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Vivian Chu, Mailstop 6N-518
Office of Regulatory Affairs
Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Ave. NE
Washington, DC 20226
Fax: (202) 648-9741

RE: Rulemaking Docket no. 2017R-22, "Bump-Stock-Type Devices"

Dear Ms. Chu:

I write you today on behalf of NFA Freedom Alliance ("NFAFA"), a nonprofit organization with specialization in legal and policy matters related to the manufacture, sale, transfer, ownership, possession, and use of items regulated by the National Firearms Act ("NFA"), our members and supporters, members of the public who benefit from our advocacy efforts, and all persons[1] who would be affected by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF", "the Bureau") in its proposed rule under ATF docket no. 2017R-22 ("Bump-Stock-Type Devices"), to submit these comments in opposition.

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[1] "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1) (internal quotations omitted).

AUTHORITIES

U.S. Const., Art. I, Sec. 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

U.S. Const., Art. I, Sec. 9, Cl. 3: "No Bill of Attainder or ex post facto Law shall be passed."

U.S. Const., Amend II: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. Const., Amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. § 921(a)(3): The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(23): The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).
26 U.S.C. § 5845(a): The term "firearm" means (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, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary

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.

26 U.S.C. § 5845(b): The term "machinegun" means 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. The term 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.

DISCUSSION

NFAFA strenuously objects to the ATF's proposed rulemaking (no. 2017R-22) and its planned illegal and unconstitutional ban on a non-firearm, non-machinegun item. The Bureau's Notice of Proposed Rulemaking offers little to those interested in the facts but spills over with countless unsupported and conclusory statements—employing over 14,000 words to provide mere window dressing for a terminally-flawed and defective public notice of its intent to violate the law and our Constitution. And the ATF's failure to comply with the Administrative Procedure Act (5 U.S.C. § 500, et seq.) makes this proposed rulemaking action a nonstarter.

For example, the ATF claims that "certain States have already banned" the subject "bump-stock-type devices" as ATF desires to ban them here – specifically, California, Florida, Massachusetts, New Jersey, New York, and Washington, 83 F.R. at 13451. But that assertion is nowhere supported in the rulemaking record, and the public have been denied their right to review and comment on these claimed foundational elements of 2017R-22.

Indeed, as is evidenced by the as-yet-unpassed California Senate Bill 1346 (legislation pending, online at http://bit.ly/2018-ca-sb1346), the State of California does not currently ban "bump-stock-type devices" in its statutes. Only if SB 1346 were passed and signed into law would California expressly ban "a bump fire stock or bump fire stock attachment" by adding such items to the definition of "multiburst trigger activator" (at Cal. Penal Code Section 16930).[2]

In another example of the ATF's failure to provide a meaningful opportunity to review and comment on its proposed rulemaking, the Bureau alleges that, "On October 1, 2017, a shooter attacked a large crowd attending an outdoor concert in Las Vegas, Nevada. By using several AR-type rifles with attached bump-stock-type devices, the shooter was able to fire several hundred rounds of ammunition in a short period of time, killing 58 people and injuring over 800." 83 F.R. 13443.

But there is no evidence of such in the record here (or, to date, anywhere else). NFAFA has thus been denied a meaningful opportunity to review and comment on the ATF's alleged reasons for this proposed rule.

As the ATF tellingly admits, it assessed bump-stock-type devices in at least "ten letter rulings between 2008 and 2017." Importantly, "ATF ultimately

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[2] Notably, while the State of Washington did recently enact legislation to expand its statutes and extend a proscription against "bump-fire stocks" in certain specified contexts, it also mandated a "buy-back program" that "must allow an individual to relinquish a bump-fire stock to the Washington state patrol or a local law enforcement agency participating in the program in exchange for a monetary payment of one hundred fifty dollars." Wash. Engrossed Senate Bill 5992 (2018) at Sec. 10 (online at http://bit.ly/2018-wa-esb5992). Indeed, the program "must be implemented between July 1, 25 2018, and June 30, 2019" – a full year – "at locations in regions throughout the state." All of these considerations are missing in the ATF's proposed rule.

concluded that these devices did not qualify as machineguns because, in ATF's own view, they did not automatically shoot more than one shot with a single pull of the trigger." 83 F.R. 13445.

That is because a bump-stock-type device is not a "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," or a "frame or receiver of any such weapon," nor does it constitute "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."

Regulating bump-stock-type devices as "machineguns" because they might "accelerate [a semi-automatic] firearm's cyclic firing rate to mimic automatic fire," 83 F.R. 13444, would inevitably lead to the absurd logical extension that belt loops, a length of string, sticks, other inanimate objects, and perhaps even well-trained fingers, also constitute "machineguns."

Given this inherent absurdity of the proposed rulemaking, the Bureau preemptively attempts to short-circuit its own logic, expressly conceding that "individuals wishing to replicate the effects of bump-stock-type devices could also use rubber bands, belt loops, or otherwise train their trigger finger to fire more rapidly." 83 F.R. at 13454. As the Wizard of Oz might have bellowed, "Pay no attention to the ATF rule behind the curtain!"

For all of these reasons and many others expressed in other comments in opposition which NFAFA strenuously echoes—*see*, *e.g.*, Firearms Policy Coalition and Firearms Policy Foundation's Comments in Opposition to

Proposed Rule ATF 2017R-22, submitted June 19, 2018,[3] (the "FPC Opposition")—the ATF clearly lacks authority to alter the statutes through its proposed regulation seeking to expand the definition of "machinegun" such that it would include and affect bump-fire-type devices and their owners.

But our opposition to the proposed rulemaking is not limited to statutory and procedural concerns. Indeed, the Bureau's proposed rulemaking no. 2017R-22 is unconstitutional as well.

The ATF's proposed rulemaking no. 2017R-22 might appear (to the uninformed) on its face to only seek a ban on "bump-stock-type devices." But, if one looks *under* the surface of the water, the treacherous iceberg of legal and logical hopscotch employed by the Bureau in the instant rulemaking could just as easily be used to apply a similar ban to virtually any semi-automatic firearm, firearm device or accessory, or even mere conduct: again, by its own admission, the rationale underlying the proposed rule would compel banning the use of *any* mechanism capable of replicating the effects of bump-stock devices, including rubber bands, belt loops, and even just well-trained trigger fingers. This shows how arbitrary and capricious, and indeed unconstitutionally vague, the ATF's proposed rulemaking really is.[4]

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[3] This Comment in opposition to the proposed rulemaking incorporates the entirety of the FPC Opposition as if fully set forth herein. The FPC Opposition and its exhibits are docketed at under rulemaking record ID nos. ATF-2018-0002-61777 and ATF-2018-0002-61778, available online at https://www.regulations.gov/document?D=ATF-2018-0002-61777 and https://www.regulations.gov/document?D=ATF-2018-0002-61778, respectively.

[4] As FPC and FPF explain in their opposition, with which NFAFA wholeheartedly agrees: "Utilizing the same flawed logic ATF used to turn a bump-stock-devices into a machine gun, ATF would merely need to assert that by placing forward pressure on the gun while holding the trigger to the rear and allowing the recoil energy of the firearm to move the firearm enough

But the egregiousness of the Bureau's intended regulatory action here extends beyond its unconstitutionally arbitrary and capricious reach.

Fundamentally, through this proposed rulemaking, the ATF – the firearms-law enforcement weapon of our nation's executive branch, under the guidance and control of Attorney General Jeff Sessions and his Department of Justice – is seeking to usurp the constitutional limitations upon its power in order to re-shape the law to suit its policy preferences, adjudicate the matter by regulatory decree, and then retroactively apply its illegal agency proclamation. This is legislation by fiat in violation of *ex post facto* principles as the FPC Opposition cogently observes:

> There is no dispute, and ATF readily admits, that its proposed rule would change the definition of machinegun; thereby, affecting numerous sections of federal law and immediately turning, *at a minimum*, half a million law-abiding citizens into criminals overnight. ATF's proposal neither includes a grandfather provision nor a safe harbor, even for a limited period of time. More disconcerting – as if such were fathomable in anything but an Orwellian nightmare is the fact that those possessing bump-stock-devices will have no knowledge of whether any final rule will be implemented, the text of that rule, and the date, as the final rule would become effective immediately upon the signature of Attorney General Sessions, without prior publication to the public. But that's no big deal, right? It's only 10 years in jail and $250,000.00, per violation. Thank God that Article 1, Section 9, Clause 3 [of the Constitution] precludes such.

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to reset the trigger, that the trigger could constitute a bump-stock-device, resulting in a variety of products designed for the competition shooter to be banned overnight. Likewise . . . , the technique of bump firing only requires the use of one's finger – as admitted by ATF in numerous court filings – thereby resulting in ATF's ability to contend that fingers, *in and of themselves*, are bump stock-devices under the NPR. Moreover, the proposal could also apply to everything from rubber bands and belt loops to slamfire shotguns and firearms."

FPC Opposition at 55-56 (emphasis original).

FPC Opposition at 33-34 (emphasis in original).[5]

As James Madison so aptly and presciently noted, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny." *Federalist Papers*, No. 47.

And here we are.

Given the egregious overreach of ATF's proposed ban, it not only violates Article I's separation of powers principles and the Ex Post Facto Clause, but also the People's Second Amendment right to keep and bear arms, and the Fifth Amendment's Takings Clauses. Regarding the rule's effect on the fundamental right to keep and bear arms under the Second Amendment, the FPC Opposition accurately explains:

> While it is impossible to know for certain, given the NPR's dearth of analysis and discussion of the Second Amendment, it may well be that the ATF, without stating so, believes that the NPR does not violate the fundamental, individual right to keep and bear arms by considering bump-stock devices to be both "dangerous and unusual weapons" *and* "not commonly possessed by law-abiding citizens for lawful purposes today." *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1031-1032 (2016). But as the Court recently reminded in *Caetano*, the controlling rule set forth in *Heller* "is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Id.*, at 1031 (emphasis in original). However, ATF does not discuss these factors, and instead walks right past the necessary analysis (and the Court's clear direction). The NPR fails to show that a bump-stock device is both "dangerous and unusual," or even that it would materially

[5] The Attorney General and ATF claim to be acting on behalf of President Donald Trump. *See*, e.g., Memorandum of February 20, 2018, 83 F.R. 7949 (online at http://bit.ly/trump-bumpstock-ban-memo). But that does not absolve the Attorney General or his agencies of their duties under the law—including the duty to protect and enforce the Constitution and rights enshrined therein.

> affect the dangerousness of any firearm so equipped, which are already dangerous *per se*. The ATF's proposed total ban self-evidently lacks necessary tailoring – indeed, its lack of tailoring underscores its overwhelming breadth – and amounts to the total destruction of the right of law-abiding people to keep and bear the affected items for self-defense and other lawful purposes.

FPC Opposition at 24-25 (emphasis in original).

The Bureau, under the purportedly pro-Second Amendment President Donald Trump, outrageously declares that, "Because, with some exceptions, the possession of a machinegun is prohibited by the GCA, the Department is well within its authority to issue a rule that further clarifies and interprets the statutory definition of machinegun. Nor is regulation of bump-stock-type devices as machineguns inconsistent with the Second Amendment." 83 F.R. at 13446. It is clear in this that President Trump, Attorney General Sessions, and the ATF do not believe that the Second Amendment provides any meaningful protection for gun owners or their property—even when they acquired and possessed such property on reliance of the ATF's "ten letter rulings between 2008 and 2017."

And the Bureau estimates that "the number of bump-stock-type devices held by the public could range from about 280,000 to about 520,000." 83 F.R. at 13451. (Mind you, these items were purchased on reliance of the ATF's own rulings.) If that estimate is correct, it means that the Attorney General and ATF hold the troubling view that any firearm (or arm of any kind, period) that is not manufactured and possessed in numbers greater than at least the 520,000 estimated here is not "in common use for lawful purposes," *Heller*, 128 S.Ct. 2783 (2008), at 2817, and thus not protected by the Second Amendment.

But that cannot be right. Indeed, as Justice Alito explained in *Caetano*, 136 S. Ct. 1027 at 1028-1033, such reasoning "poses a grave threat to the fundamental right of self-defense," *id*. at 1033.

In discussing the question of commonality, Justice Alito explained that the "relevant statistic is that [h]undreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." *Id*. at 1032 (internal quotations omitted). Here, the ATF concedes that hundreds of thousands of bump-stock-type devices have been *legally* sold into the market and are currently possessed by law-abiding American people for lawful purposes in virtually every state (except those few jurisdictions where such devices are proscribed under state or local law).[6] And, "[w]hile less popular than handguns," Justice Alito went on to hold that "Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." *Id*. at 1033. Similarly, bump-stock-devices may be less popular than handguns, but they are certainly in common use for lawful purposes.

As discussed above, the ATF alleges, without any supporting evidence, that bump-stock-devices were used in <u>one</u> tragic crime. And this <u>single, bare allegation</u> – that firearms with bump-stock-devices were used to attack "a large crowd attending an outdoor concert in Las Vegas, Nevada," 83 F.R. at 13443 – is the only substantiation that the large and powerful ATF, with a FY 2017 budget of $1.258 billion, could gin up.[7]

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[6] The ATF claims that six states (California, Florida, Massachusetts, New Jersey, New York, and Washington) already ban bump-stock-devices. *See* 83 F.R. at 13451. But as discussed and shown above, only five states currently ban these devices. Thus, like the Tasers and other electronic arms in *Caetano*, the American people may lawfully possess bump-stock-devices in 45 States.

[7] "In fiscal year 2017, ATF had 5,113 employees, including 2,623 special agents and 828 industry operations investigators. The agency's 2017 enacted

By any standard, let alone a constitutionally-required *heightened* one, bump-stock-devices are commonly possessed for lawful purposes by the hundreds of thousands, and are not any more "dangerous and unusual" than Tasers and stun guns—or even some common models of semi-automatic handguns.

The ATF's proposed dispossession of property interests would inexorably violate the Takings Clause as well. "As this regulation is clearly not meant to adjust the benefits or burdens of economic life, the compelled forfeiture or destruction of bump-stock-devices and other firearms and devices covered by the NPR constitutes a physical invasion and taking by government; and therefore, ATF must address and provide for the payment of just compensation to each individual who would be deprived of their property under the NPR." FPC Opposition at 28 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

Should this rulemaking take effect, "current possessors of these devices would be required to surrender them, destroy them, or otherwise render them permanently inoperable upon the effective date of the final rule," 83 F.R. at 13442, with no compensation. The ATF estimates that its proposed rulemaking would negatively affect manufacturers, some 2,270 retailers, thousands of individuals,[8] and [at least] between 280,000 and 520,000 items by forcing their total dispossession (taking) on pain of serious criminal penalty — even while

budget was $1.258 billion." ATF Fact Sheet - Staffing and Budget, published May 2018, online at http://bit.ly/atf-budget-fast-facts.

[8] Since the ATF has not yet established or enforced any rule that would prohibit the acquisition, possession, and use of these items, and since they are still legal to have and use in virtually every state, the number of people that would be affected by the Bureau's proposed rule is likely increasing by the minute.

the ATF readily admits that people purchased and now possess them because they do "not qualify as machineguns" *and* because "they did not automatically shoot more than one shot with a single pull of the trigger." 83 F.R. at 13445. Simply put, in 2018, bump-stock-type devices are still not firearms, and still do not "automatically shoot more than one shot with a single pull of the trigger."

The Bureau claims that the rulemaking would cost $217,000,000. 83 F.R. at 13449. This cost analysis does not include such necessary and relevant factors as just compensation, for one. As detailed analysis of the total estimated costs in the FPC Opposition illustrates, *id.* at 30-32, "[r]egardless of the estimate considered, ATF has failed to address any appropriations available to it or, more generally, the Department of Justice to fund these takings and any such fund, if limited solely to bump-stock-devices, must have a high estimate of $221,494,000.00 ($425.95 x 520,000)[9] available to ensure that all individuals are justly compensated. If, on the other hand, the proposal will apply to shotguns and other firearms capable of 'slamfiring', as well as Gatling guns, triggers and fingers, there must be an allocation of no less than $50,000,000,000,000.00," *id.* at p. 32.

In any event, as FPC and FPF establish in their opposition: "before ATF can proceed in this matter, it must provide logistical information as a part of its cost-impact statement detailing how it plans to pay compensation including, but not limited to, the compensation rate, timeline for completing payment, source of the funding, and sequestration of an appropriate amount in an account restricted to paying just compensation in this matter. Thereafter, it must provide interested parties with a meaningful opportunity to respond,

[9] As FPC and FPF explain in their total cost estimation, the ATF has estimated that 520,000 bump-stock-devices have been produced and sold into the market. FPC Opposition at 30.

which, per 18 U.S.C. § 926(b), cannot be shorter than ninety days." FPC Opposition at 32.

Exacerbating this situation is the reality that these estimates do not even account for the taxpayer-borne costs of litigation and the government's defense of this lawless rule. But most disturbingly, the proposed rulemaking ignores the costs to the rule of law, the agency's credibility, and the People's trust. And if the rule of law does not matter to the President, to the Attorney General, and to the armed government officials under their direction and control, the People will eventually come to the conclusion that it is no longer relevant to them, either.

The ATF might very well regret its many (legally-sound) prior determinations holding that "bump-stock-devices" are not "machineguns" nor firearms under the statutes. It may even desire to wield the sword of legislative powers possessed exclusively by the Congress under Article I of our Constitution. But the ATF is not Congress, and proposed rulemaking 2017R-22 exceeds the agency's statutory and constitutional authority.

Should the President, the Attorney General, or even the People one day prefer a different definition of "machinegun," one so encompassing that the rule would swallow all exceptions (like the subject "bump-stock-devices" at issue here), Congress must first enact such sweeping legislation itself; and then the President could choose to defend its constitutionality in court, or not. But, either way, that is the only legitimate process for the government to attempt to institute a ban against these devices – not ATF legislation by fiat. Nevertheless, that is precisely what the ATF seeks to achieve through this proposed rule:

> ATF has, once again, made a mockery of rulemaking proceedings by engaging in numerous improper and bad-faith tactics that

> deny meaningful public participation. As shown in these and other comments, the instant NPR is terminally-ridden with procedural defects. As a result, ATF cannot promulgate any final rule that hopes to survive judicial review without starting anew. And ATF's proposed legislation-by-fiat stretches far beyond its statutory authority, ignores important separation of powers principles, and attempts to usurp that which is solely the domain of Congress.

FPC Opposition at 66.

CONCLUSION

For all these reasons, those expressed in our prior comments to the ATF's related Advanced Notice of Proposed Rulemaking (NFAFA comment dated January 24, 2018, docketed under ID no. ATF-2018-0001-30060 regarding Federal Register Doc. # 2017-27898), and those expressed in the FPC Opposition to the ATF's unlawful process and proposed regulation, the ATF should elect Alternative 1, the 'no-change' alternative. Please contact me immediately if you have any questions or if any further action is required in order for you to accept and place these comments into the rulemaking record.

Mr. Todd Rathner
Executive Director