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Gun Control: ATF Final “Stabilizing Brace” Rule

On January 31, 2023, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a final rule entitled “Factoring Criteria for Firearms Attached with ‘Stabilizing Braces.’” The rule redefines the term “rifle” as a means to reclassify certain brace-equipped firearms as short-barreled rifles (SBRs). The firearms in question were previously classified as pistols and, as such, were regulated solely under the Gun Control Act of 1968 (GCA). Reclassified as SBRs, these firearms now fall under the more restrictive 1934 National Firearms Act (NFA). Under the rule, moreover, nearly all rifled-bore firearms with barrels less than 16 inches and equipped with braces or similar devices appear to be non-transferable until registered with the Attorney General under the NFA.

To comply with the rule, federal firearms licensees (FFLs) and private owners of these firearms have several options. They may submit an NFA tax/registration form and other required documentation (e.g., fingerprints and personal photo) to ATF by May 31, 2023 on the firearms in question. No tax payment is required, as ATF has opted to “forbear” the \$200 NFA tax. Alternatively, possessors may alter the firearms by permanently removing the brace or by replacing the barrel with one longer than 16 inches. They may also destroy or turn the firearms over to the authorities as contraband. Some Members of Congress have introduced legislation to nullify the ATF rule by removing all short-barreled firearms, as well as similar firearms, from the purview of the NFA. See H.R. 381, H.R. 646/S. 163, S. 361, H.J. Res. 44, and H.R. 1678.

ATF and Firearm Classifications

Under the Attorney General’s delegated authority, ATF promulgates regulations and guidance pursuant to the GCA and NFA. ATF issues firearm classifications in letter rulings and open letters, as well as other written private determinations, to assist FFLs and others in complying with their responsibilities under federal law. Although these forms of guidance do not have the force of law, they represent ATF’s best interpretation of statute and reported case law, and are relied upon as precedent in court cases. ATF determinations are subject to the Administrative Procedure Act (APA) and can be challenged in federal court after all other administrative remedies have been exhausted. These forms of guidance (ruling, open, and private determination letters) are arguably artifacts of ATF’s origins in the Department of the Treasury, before Congress transferred ATF from Treasury to the Department of Justice (DOJ) in 2003. While the GCA is criminal law, firearms and ammunition are regulated under federal statute primarily as commodities. These guidance documents arguably allow ATF to more quickly and efficiently address emerging developments than by promulgating a regulation under the APA.

Today, ATF’s Firearms and Ammunition Technology Division (FATD) is the principal federal authority charged with classifying firearms and ammunition under federal law. The FATD is also responsible for processing requests for importation and domestic manufacturing evaluations, and requests for marking variances. Upon written request, the FATD also issues determination (classification) letters regarding technical aspects of the NFA, GCA, and other applicable federal laws. Classification letters, once released to the original requestor, are not made available to the public, though they may be obtained by outside interested parties pursuant to the Freedom of Information Act (FOIA) and Privacy Act of 1974. The letters released are often redacted to protect proprietary information and the privacy of individuals. In some cases, the letters are released to other parties by the original requesters.

ATF has compiled firearms-related statutes and regulations in a *Federal Firearms Regulations Reference Guide, 2014* that includes some, but not all rulings. More recent rulings are periodically published on ATF’s website (www.atf.gov). Nevertheless, there is no central index of ATF letter rulings, determinations (however redacted), or open letters. Hence, observers caution that there is no certainty that any individual who files a FOIA request for previously issued classification letters will receive every relevant letter issued by the ATF. In addition, some observers maintain that some ATF rulings have been inconsistent with previous rulings, though these possible inconsistencies might reflect changed legal reasoning by DOJ and ATF attorneys.

GCA-NFA Firearm Definitions

Under the GCA-NFA construct, NFA-regulated firearms are regulated first under the GCA. The three basic types of firearms defined under the GCA are shotguns, rifles, and handguns. Congress included identical statutory definitions for the terms “shotgun” and “rifle” in the GCA and NFA.

The term “shotgun” means “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger” (18 U.S.C. §921(a)(5) and 26 U.S.C. §5845(d)).

The term “rifle” means “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger” (18 U.S.C. §921(a)(7) and 26 U.S.C. §5845(c)).

It follows that the defining feature of a long gun (shotgun or rifle) is a shoulder stock. Unlike “smoothbore” shotguns, the barrel bores of rifles are machine-cut with spiraling lands and grooves that impart a flight-stabilizing spin on a bullet around its axis of trajectory. Rifled-bore handguns are regulated under the GCA.

The term “handgun” means “(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled” (18 U.S.C. §921(a)(29)).

It follows that the defining feature of a handgun is its short stock. The term handgun includes both pistols and revolvers (26 C.F.R. §§478.11 and 479.11). The GCA places no restrictions on the barrel or overall length of such handguns, except their design allows them to be used singlehandedly.

The NFA further regulates machine guns, silencers, “sawed-off” shotguns, and other weapons considered to be more dangerous and unusual than firearms typically owned by civilians in the 1930s. These weapons were sometimes used by interstate bank robbers, bootlegging gangsters, and other criminals, who on occasion outgunned federal agents and the police. Pertaining to the ATF final rule, the NFA regulates short-barreled shotguns (SBSs) and short-barreled rifles (SBRs):

(1) shotguns with barrels less than 18 inches in length, (2) rifles with barrels less than 16 inches in length, or (3) any existing shotgun or rifle that has been modified to be less than 26 inches in overall length by shortening its stock and/or barrel(s). (See 18 U.S.C. §§921(a)(6) and (8), and 26 U.S.C. §5845(a).)

Also pertaining to the rule, the NFA regulates “any other weapons” (AOWs) and “destructive devices” (DDs). AOWs include certain deceptive or disguised firearms (e.g., umbrella, belt buckle, and pen guns). The AOW classification also captures smoothbore handguns (less than 26 inches in overall length) and other “concealable” firearms with combination smoothbore and rifled bore barrels between 12 and 18 inches in length (26 U.S.C. §5845(e)). DDs include any arms with barrel bore diameters greater than one-half inch (e.g., grenade launchers, bazookas, mortars, and certain “non-sporting” shotguns); as well as certain munitions and incendiaries (e.g., grenades, rockets, mortar rounds, mines, and Molotov cocktails) ((18 U.S.C. §921(a)(4) and 26 U.S.C. §5845(f)).

There is a fourth type of firearm—undefined in statute or regulation—that is regulated solely under the GCA. Since at least 1976, ATF adopted 26 inches in overall length as the determining dimension that separates NFA-regulated “concealable” smoothbore handguns, or AOWs, from solely GCA-regulated short-stocked, smoothbore firearms. ATF adopted this presumptive dimension of concealability from the statutory definitions for SBRs and SBSs discussed above. ATF sometimes refers to these GCA-regulated short-stocked, smoothbore firearms, which are greater than 26 inches in overall length, as “pistol grip firearms.”

Relatedly, some GCA-regulated handguns and pistol grip firearms are dimensionally equivalent—in terms of their barrel lengths, overall lengths, and/or barrel bores—to other NFA-regulated firearms. It is a felony to modify an existing rifle or shotgun by shortening its stock and/or barrel(s) into a short-barreled rifle or shotgun without following NFA requirements, which includes remitting a \$200 making tax. However, a handgun with equivalent dimensions does not trigger the NFA requirements or prohibitions, as long as a shoulder stock is never affixed to its frame or receiver.

Stabilizing Brace or Shoulder Stock

ATF had long ruled that the attachment of a shoulder stock to a handgun or pistol grip firearm transformed that solely GCA-regulated firearm into an NFA-regulated short-barreled rifle or shotgun. In November 2012, however, ATF ruled that attaching a stabilizing brace to an Armalite (AR)-type pistol would not change that firearm’s classification from a solely GCA-regulated handgun to an NFA-regulated SBR. As brace-equipped firearms became popular, it became clear that many people intended to use stabilizing braces as quasi-shoulder stocks, instead of strapping the brace to their forearm. In response, ATF issued guidance that appeared to some to be contradictory to previous guidance. Under the final 2023 rule, ATF has revised its definition of the term “rifle” to capture rifled-bore firearms, equipped with a “stabilizing brace” or similar device that provides sufficient surface area to allow the firearm to be shoulder-fired, in consideration of the following factors:

length and weight consistent with other rifles;

length of pull from the center of the trigger to the center of the shoulder stock, or similar attachment that is consistent with other rifles;

lights and scopes that the design and use of would normally require the firearm to be shouldered;

any component or rearward portion of a receiver that provides sufficient surface area to allow (1) the firearm to be shoulder-fired or (2) the attachment of a device that would provide such surface area; and

a manufacturer’s direct or indirect marketing and promotional material indicating the firearm could be shoulder-fired.

Notably, the final rule does not address brace-equipped, smoothbore pistol grip firearms, though the text preceding the actual rule has led some readers to question whether such firearms should be submitted for re-classification. However, ATF has stated that this is not so. Nonetheless, this rule will effect several million individuals who have purchased or assembled brace-equipped firearms. Critics contend that ATF has exceeded its authority, placing lawful gun owners in legal jeopardy, while not addressing the root causes of gun violence. Supporters point to four mass public shootings involving assailants who used braced firearms and view the rule as within ATF’s delegated authority and in the interests of public safety.

William J. Krouse, Specialist in Domestic Security and Crime Policy

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