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COMMENTS OF THE NATIONAL RIFLE ASSOCIATION ON ATF'S PROPOSED RULE TO AMEND THE DEFINITION OF "MACHINEGUN"

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Via electronic submission to regulations.gov

Re: ATF's Notice of Proposed Rulemaking Docket Number ATF2017R-22

On March 29, 2018, ATF posted a notice of proposed rulemaking to the federal register that would amend the existing definition of "machinegun" used in the enforcement of domestic federal gun laws.¹ The National Rifle Association of America submits the following comments in response to the proposed rulemaking.

I. Congress's Definition of "Machinegun" Creates a Mechanical Test, Not a Performance-Based Standard

When assessing whether bump fire stocks meet the legal definition of a "machinegun," it's important to keep in mind the statutory limitations of that term. Congress defines "machinegun" 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."² More relevant to bump fire stocks,

¹ 83 Fed. Reg. 13442 (March 29, 2018). <https://www.gpo.gov/fdsys/pkg/FR-2018-03-29/pdf/2018-06292.pdf>

² 26 U.S.C. § 5845(b); *see also* 18 U.S.C. § 921(a)(23) (adopting the same definition for purposes of the Gun Control Act).

the term also includes “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.”³ Thus, the law sets forth a mechanical test, not a performance-based standard focusing on rate of fire.

Because Congress created a mechanical test, ATF has consistently applied the definition to devices or firearms depending on their function, not on the rate of fire achievable with the device or firearm.⁴ Indeed, ATF has noted that “bump fire” can also be induced in unmodified semiautomatic firearms. Yet unmodified semiautomatic firearms are clearly not “machinegun[s]” under federal law and do not become one simply because a particular user induces bump fire with them.⁵

Semiautomatic firearms were in common use when Congress created the first definition of “machinegun” in 1934,⁶ and the current definition of “machinegun” in 1968.⁷ Yet unmodified semiautomatic firearms have never been considered “machinegun[s]” for purposes of federal law.⁸ Indeed, Congress enacted an entirely separate law to regulate AR-15s and various other semiautomatic firearms between 1994 and 2004,⁹ with no suggestion that these firearms could simply have been administratively reclassified as “machinegun[s].”

While the new proposed definitions of “automatically” and “single function of the trigger” continue to focus on mechanical function, rather than capability or performance, there are numerous phrases throughout the proposed rule that could be used to imply capability or performance is relevant to a firearm’s classification as a “machinegun.” For example, Section II of the proposed rule begins: “[s]hooters use bump-stock-type devices with semiautomatic firearms to accelerate the firearm’s cyclic firing rate to mimic automatic fire. Such devices are designed principally to increase the rate of fire of semiautomatic firearms.”

This focus on performance by claiming that a bump fire stock either “increase[s] the rate of fire of semiautomatic firearms” or “mimic[s] automatic fire” is irrelevant to whether or not a bump fire stock is a machine gun. Either it is a “part designed and intended solely and exclusively, or combination of parts

³ *Id.*

⁴ See, e.g., ATF’s discussion of prior determinations regarding “bump-stock-type devices” in the proposed rule. 83 Fed. Reg. at 13444-45.

⁵ See letter from Sterling Nixon, Chief, ATF Firearms Technology Branch, to Jason A. Lee (Oct. 13, 2006) (“As long as you must consciously pull the trigger for each shot of the ‘bump fire’ operation, you are simply firing a semiautomatic weapon in a rapid manner and are not violating any Federal firearms laws or regulations.”).

⁶ See National Firearms Act of 1934, 48 STAT. 1236, Sec. 1 (June 26, 1934) (defining “machine gun”).

⁷ See Gun Control Act of 1968, Pub. L. 90-618, Sec. 201 (Oct. 22, 1968) (defining “machinegun” for purposes of the re-enacted and amended National Firearms Act) This definition was amended slightly by the Firearm Owners Protection Act of 1986. Pub. L. 99-308, Sec. 109 (May 19, 1986).

⁸ This was so, even though the 1934 definition encompassed “any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger.” The term “semiautomatically” was omitted from the 1968 definition.

⁹ See Public Safety and Recreational Firearms Use Protection Act, Title XI of P.L. 103-322 (Sept. 13, 1994).

designed and intended, for use in converting a weapon . . . to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger,”¹⁰ or it is not.

Beyond being irrelevant, ATF’s claim that “bump-stock-type devices . . . accelerate the firearm’s cyclic firing rate . . .” is simply incorrect. These devices do not affect the rate of fire of the host firearm, which is determined by the firearm’s operating system and, to a limited extent, certain environmental factors such as the level of lubrication and cleanliness of the host firearm.

The rate of fire achievable with a particular firearm or device is irrelevant to whether or not a particular firearm is a “machinegun.” Some “machinegun[s]” fire as slowly as 200-400 rounds per minute, while many common “machinegun[s]” fire 1000 rounds per minute or more.¹¹ With such a broad range of firing rates, it’s apparent why Congress did not use rate of fire as a determinant factor in the definition of “machinegun.”

However ATF proceeds with this rulemaking, it is important that the distinction between semiautomatic firearms and machineguns remains clear. There are tens of millions of semiautomatic firearms currently possessed by law-abiding Americans. Suddenly and retroactively banning them as “machinegun[s]” under federal law would create a number of very serious constitutional, legal, and practical problems. More to the point, the statutory definition is simply not intended to stretch this far.

II. Application of the Regulation to Existing Bump Fire Stocks

The proposed rule does not provide for a registration period for “any device that would be classified as ‘machinegun’ as a result of this rulemaking.” Without the ability to register, owners of existing devices will be required to destroy their heretofore-lawful property. ATF claims that “[a] final rule will provide specific information about acceptable methods of disposal, as well as the timeframe under which disposal must be accomplished to avoid violating 18 U.S.C. 922(o).”

As support for requiring such disposal, ATF claims that, “[t]he NFA provides that only the manufacturer, importer, or maker of a firearm may register it.” This statement ignores the three methods that ATF has used in the past when reversing prior classifications under the NFA: amnesty, non-retroactivity, and modification of the device.

In this case, equitable principles strongly favor protecting those who in good faith acquired devices that ATF now seeks to reclassify as “machinegun[s].” Owners of these products have relied on over a decade of ATF’s own rulings and guidance when lawfully acquiring bump fire stocks, and the proposed rule would now turn these gun owners into felons or require destruction of their property.

Beyond problems of fundamental fairness, the lack of a way for gun owners to retain some value in their property likely makes the proposed rule a taking in violation of the Fifth Amendment. While some courts have refused to recognize taking challenges that result from the exercise of the government’s regulatory

¹⁰ 26 U.S.C. § 5845(b) (The definition of machinegun has been reorganized in this case so that it is more readable as applied to a “part” or “combination of parts.”

¹¹ The Chauchat light machine gun has a rate of fire of only 250 rounds per minute. Ivan V. Hogg & John Weeks, *Military Small Arms of the 20th Century* 269 (DBI Books, 6th ed. 1991).

authority,¹² recent Supreme Court case law makes these cases of questionable merit. In *Murr v. Wisconsin*, a regulatory land-use decision, the Court held that:

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation. The Clause is made applicable to the States through the Fourteenth Amendment. As this Court has recognized, the plain language of the Takings Clause requires the payment of compensation whenever the government acquires private property for a public purpose, but it does not address in specific terms the imposition of regulatory burdens on private property.¹³

In response to this new guidance from the Supreme Court, the United States District Court for the Southern District of California issued an injunction blocking enforcement of a law that would have required gun owners to surrender their lawful magazines, remove them from the state, or sell them to a licensed firearm dealer.¹⁴ That court relied, in part, on the fact that the plaintiffs were likely to succeed on the merits of their Takings Clause claim based on the forced loss of their magazines without compensation.¹⁵

The case for a Takings Clause violation is even stronger with devices that would be reclassified as “machineguns” by the proposed rule because, unlike the California magazine owners who could move their property out of the state or transfer it to a firearm dealer, owners of bump fire stocks are given only the option of destroying their property.

To comply with principles of equity and ensure that the proposed rule is not a violation of the Takings Clause, ATF must address the problem the proposed rule creates for existing bump fire stock owners -- through an amnesty, by limiting retroactivity of any final rule, or by providing for modification of the devices.

a. Amnesty

When passing the Gun Control Act in 1968, Congress included a 30-day amnesty period for individuals to register NFA firearms.¹⁶ In addition to that amnesty period, Congress gave the Secretary of the Treasury the authority to conduct additional amnesty periods of up to 90 days for any single period.¹⁷ This provision gave broad authority to the Secretary by allowing amnesty “as the Secretary determines will contribute to the purposes of this title.”¹⁸

¹² See e.g., *Akins v. United States*, 82 Fed.Cl. 619, 622 (2008).

¹³ 137 S. Ct. 1933 (2017).

¹⁴ *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1139-40 (S.D. Cal. 2017).

¹⁵ *Id.* at 1139.

¹⁶ Pub.L. 90-618, Title II, § 207(b), Oct. 22, 1968, 82 Stat. 1230.

¹⁷ Pub.L. 90-618, Title II, § 207(d), Oct. 22, 1968, 82 Stat. 1230.

¹⁸ *Id.*

When ATF reclassified certain shotguns as destructive devices in 1994,¹⁹ the agency also provided for a period of amnesty, which finally closed May 1, 2001 after about 8,200 of the shotguns were registered with ATF.²⁰

ATF could provide one or more 90-day periods of amnesty for the registration of bump fire stocks. While there are some additional complications due to the lack of markings on bump fire stocks, Congress has delegated broad discretion to determine the scope and requirements of any amnesty. ATF already has experience with firearms marking issues for individuals who are not federal firearm licensees. (Every time a non-licensee makes an NFA “firearm,” the maker must mark the firearm in compliance with federal law.²¹)

In addition to providing amnesty for bump fire stocks, ATF should consider a broader amnesty for “machinegun[s].” When Congress delegated the authority to provide for additional periods of amnesty, there was a clear legislative understanding that amnesty generally serves the purposes of federal firearms laws by bringing “machinegun[s]” and other NFA “firearms” that are currently contraband, and therefore likely to eventually end up in the wrong hands, into the legal market where they have value and are extremely unlikely to be used in crime.²²

While there has always been some concern about an amnesty affecting ongoing investigations or allowing possession by otherwise prohibited persons²³, ATF, as previously stated, could place substantial limitations on the scope of any amnesty, and would be free to set the requirements for registration to prevent the problems associated with the 1968 amnesty.

b. No Retroactive Effect

ATF has broad authority to limit the retroactive effect of administrative actions affecting the internal revenue laws.²⁴ In the case of regulations, there is a general rule against retroactive effect.²⁵

In past rulings, ATF has attempted to completely limit any retroactive effect. For example, in the case of AR-15 “Auto Sears,” ATF stated that “[w]ith respect to the machine gun classification of the auto sear under the National Firearms Act, pursuant to 26 U.S.C. 7805(b), this ruling will not be applied to auto sears manufactured before November 1, 1981. Accordingly, auto sears manufactured on or after

¹⁹ ATF Rul. 94-1, 94-2.

²⁰ ATF Rul. 2001-1 (repealed by ATF Rul. 2017-1 because ruling was “unnecessary and obsolete” due to long past deadline for registration).

²¹ 26 U.S.C. § 5842.

²² See Testimony of ATF Director Stephen E. Higgins, before the Subcommittee on Crime of the House Committee on the Judiciary on H.R. 641 and Related Bills (May 17, 24, and June 27, 1984) (testifying that “[r]egistered machineguns which are used in crimes are so minimal as to not be considered a law enforcement problem.”)

²³ These two examples could be determined to not “contribute to the purposes” of the NFA, so ATF could exclude them, and other similarly problematic registrations, from the proposed amnesty.

²⁴ 26 U.S.C. § 7805(b)(8).

²⁵ 26 U.S.C. § 7805(b)(1) It’s unclear how this section would apply to the reclassification of certain devices as “machinegun[s]” by regulation.

November 1, 1981, will be subject to all of the provisions of the National Firearms Act and 27 C.F.R. Part 479.”²⁶

The Seventh Circuit rejected this broad reading of section 7805(b) in *United States v. Cash*.²⁷ While ATF’s “Auto Sear” ruling seemed to imply that mere possession of a pre-1981 sear alone remained lawful, the *Cash* court limited 7805(b)’s retroactivity limitations to only excusing the payment of taxes:

Defendants believe that it places auto sears manufactured before November 1, 1981, outside all obligations laid by statute on the ownership and transfer of firearms. But nothing in the firearms statutes gives the Secretary of the Treasury (or the Bureau of Alcohol, Tobacco and Firearms) the power to make exemptions to § 5845(b) and associated legal obligations. The statute to which ATF Ruling 81-4 refers, 26 U.S.C. § 7805(b), provides that the Secretary cannot give retroactive application to tax regulations and adds in § 7805(b)(8) that the “Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.” Read in conjunction with § 7805(b)(8), the proviso in the fourth paragraph of ATF Ruling 81-4 means only that the Secretary will not collect any tax under 26 U.S.C. §§ 5801, 5811, or 5821 on account of auto sears manufactured or transferred before November 1, 1981. The ruling does not-and cannot-excuse compliance with criminal laws applicable at the time of post-1981 transfers.²⁸

In *United States v. Dodson*, the Sixth Circuit agreed with this reading of section 7805(b), concluding that the statute’s purpose was to excuse prior tax and regulatory violations, and not continuing non-compliance with criminal laws.²⁹

While NRA does not agree with this narrow reading of section 7805(b), reliance on this restrictive interpretation would complicate any attempt to generally limit the retroactivity of the proposed rule. However, this provision still serves an important purpose when used in conjunction with an amnesty. Section 7805(b) can excuse tax payments that might otherwise be required when a firearm is registered under an amnesty.

ATF used the provision in this manner during the registration period for the shotguns that were reclassified as NFA “firearms,” discussed *supra*.³⁰ Registrants were not required to pay the \$200 transfer tax that would have been associated with the acquisition of a “destructive device.” This same approach

²⁶ ATF Rul. 81-4 (The ruling does note that “[r]egardless of the date of manufacture of a drop in auto sear, possession of such a sear and certain M16 fire control parts is possession of a machine gun as defined by the NFA. Specifically, these parts are a combination of parts designed and intended for use in converting a weapon into a machine gun as defined in the NFA.”)

²⁷ 149 F.3d 706, 707 (7th Cir. 1998).

²⁸ *Id.*

²⁹ 519 F. App’x 344, 349 (6th Cir. 2013).

³⁰ ATF Rul. 94-1, 94-2.

could be applied to excuse tax payments for the registration of bump fire stocks or other “firearms” during the recommended amnesty period.

c. Modification

As discussed in the proposed rule, when ATF reclassified the “Akins Accelerator” as a “machinegun,” existing owners of the device were allowed to remove and dispose of a spring rather than destroying the entire device.³¹ Similar modifications could be done in the case of bump fire stocks. While it would be up to ATF to determine the exact extent of modification necessary, removal of the finger rest, permanently affixing the stock, or removal of the stock pin assembly would seem to limit the use of a bump fire stock to semiautomatic fire only.

While modification in these ways would limit the financial harm to gun owners over complete destruction, these types of modifications may so diminish the utility of a bump fire stock that a violation of the Takings Clause still occurs.³² For this reason, NRA recommends an amnesty as a less onerous solution for dealing with the existing supply of bump fire stocks.

III. Conclusion

However ATF continues with this proposed rule, it must keep in mind the limitations placed on the definition of “machinegun” by Congress. If ATF decides to reverse prior determinations regarding the classification of specific devices, then it should provide for an amnesty period for these devices and other unregistered “machinegun[s].”

Signed,



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³¹ 83 Fed. Reg. at 13445.

³² A “regulatory taking” occurs when the government regulates the use of property in a manner that “is tantamount to a direct appropriation or ouster.” *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005).