

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)

Army Corps of Engineers Water Resource Projects

- 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

Morris v. U.S. Army Corps of Engineers, 60 F.Supp.2d 1120 (D. Idaho 2014)

- “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
- *Contra: GeorgiaCarry.org, Inc. v. Army Corps of Engineers*, 212 F.Supp.3d 1348 (N.D. Ga. 2016)

ACE Proposed Rule

- 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)

Operation Choke Point

- 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

Gun Control Advocates Take the Cue

- Andrew Ross Sorkin, “How Banks Could Control Gun Sales if Washington Won’t,” New York Times (Feb. 19, 2018)
 - *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

OCC Proposed Rule

- “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”

OCC Proposed Rule: New Mandates

- *[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

WITH BATFE?!

Gun Control, Right on Q

National Firearms Act & “Short-Barreled Rifles”

- 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

Pistol Stabilizing Braces

- 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

BATFE Subsequent Approach to Braces

- 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”

Result of BATFE's Guidance

- 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

BATFE Now Changing Course?

- 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)