegun*, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."[52]
- Finally, one of the exceptions built into the definition of "any other weapon" includes an "intent" component. The term "any other weapon" means, among other things, "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive," but "shall not include . . . weapons designed, made, or *intended* to be fired from the shoulder and not capable of firing fixed ammunition."[53]

In situations where the statute requires the ATF to consider "intended" use because of the statutory language, it is not necessarily required to simply accept a manufacturer's representations about how the manufacturer intends a weapon to be used. In determining whether a weapon is "intended" for a certain use, the ATF may consider other relevant sources in addition to the manufacturer's assertions made to the agency.[54] It is an open question whether the word "intended" must refer to the manufacturer's subjective intent, an objective inquiry into likely use, or, rather, is ambiguous.[55]

A revised approach to "intended use" would enable the ATF to determine whether the firearm or device could reasonably be used by a person to create a firearm as defined under the NFA. For example, rather than relying solely on what the manufacturer states the intended use for a pistol brace is, assessing whether it is feasible and reasonable to think a user might attach the brace to a handgun to create a shoulder stock, thereby creating a short-barrel rifle, should be considered by the ATF. Similarly, when considering whether the design of a firearm qualifies as a short-barreled rifle, the ATF should consider both the design of the firearm as well as whether it is possible for a user to reasonably and easily conceal the firearm on their person.

---

[52] *Id.* § 5845(b) (emphasis added).

[53] *Id.* § 5845(e) (emphasis added). By regulation, ATF defines "fixed ammunition" as "[t]hat self-contained unit consisting of the case, primer, propellant charge, and projectile or projectiles."" 27 C.F.R.§ 479.11. This definition appears to accord with ordinary usage, as essentially all modern firearms fire "fixed ammunition" (that is, ammunition in which the projectile and the propellant are packaged together as a single cartridge), as opposed to using separately-loaded charges. Because this "intent"-based exception is limited to weapons that are not capable of firing fixed ammunition, it is unlikely that it would apply to a weapon being manufactured today. If, however, ATF were presented with a weapon that was "capable of being concealed on the person" but was also, in ATF's judgment, "intended to be fired from the shoulder and not capable of firing fixed ammunition," then the weapon would not fall within the category of "any other weapon."

[54] *See e.g., United States v. Article of 216 Cartoned Bottles,* 409 F.2d 734, 739 (2d Cir. 1969) ("It is well settled that the intended use of a product may be determined from its label, accompanying labeling, promotional material, advertising and any other relevant source."); *United States v. Undetermined Quantities of Articles of Drug,* 145 F. Supp. 2d 692, 698-99 (D. Md. 2001) (collecting cases supporting the significance of "objective evidence disseminated by the vendor" in determining the intended use of a product).

[55] *See e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 519 (1994) (the similar term "primarily intended . . . for use" "might be understood to refer to the state of mind of the [seller]" but the better reading is that it refers to "a product's likely use"); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 160 (4th Cir. 1998) (rejecting agency's conclusion that tobacco products were "intended to affect the structure of any function of the body" without evidence of claims to that effect by tobacco manufacturers); *United States v. Articles of Banned Hazardous Substances,* 614 F. Supp. 226, 231 (E.D.N.Y. 1985) (term "toys intended to be used by children" cannot "rational[ly]" refer to a purely subjective inquiry into the manufacturer's intent).

Notably, the ATF has in the past declined to classify weapons as "firearm[s]" under the NFA without considering whether the weapon was capable of being concealed (instead noting that the NFA classification could change if the weapon *was* concealed).[56] However, that approach appears to be inconsistent with the statutory text, which encompasses weapons "*capable of being concealed* on the person."[57] The ATF's current narrow approach to classifying firearms under the NFA enables the unregulated manufacture and sale of short-barreled firearms on the commercial market. Under a revised NFA determination framework, the ATF should be required to consider both the design of and intended use of the firearm, and consider what the firearm can be used for under the NFA.

One additional component of the new framework could be the solicitation of expert opinions by firearms experts, similar to the submission of amicus briefs in legal proceedings. The ATF would benefit from the perspective of experts who do not have a financial stake in the particular firearm or device being considered, and the solicitation of such opinions would enhance the public transparency of the NFA determination process.

B. Legal justification and process

As noted above, the NFA's definition of "firearm" expressly incorporates two limited grants of discretion to the ATF to carve out certain devices or firearms from the NFA's ambit. The NFA expressly contemplates that the ATF director can "find[]" that a certain type of weapon is a "firearm" under the NFA because it is "primarily a collector's item and...not likely to be used as a weapon;"[58] that a particular device is not a "destructive device" because it is "not likely to be used as a weapon, or is an antique or a rifle which the owner intends to use solely for sporting purposes."[59] As also noted above, ATF regulations provide that a person can "request" such a "ruling" or "determination," and that, in response to such a request, the ATF "shall" make the determination.[60] Because an agency must abide by its own regulations,[61] the ATF is required to make these particular determinations if a request is properly made.

Outside the context of the two statutory carve-outs, the text of the NFA's definition controls what firearms are covered by the act, and the ATF has no specific statutory obligation to issue "rulings" specifying in advance whether particular firearms are covered or not. To be sure, as noted earlier, the ATF has implicit authority (and an implicit obligation) to interpret the NFA's definition of "firearm," by virtue of its general authority (and obligation) to administer and enforce the statute.[62] Pursuant to this authority, the ATF has promulgated a definitional regulation that largely reproduces the definition in the statute, and issued a handful of binding rules interpreting the NFA definitions as to certain particular weapons. For the most part, however, the ATF has chosen to provide specific guidance on the NFA's definition of "firearm" through its NFA classification rulings. Again, the ATF has no obligation to issue such rulings; they are simply a way the ATF has chosen to provide guidance about its understanding of the scope of the statute. In administrative law terms, these rulings are "interpretive rules" or "guidance

---

[56] U.S. Department of Justice, "Letter from Michael R. Curtis, Chief, Firearms Tech. Indus. Serv. Branch, ATF, to O.F. Mossberg & Sons, Inc.," March 2, 2017, 2, www.mossberg.com/wp-content/uploads/2017/03/Shockwave-Letter-from-ATF-3-2-17.pdf.

[57] *Id.* (emphasis added).

[58] 26 U.S.C. § 5845(a).

[59] *Id.* § 5845(f).

[60] 27 C.F.R. §§ 479.24 & 479.25.

[61] *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954).

[62] *See* 26 U.S.C. §§ 7801(a)(2) & 7805(a); 28 C.F.R. § 0.130.

documents." They are not binding on the agency or on regulated parties;[63] and they are lawful so long as they do not "determin[e] the extent of substantive rights and liabilities."[64] As discussed further below, although it is an open question, interpretations contained in this form—like internal agency guidelines—would likely not receive *Chevron* deference from courts.[65]

Administrative law considerations relevant to NFA classification rulings

Four important consequences stem from the fact that NFA classification rulings are "guidance documents" that lack force of law. First, as just noted, the interpretations contained in these rulings are not assured *Chevron* deference. In *Mead*, the Supreme Court considered whether an analogous "classification ruling" made in a letter to a regulated party was owed deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Because nothing in the statute "indicat[ed] that Congress meant to delegate authority to [the agency] to issue classification rulings with the force of law," the Court concluded that *Chevron* deference was not appropriate.[66] The Court also observed that the agency did "not generally engage in notice-and-comment practice when issuing them" or treat them as binding on third parties.[67] Subsequently, in *Barnhart*, the Supreme Court characterized *Mead* as using a multifactor analysis to decide whether *Chevron* deference was appropriate.[68] The Court clarified that "the interstitial nature of the legal question, the related expertise of the agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" are considerations that support the use of *Chevron* deference.[69]

When a court declines to apply *Chevron* deference to an agency's interpretation, it applies *Skidmore* deference, meaning that the interpretation is "entitled to respect" to the extent that it has the "power to persuade."[70] There does not appear to be any circuit precedent addressing *Chevron*'s applicability to the ATF's NFA classification rulings (either published or unpublished); district court decisions are mixed, but the better-reasoned view seems to be that *Chevron* does not apply, at least to unpublished letter rulings.[71] That said, a new administration could strive to

---

[63] *See, e.g., Hoctor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996) ("Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.")

[64] *Tax Analysts & Advocates v. Internal Revenue Serv.*, 505 F.2d 350 (D.C. Cir. 1974); *see also Amergen Energy Co., LLC ex rel. Exelon Gen. Co., LLC v. United States*, 94 Fed. Cl. 413, 422 (Fed. Cl. 2010) (private letter rulings issued by IRS bind neither the agency or a court).

[65] *See United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) (where there is "no indication that Congress intended [a tariff classification letter] ruling to carry the force of law," ruling was not entitled to *Chevron* deference); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (agency's "interpretation contained in an opinion letter" did "not warrant *Chevron*-style deference"); but *see Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (applying *Chevron* deference to an interpretation contained in an FDA letter ruling based on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time") (citing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

[66] *Mead Corp.*, 533 U.S. at 231–32.

[67] *Id.* at 233.

[68] *Barnhart*, 535 U.S. at 222.

[69] *Id.*; *see also Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012).

[70] *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[71] *See Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14, 22 (D.D.C. 2014) (applying *Skidmore* deference); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 294 F. Supp. 2d 896, 900 (E.D. Ky. 2003) (without deciding whether *Chevron* applied, concluding that ATF classification rulings are "entitled to at least the highest level of *Skidmore* respect"); *Freedom Ordnance Mfg., Inc. v. Brandon*, No. 3:16-cv-00243, 2018 WL 7142127, *5 (S.D. Ind. Mar. 27, 2018) (describing the question as "difficult"

issue NFA classification rulings in a way that would increase the chances of a reviewing court applying *Chevron* deference by issuing published rulings that, tracking the *Barnhart* factors, show how the ATF had given "careful consideration" to the question, and explain why it is important to the NFA's administration, and the product of the ATF's relevant technical expertise.

A new interim final rule issued by the Department of Justice, of which ATF is a component, also may have consequences for deference. This rule provides that a guidance document "shall not represent the Department's interpretation of a statute or regulation"—and so cannot be owed judicial deference—"unless and until it is publicly available on the Guidance Portal," a new online database of guidance documents.[72] So long as this rule remains in effect, the ATF must publish any NFA classification ruling on the Guidance Portal as a prerequisite for seeking deference to that interpretation.

Second, the ATF is free to revise its interpretations so that weapons or devices previously deemed outside the scope of the NFA would be considered "NFA firearms."[73] In so doing, the ATF would of course be constrained by the language of the statute, against which any interpretation it offered would be judged in court. Further, to the extent that a new statutory interpretation leads to a change in policy, an agency must provide a "reasoned explanation" for the policy change and "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[74] Particularly because a product's status as an "NFA firearm" has criminal consequences,[75] it would likely be prudent for the ATF to undertake at least a transparent and deliberative process (if not a full APA rulemaking with notice and comment, following the procedures of 5 U.S.C. § 553) if it were to change any interpretation to expand the scope of NFA firearms.[76]

Third, under current Department of Justice policy, which has recently been codified into an interim final rule, guidance documents cannot be used "for the purpose of coercing persons or entities . . . into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation" or relied on in civil or criminal enforcement actions.[77] Guidance documents may still be used in enforcement proceedings (e.g., to establish

---

and assuming without deciding that *Skidmore* applies); but *see Modern Muzzleloading, Inc. v. Magaw*, 18 F. Supp. 2d 29, 36 (D.D.C. 1998) (applying *Chevron* to ATF classification letter interpreting the Gun Control Act).

[72] Dep't of Justice, "Processes and Procedures for Issuance and Use of Guidance Documents," August 21, 2020, 13, www.justice.gov/file/1308736/download.

[73] *See Dickman v. C.I.R.*, 465 U.S. 330, 343 (1984) ("[I]t is well established that [an agency] may change an earlier interpretation of the law . . . even though [a regulated party] may have relied to [its] detriment upon the [agency's] prior position."); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) ("[I]t is well understood that [a]n agency is free to discard precedents or practices it no longer believes correct. . . . If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

[74] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–13 (2020).

[75] *See* 26 U.S.C. §§ 5861 (unlawful acts) & 5871 (criminal penalties).

[76] *See* Proposed Bump-Stock Rule, 82 Fed. Reg. at 60,930; Final Bump-Stock Rule, 83 Fed. Reg. at 66,523, 66,530 (providing persons currently in possession of a bump-stock-type device 90 days to destroy or abandon those devices to avoid criminal liability); *see generally Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019) (affirming denial of preliminary injunction in APA challenge to the bump-stock rule).

[77] Dep't of Justice, Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, 85 Fed. Reg. 50,951, 50,953 (August 19, 2020). *See also* Letter from Jeff Sessions, Att'y Gen., *Prohibition on Improper Guidance Documents* (November 16, 2017); Letter from Rachel Brand, Assoc. Att'y Gen., *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (January 25, 2018); Justice Manual § 1-20.000 ("Criminal and civil enforcement actions . . . must be based on violations of applicable legal requirements, not mere noncompliance with guidance documents issued by federal agencies.").

scienter or notice), but a new administration's NFA classification rulings would not necessarily deter savvy and motivated regulated parties while those policies remain in effect.

Finally, one of the new interim final rules concerning the issuance and use of guidance documents by the Department of Justice establishes substantial procedural hurdles—including review by the White House's Office of Information and Regulatory Affairs, and notice and an opportunity for public comment—before any agency within the Department of Justice issues "significant guidance documents."[78] Importantly, these procedures are *not* required for significant guidance made through a "pre-enforcement ruling,"[79] which is defined as "a formal written communication by an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person," including "letter rulings."[80] This means that the ATF's NFA classification rulings would be exempted from the new requirements. However, unless the interim final rule is amended or repealed by a new administration, any significant guidance on the meanings of the NFA definitions that is *not* published in response to an inquiry would be subject to these procedural requirements.

Based on these considerations, the most prudent course would be for the ATF to publish the new NFA determination framework and open a notice-and-comment period. The ATF should publicly issue a special advisory of a proposed NFA determination framework, as well as information about the publication of NFA decision letters on the ATF's website. The notice would include information about an open comment period of 30 days, after which the ATF would finalize the framework, implement the new NFA determination framework, and publicize NFA decision letters. It is imperative that during the comment period, the ATF ensures the framework enables them to implement the NFA properly. Similarly, the ATF should issue both a public notice about the retroactive review process of NFA decision letters, and send communications about the retroactive review directly to manufacturers.

Finally, there are no statutory or regulatory limitations on the ATF's publication of its NFA determinations. Nothing in the NFA or ATF's regulations prevents the ATF from publishing its classification rulings or from seeking public input before issuing them. As explained above, the ATF already does publish some of its classification rulings. Because publishing *all* classification rulings would represent a change of practice, the ATF should be prepared to take the straightforward step of explaining its shift toward a more transparent approach (and should consider revising the NFA Handbook to explain that classification rulings issued in response to manufacturers' inquires will be published). One possible reason for this change, for instance, might be to avoid having "private law" that is known only to particular manufacturers. Another reason would be the new Department of Justice rule, which makes the publication of a guidance document a prerequisite for seeking *Chevron* deference to the guidance document's interpretation of a statute.

[78] "Processes and Procedures for Issuance and Use of Guidance Documents," *supra*, at 11-13.

[79] *Id.* at 11.

[80] *Id.* at 8.