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September 2, 2020

Mr. Kelly D. Brady
Special Agent in Charge
Boston Field Division
Bureau of Alcohol, Tobacco, Firearms and Explosives
United States Department of Justice
10 Causeway Street, Suite 791
Boston, Massachusetts 02222

Re: In response to “Cease and Desist – ‘Honey Badger’ Firearm”

Dear Special Agent in Charge Brady:

On behalf of our client, Q, LLC (“Q”), we write in response to your letter dated August 3, 2020 (the “Letter”), which directs Q to (1) “[c]ease and desist all manufacture and transfer of the ‘Honey Badger Pistol’ firearm unless you properly register each firearm manufactured on an ATF Form 2 as required by the [National Firearms Act], and file the appropriate ATF Form prior to the transfer”; (2) “[c]ontact ATF to develop a plan for addressing those firearms already distributed”; and (3) “[p]rovide a sample of the Sugar Weasel and Mini Fix firearms to ATF for an official classification.”¹

The Letter notified Q that the Honey Badger pistol with arm brace is in fact a rifle with a barrel under 16 inches in length and thus subject to the National Firearms Act. Q disagrees with that conclusion and notes that both it, and thousands of its customers, have always regarded this firearm to be a pistol based on its reading of the law and ATF classification letters in the public domain. As addressed below, Q also believes ATF’s actions violate procedural norms and will have a major impact on the firearms industry. Notwithstanding these concerns, Q greatly appreciates the professionalism and courtesy exhibited by the Boston Field Division and intends to fully cooperate with ATF to amicably resolve this matter. As such, we have submitted the two requested firearms for evaluation and outlined a proposal for addressing the firearms already owned by the public.

I. The Letter Is Procedurally Deficient And Is Not Based On Publicly Available Standards.

The Letter bases its directives on a determination that “the Honey Badger is properly classified as a ‘short-barreled rifle’ as defined by” the National Firearms Act, 26 U.S.C. §§ 5801–5872, because, *inter alia*, “[t]he 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

¹ Pursuant to the telephone conference on August 14, 2020 and email correspondence on August 28, 2020, the Boston Field Division extended the relevant deadlines to September 2, 2020.

the shoulder.” The Letter, however, does not reveal the standard applied by the Boston Field Division (“Division”) in concluding that the addition of a stabilizing brace—an orthotic device designed and intended to provide a shooter with the ability to more safely use a heavy firearm—renders “the firearm . . . designed and intended to be fired from the shoulder.” That omission is troubling because the Firearms and Ammunition Technology Division (“FATD”) has previously concluded, on multiple occasions, that firearms equipped with similar stabilizing braces *are not* designed and intended to be fired from the shoulder.² Moreover, ATF has not promulgated regulations or other publicly available guidance documents that purport to establish a standard upon which such a determination could be based.³

The Letter’s failure to identify a legal standard or address apparent conflicts with past rulings raises serious concerns about its lawfulness. As an initial matter, the Administrative Procedure Act (“APA”) sets forth the procedures by which ATF is “accountable to the public and [its] actions subject to review by the courts.”⁴ The APA requires ATF “to engage in ‘reasoned decisionmaking,’”⁵ and directs that actions be “set aside” if they are “arbitrary” or “capricious.”⁶ Furthermore, the Supreme Court has held that where, as here, an agency’s “prior policy has engendered serious reliance interests” it is “arbitrary or capricious to ignore such matters” when attempting to change such policy.⁷ Accordingly, to change policy ATF must “display awareness that it is changing position” and provide a “reasoned explanation” showing that the agency believes the new policy to be better than its old policy.⁸ The Letter fails to comply with these basic procedural requirements, or to show that its determination can be squared with the many past decisions reaching opposite results.

The Letter also conflicts with recently enacted executive orders that seek to ensure compliance with the APA and fundamental regulatory fairness. Executive Order 13892 provides that “[w]hen an agency takes an administrative enforcement action, engages in adjudication, or

² Several of these determinations are listed in Attachment A. Subsequent to the Letter, the Division provided Q with a partially redacted Report of Technical Examination from an examiner within the Firearms Technology Criminal Branch dated June 15, 2020 (the “Report”). The Report documents some technical characteristics of the Honey Badger Pistol. However, like the Letter, the Report fails to identify any source of law purportedly applied in determining that “the weapon is intended to be fired from the shoulder.” Moreover, the non-exclusive list of factors recited on page 4 in the Report have not been publicly stated by ATF, and the Report’s discussion of this seemingly arbitrary selection of factors is conclusory and fails to address contrary determinations by the agency. Thus, the Report cannot make up for the deficiencies in the Letter. See generally *Tripoli Rocketry Ass’n, Inc. v. ATF*, 437 F.3d 75 (D.C. Cir. 2006).

³ In fact, the only public guidance on stabilizing braces issued by the agency states that “ATF has previously determined that attaching [a] brace to a firearm does not alter the classification of the firearm or subject the firearm to National Firearms Act . . . control.” FATD, *Open Letter on the Redesign of “Stabilizing Braces”* (Jan. 16, 2015). That guidance was quietly removed from ATF’s website in 2019 but was not formally rescinded and remains available online. See https://www.sterlingarsenal.com/uploads/ATF_Open_Letter_On_Stabilizing_Braces_20150116.pdf.

⁴ *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citation omitted).

⁵ *Id.*

⁶ 5 U.S.C. § 706(2)(A).

⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

⁸ *Id.* (emphasis deleted).

otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise.”⁹ Moreover, Executive Order 13891 establishes procedural requirements that an agency must follow to ensure that any standards of conduct it enforces qualify as publicly stated. These requirements include adopting regulations through notice and comment procedures and posting non-binding guidance on publicly accessible agency websites.¹⁰ Here, the Letter does not identify *any* relevant legal standard for determining whether a firearm is designed and intended to be fired from the shoulder, let alone a standard that has been publicly stated in a manner designed to avoid unfair surprise.

Most serious, the Letter threatens criminal prosecution without adequate notice.¹¹ That makes concerns about the lawfulness of ATF’s determinations even more acute. “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”¹² Accordingly, the Supreme Court has held that due process bars enforcement of criminal statutes where an agency improperly “changes course” with respect to conduct it deems unlawful.¹³ That is because an “abrupt” or otherwise improper “regulatory change” makes it impossible for “a person of ordinary intelligence” to know “what is prohibited.”¹⁴ The Letter is such a change because, as explained above, FATD has previously concluded that firearms configured with stabilizing braces similar to the Honey Badger Pistol are not designed or intended to be fired from the shoulder.¹⁵ Moreover, the agency has never announced any change in position, nor promulgated any publicly available standard.¹⁶ Q thus lacked fair notice of the result announced in the Letter.

Concerns about fair notice likewise extend to the thousands of Americans who purchased the Honey Badger Pistol in reliance on ATF’s past construction of the National Firearms Act. Justice Gorsuch recently explained how ATF’s “bureaucratic pirouetting” on the interpretation of a different federal gun statute forced “ordinary citizens . . . to guess” about how best “to conform

⁹ 84 Fed. Reg. 55239, 55241 (Oct. 15, 2019); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 & n.15 (2012) (discussing examples of agency actions that fail to provide reasonable certainty or fair warning of what a legal standard administered by an agency requires).

¹⁰ 84 Fed. Reg. 55235, 55236–37 (Oct. 15, 2019).

¹¹ *See* Letter at 2–3 (“Your failure to take the above steps may result in (1) law enforcement action by ATF, including a referral of this matter to the United States Attorney’s Office for criminal prosecution; (2) tax assessment and collection; and/or (3) seizure and forfeiture of the firearms and property involved in violations of Federal law.”); It is worth noting that ATF conducted a full compliance inspection of Q last year and did not raise any objections about the Honey Badger at that time.

¹² *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

¹³ *Id.* at 254.

¹⁴ *Id.* (citation omitted); *see also Christopher*, 567 U.S. at 156 & n.15.

¹⁵ *See* note 2, *supra*.

¹⁶ *See* note 3, *supra*.

their conduct” to the law.¹⁷ That case is still wending its way through the court system;¹⁸ in the meantime, however, Justice Gorsuch’s explication of the harms that result when ATF reverses course underscores the need for ATF to carefully consider the effect of the Letter both on Q and on thousands of law-abiding American citizens, and to ensure that any policy changes follow proper procedures.

Finally, ATF has thus far refused to provide any indication of *how* the Honey Badger Pistol can be reconfigured such that ATF would no longer consider it a short-barreled rifle subject to National Firearms Act control. Instead, without further direction, ATF asked Q to formulate a remedy for its review. This deprives Q and the government of a potential resolution and illustrates the lack of notice provided by ATF on these important issues. “The agency’s approach leaves [Q] (as well as other regulated parties, and [potentially] reviewing courts) guessing.”¹⁹ These procedural shortcomings violate the APA and substantially undermine due process.

II. Q Has Ceased The Manufacture And Transfer Of The Honey Badger Pistol And Proposes That ATF Declare Its Determination Non-Retroactive So That An Appropriate Replacement Brace Can Be Effectively Distributed.

Q reserves its rights to challenge the Letter based on any potentially applicable legal objections, including those outlined above. Without waiving its rights, Q has “[c]ease[d] . . . all manufacture and transfer of the ‘Honey Badger Pistol’ firearm” as directed by the Letter. In addition, Q proposes to develop consistent with the Letter and in conjunction with the Division “a plan for addressing those firearms already distributed.”

We should first point out that Q does not have the financial means to send out 16-inch replacement barrels to its customers, as contemplated by the Division.²⁰ Such an endeavor would likely push the company into bankruptcy. As an alternative, Q proposes to exchange the supplied stabilizing brace for one that ATF concludes will not cause the firearm to be designed and intended to be fired from the shoulder. Although ATF has thus far been unwilling to discuss a suitable alternate configuration with Q, Q welcomes the Division’s input as it seeks to develop an appropriate solution.²¹

¹⁷ *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790–91 (2020) (statement of Gorsuch, J.).

¹⁸ *See id.* at 791.

¹⁹ *Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14, 25–26 (D.D.C. 2014) (holding ATF classification letter arbitrary and capricious).

²⁰ Aside from financial considerations, increasing the barrel length on Q’s design adds significant pressure to the gas system, causing the bolt carrier group (“BCG”) to cycle at an increased speed. This causes the BCG to bounce off the face of the chamber when feeding a new cartridge, resulting in a failure to fire. If ATF decides to apply this determination retroactively and rejects removal of the existing arm brace for replacement with an “ATF-approved” arm brace (*i.e.* an arm brace that is not considered a shoulder stock), Q will be left without a realistic option to rectify the situation.

²¹ Q observes that there may be other ways for individuals who possess Honey Badger Pistols to become compliant. For example, an individual may remove the barreled upper receiver from the Honey Badger Pistol. The separated

To facilitate an exchange program and avoid the creation of “weapons made from rifles,” ATF should determine that the ruling contained in the Letter “shall be applied without retroactive effect.”²² ATF has frequently exercised its statutory authority to deny retroactive effect to National Firearms Act determinations. For example, in the 1980s, ATF held that several decisions classifying certain firearms as “machineguns” would not apply to the manufacture or transfer of affected firearms before the date of the classification.²³ And in the 1990s, ATF waived taxes that would have otherwise been imposed after the agency classified certain shotguns as “destructive devices.”²⁴ In an exercise of prosecutorial discretion and statutory authority, ATF should similarly deny retroactive application of the Letter to the Honey Badger Pistol. This proposal is based on the fact that neither Q nor its purchasers (end-users) believed the Honey Badger to be a rifle and did not anticipate ATF would classify the pistols as short-barreled rifles. At no point did Q design or intend for the Honey Badger to be fired from the shoulder.

This proposal serves several salutary goals. First, it will alleviate many of the APA and due process concerns raised above because it will give ATF’s new interpretation of the National Firearms Act only prospective effect. Second, it will allow private parties to conform their conduct to ATF’s new interpretation of the law. Finally, it is more equitable to Q and to the thousands of law-abiding American citizens who made and purchased the Honey Badger Pistol with the understanding that it was not intended or designed to be fired from the shoulder.²⁵

Non-retroactive application of this new interpretation of the law is also practical. An exchange program is likely to be more effective if potential participants are assured that an exchange will bring them into compliance with the National Firearms Act without subjecting them to retroactive liability. Common sense dictates that law-abiding gun owners may be less likely to participate in a program that could expose them to retroactive tax liability and registration requirements.

components would no longer meet the definition of a short-barreled rifle, provided the individual also possesses a pistol or registered short-barreled rifle to which the upper receiver may be affixed. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (interchangeable short barrel, long barrel, pistol grip, and shoulder stock not a short-barreled rifle as long as not assembled as such).

²² 26 U.S.C. § 7805(b)(8); *see id.* § 7801(a)(2)(A) (“the term ‘Secretary’ . . . shall, when applied to th[e] provisions of this title] mean the Attorney General”); 28 C.F.R. § 0.130 (subdelegating authority to ATF). The decision could also be rested on prosecutorial discretion. *See United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741–42 (D.C. Cir. 2016).

²³ *See* ATF 81-4 (AR-15 drop-in auto sear), <https://www.atf.gov/resource-center/docs/atf-ruling-81-4pdf/download>; ATF Ruling 82-2 (KG-9 pistol), <https://www.atf.gov/file/55366/download>; ATF Ruling 82-8 (SM10 and SM11A1 pistols and SAC carbine), <https://www.atf.gov/file/55376/download>; *see also* ATF Ruling 76-6 (grandfathering smooth-bore Taser manufactured prior to “any other weapon” determination).

²⁴ *See* ATF Ruling 94-1 (USAS-12 shotgun), <https://www.atf.gov/file/55416/download>; ATF Ruling 94-2 (Striker-12/Streetsweeper shotgun), <https://www.atf.gov/file/55426/download>.

²⁵ *See Staples v. United States*, 511 U.S. 600, 616 n.11 (1994) (explaining that a violation of the National Firearms Act requires that “the defendant knows of the characteristics of his weapon that bring it within the scope of the Act”).

Please be advised that Q is currently working to develop a new arm brace design to rectify the points raised in FATD's Report.

III. Q Has Submitted The Sugar Weasel And Mini Fix To FATD.

The Letter also directs Q to “[p]rovide a sample of the Sugar Weasel and Mini Fix firearms to ATF for an official classification.” Q has submitted samples concurrent with this response to the Firearms Technology Industry Services Branch of FATD. Q expects that any determinations by the agency will comply with the APA, applicable executive orders, and due process principles.

In addition, Q expects that any determinations about the classification of the Mini Fix and Sugar Weasel (as well as the reconfigured Honey Badger) will be kept in non-final form until Q has had an opportunity to provide feedback on the agency's proposed position including, if needed, to senior leadership in the Department of Justice. ATF has long taken the position that the manufacturer's intent—while not dispositive—is relevant to classification reviews. Due process also requires an opportunity to be heard. Accordingly, it is critical that Q provide input on ATF's proposed determinations before any final decision.

* * * * *

Q trusts that its decision to “[c]ease an desist all manufacture and transfer of the ‘Honey Badger Pistol’ firearm” and its decision to “[p]rovide a sample of the Sugar Weasel and Mini Fix firearms to ATF for an official classification” have resolved the Division's concerns.

In addition, Q looks forward to working with the Division to develop an acceptable “plan for addressing those firearms already distributed” along the lines proposed above. With that said, in the event of any disagreements, Q expects to raise any areas of uncertainty with leadership at the Department of Justice. Q also reserves its rights to challenge any unfavorable decision.

Respectfully,

/s/ Megan L. Brown

Megan L. Brown

cc: Office of the Deputy Attorney General
John Moran
Chief of Staff

Office of the Deputy Attorney General
John Higgins
Associate Deputy Attorney General

ATF
Marvin Richardson
Deputy Director

ATTACHMENT A

SAMPLE ATF CLASSIFICATION LETTERS

- Letter from John R. Spencer, Chief, Firearms Technology Industry Services Branch, to Alex Bosco (Nov. 26, 2012) (ATF No. 3311/2013-0172)
- Letter from Max Kingery, Acting Chief, Firearms Technology Industry Services Branch, to Eric Lemoine (Oct. 28, 2014) (ATF No. 3311/302492)
- Letter from George Rogers, Acting Chief, Firearms Technology Industry Services Branch, to Ulrich Wiegand (Mar. 25, 2015) (ATF No. 3311/302972)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Michael Faucette (Dec. 22, 2015) (ATF No. 3311/304296)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Paul Reavis (Oct. 3, 2016) (ATF No. 3311/304679)
- Letter from Michel R. Curtis, Chief, Firearms Technology Industry Services Branch, to Paul Reavis (Jan. 18, 2017) (ATF No. 3311/304511)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Robert Weir (Aug. 22, 2017) (ATF No. 3311/307313)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Andrew Barnes (July 24, 2018) (ATF No. 3311/308618)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Cody Cramer (Apr. 24, 2017) (ATF No. 3311/304587)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Garrett Keller (Sept. 13, 2017) (ATF No. 3311/306179)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Rick Vasquez (Oct. 31, 2017) (ATF No. 3311/306285)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Martin Ewer (Oct. 31, 2017) (ATF No. 3311/307364)
- Letter from Michael R. Curtis, Chief, Firearms Technology Industry Services Branch, to Garrett Keller (Nov. 21, 2017) (ATF No. 3311/307479)