2020 Federal Update: Partly Sunny, Increasing Cloudiness

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Topics

- Armed on Army Corps Recreational Sites
- OCC Scuttles OCP
- Brace Yourself: BATFE Targets Pistol Stabilizing Braces
Army Corps of Engineers Rulemaking

85 Fed. Reg 20460 (April 13, 2020)
Comprise one of the largest network of outdoor recreation sites in America

- > 400 lake and river projects in 43 states
- Home to hiking, boating, fishing, camping, hunting, geo-caching, etc.
- 12 million acres of public lands and waters
  - 55,390 miles of shoreline
  - 7,892 miles of trails
  - 93,101 campsites
  - 3,748 boat ramps
Firearms Presumptively Banned

“The possession of loaded firearms, ammunition ... or other weapons is prohibited ...”

Exceptions:

- Law enforcement officers
- Authorized hunting and fishing (but must be unloaded when transporting to, from, or between sites)
- Authorized shooting ranges
- Upon written permission of District Commander

36 C.F.R. § 327.13
“The regulation banning the use of handguns on Corps' property by law-abiding citizens for self-defense purposes violates the Second Amendment.”

- Enforcement enjoined as to Corps’ property in Idaho
- Nov. 20, 2017: ACE granted both plaintiffs in case written permission to carry loaded firearms on ACE lands in Idaho, Montana, Oregon, and Washington
- Dec. 15, 2017: Ninth Circuit granted joint motion to dismiss earlier ACE appeal
- Jan. 4, 2018: Court administratively closed case based on ACE’s contention that ban would be amended

Contrary to:

Would amend 36 C.F.R. § 327.13 to read:

An individual may possess or transport a weapon [including “any firearm”] on any project provided that ... The individual is not otherwise prohibited by Federal, state, or local law from possessing or transporting such weapon; and ... The possession or transportation of such weapon is in compliance with applicable Federal, state, and local law.

Comment period ended June 12, 2020

Final action due Feb. 2020 (per Unified Agenda)
Consistent With Policy on Other Publicly Accessible Federal Lands

- National Park Service (36 C.F.R. § 2.4)
- U.S. Fish and Wildlife Service (50 C.F.R. § 27.42)
- Bureau of Land Management (43 C.F.R. § 8365.1-7)
- Bureau of Reclamation (43 C.F.R. § 423.30)
- U.S. Forest Service (36 C.F.R. §§ 261.8, 261.57)

“Federal facilities” ban still applies (“building or part thereof owned or leased by the Federal Government where Federal employees are regularly present for ... official duties”) 18 U.S.C. § 930
Office of the Comptroller of the Currency Rulemaking

85 Fed. Reg. 75261 (Nov. 25, 2020)
Controversial enforcement program by banking regulators (including DOJ and FDIC) during the Obama administration

- Proponents claimed it was a legitimate effort to combat fraud perpetrated through banks and payment processors
- Critics charged the regulators were pressuring banks to sever ties with legitimate and creditworthy businesses for political reasons

- Banks declined or terminated business with firearm industry clients, which were included on a list of “high risk” merchants issued by FDIC in 2011
- Trump DOJ terminated “misguided” OCP in 2017
What if the finance industry — credit card companies like Visa, Mastercard and American Express; credit card processors like First Data; and banks like JPMorgan Chase and Wells Fargo — were to effectively set new rules for the sales of guns in America?

Collectively, they have more leverage over the gun industry than any lawmaker.

Banks should enforce “terms of service” that mirror gun control measures rejected by Congress (e.g., prohibiting semi-auto sales, limiting magazine size)
Members of Congress Pressured Banks to Curb Business With Gun Industry in Letters and Hearings

Letter by Sens. Diane Feinstein (D-CA) and Brian Schatz (D-HI) to Wells Fargo CEO Timothy J. Sloan (May 1, 2018)

Praised other banks and corporations that had limited or quit business with firearm-related companies: “we hope this is the path forward for similar financial entities”

Suggested banks require clients to adopt practices mirroring proposals in pending gun control legislation

In 2019 hearings before the Financial Services Committee, Rep. Carolyn Maloney (D-NY) chastised Wells Fargo and J.P. Morgan Chase executives for doing business with firearm industry clients
“The Office of the Comptroller of the Currency is proposing a regulation to ensure that national banks and Federal savings associations offer and provide fair access to financial services.”

Authority: 12 U.S.C. § 1: OCC “charged with assuring ... fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to its jurisdiction”

Characterizes OCP as “now-discredited” program in which “government agencies ... pressured banks to cut off access to financial services to disfavored (but not unlawful) sectors of the economy”
[A] covered bank shall ...

Not deny any person a financial service the bank offers except to the extent justified by such person’s quantified and documented failure to meet quantitative, impartial risk-based standards established in advance by the covered bank * * *

Not deny, in coordination with others, any person a financial service the banks offers.

Bank is presumed to be “covered” if “it has $100 billion or more in total assets”

Comments accepted through Jan. 4, 2021
WTH BATFE?!  

Gun Control, Right on Q
NFA regulated “firearm” includes “a rifle having a barrel ... of less than 16 inches in length” 26 U.S.C. § 5845(a)

A “rifle” means “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder ...” 26 U.S.C. § 5845(c)

Subject to $200 making and transfer tax and registration in the National Firearms Registration and Transfer Record 26 U.S.C. §§ 5811, 5812, 5821, 5822, 5841, 5861

Violations carry a fine of up to $10,000 and imprisonment of up to 10 years. 26 U.S.C. § 5871
A device affixed to a large framed pistol (usually of the AR or AK variety) to stabilize the pistol for one-handed operation

Originally conceived to help disabled shooters operate large frame pistols

ATF evaluated an SB Tactical Brace in 2012 and concluded attachment of the brace to a firearm “does not convert that weapon to be fired from the shoulder and would not alter the classification of a pistol or other firearm”

SB then licensed its brace designs to SIG SAUER, Inc. and Century Arms International in 2013
Jan. 2015 Open Letter: Using a stabilizing brace as designed does not result in the creation of a short-barreled rifle, but **shouldering the brace as a stock would constitute a “redesign” of the firearm**, resulting in its reclassification as an SBR

March 2017: “Clarified” Jan. 2015 ruling by explaining it only applies when the “possessor takes affirmative steps to configure the device for use as a shoulder stock” and to “undermin[e] its ability to be used as a brace”

Doesn’t apply to “incidental, sporadic, or situational ‘use’ of an arm-brace (in its original approved configuration) equipped firearm from a firing position at or near the shoulder”
Pistol stabilizing braces become wildly popular
Manufacturers begin including them as original equipment on pistols marketed to public
Over 4 million braces believed to be owned by Americans
Aug. 3, 2020: BATFE issues “cease and desist letter” to Q, LLC regarding the manufacture and transfer of its braced Honey Badger Pistol

“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.”

Q ordered to “[c]ontact ATF to develop a plan for addressing those firearms already distributed” and to provide samples of their other braced pistols for ATF classification

Oct. 9, 2020: DOJ suspends effective date of Aug. 3 letter for 60 days for “further review”
Problems With BATFE Approach to Pistol Stabilizing Braces

- No formal, publicly-available standards of what constitutes a braced pistol v. an SBR
  - To date, case-by-case, “know-it-when-they-see-it” approach
- No clear statutory authority to regulate the manufacturing or possession of the braces themselves
  - Actionable NFA violation is the making or possession of an SBR, not of a brace (or even of a stock)
- Braces have legitimate and lawful uses (v. no evidence of widespread misuse of braced pistols)