



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

**SEP 24 2018**

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Thomas E. Brandon, Acting Director for the Alcohol, Tobacco, Firearms and Explosives Bureau of the Department of Justice, before the Senate Judiciary Committee on December 6, 2017, at a hearing entitled "Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System (NICS)." We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we can be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in cursive script that reads "Prim Escalona".

Prim F. Escalona

Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Dianne Feinstein  
Ranking Minority Member

**Questions for the Record**  
**Bureau of Alcohol, Tobacco, Firearms and Explosives**  
**Before the Senate Committee on the Judiciary**  
**For a Hearing Entitled**  
**“Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National**  
**Instant Criminal Background Check System (NICS)”**  
**December 6, 2017**

**Questions Posed by Senator Durbin**

- 1) **Director Brandon, from a law enforcement perspective, does the broad and unregulated availability of bump stocks increase the risk of harm to civilians and to law enforcement officers?**

**Response:** Bump stock devices accelerate the rate of fire of a semiautomatic firearm, in some cases permitting a rate of fire comparable to a fully automatic machine gun. As such, these devices, if misused, pose a risk similar to fully automatic weapons to both civilians and law enforcement. The tragic mass shooting in Las Vegas demonstrates the harm that can result from the criminal use of these devices.

- 2) **It is my understanding that when ATF has attempted to use its regulatory authority to deem certain firearms or devices as subject to ATF regulation, members of the gun industry have often responded by filing lawsuits or by urging Congress to include appropriations riders that constrain ATF’s regulatory authority. Are you aware of any examples of this? If so please elaborate.**

**Response:** Like all agency actions, Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF) regulatory decisions, including how firearms or devices are classified under the law and regulations, have been challenged in court by plaintiffs who are participants in the regulated industry. Examples of such cases include *Sig Sauer v. Brandon*, 826 F.3d 598 (1<sup>st</sup> Cir. 2016), and *Modern Muzzleloading v. Magaw*, 18 F. Supp. 2d 29 (D.D.C. 1998).

Appropriations language has imposed a number of restrictions on ATF’s regulatory authority. A few examples include riders that prohibit ATF from using appropriated funds to:

- Require a physical inventory of firearms held by a Federal firearms licensee (FFL);
- Consolidate or centralize FFL firearm acquisition or disposition information;
- Electronically retrieve FFL out of business record information by name or personal identification code; and
- Change the definition of “curios or relics” in 27 C.F.R. 478.11.

- 3) **If a police officer pulls over a driver who is carrying a concealed weapon on his person and the driver presents an out-of-state concealed carry permit, is there any national database that the police officer can currently use to check to see if the driver's out-of-state permit is valid?**

**Response:** ATF is prohibited by law from consolidating or centralizing FFL record information, and does not maintain such a national database. ATF is not aware of whether any other law enforcement agency may maintain or use such a national database.

- 4) **Will you commit to let the Chicago Police Department fully utilize the NIBIN National Correlation and Training Center in Huntsville, Alabama, without any further delay?**

**Response:** Expanding the capacity of the National Integrated Ballistic Information Network (NIBIN) National Correlation and Training Center (NNCTC) to allow it to provide services to the Chicago Police Department (PD) and other law enforcement agencies currently on a waiting list is a top priority for ATF. The NNCTC currently provides ballistic image correlations for 27 NIBIN sites across the country. This represents the limit of the NNCTC's capacity at its current staffing level. ATF re-allocated existing resources in Fiscal Year (FY) 16 and 17 to achieve and maintain effective performance at this level. In FY18, Congress fully funded ATF's proposed expansion of the NNCTC. This will allow ATF to acquire suitable space to house support staff who will perform NIBIN correlations and provide necessary training to state and local law enforcement. In FY17-18, ATF deployed the NIBIN van to the Chicago PD, which made gun crime correlation entries and processed information through NNCTC. The Administration's proposed FY19 budget for ATF includes funding for a second phase expansion of the NNCTC. This planned expansion in FY19, contingent on the level of funding Congress appropriates, may allow ATF to provide NNCTC services to the Chicago PD and other agencies on the waiting list.



### Questions Posed by Senator Feinstein

- 5) **Director Brandon, the ATF has stated in the past – multiple times – that it cannot regulate bump stocks used in the Las Vegas shooting under current law.**

**What role did the ATF play, in connection with the Justice Department, to initiate the process of promulgating a federal regulation of bump stock devices under the National Firearms Act and Gun Control Act?**

**Response:** ATF is the federal agency primarily responsible for enforcing the regulatory provisions of the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). In the past, ATF has issued classification letters with respect to certain bump stock type devices in which it concluded that those devices were accessories that were not subject to regulation under the NFA or GCA. In the aftermath of the Las Vegas tragedy, ATF received numerous requests from Members of Congress and the general public requesting that it re-examine its past classifications of bump stock devices to determine whether the types of bump stock devices currently on the market could be classified as machineguns under the NFA or GCA.

Responding to these requests required ATF to determine whether a permissible interpretation of the definition of “machinegun” under GCA and NFA could extend to include bump stock devices. After consultation with the Department of Justice, ATF determined that such an interpretation was permissible and began the process of promulgating a federal regulation interpreting the definition of “machinegun” through the publication of an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register on December 26, 2017.

On March 23, 2018, the Attorney General approved a Notice of Proposed Rulemaking (NPRM) with regard to bump stock type devices. On March 29, 2018, the NPRM was officially published in the Federal Register for a 90-day public comment period. The public comment period closed at midnight on June 27, 2018. ATF is reviewing those comments as part of the process required by the Administrative Procedure Act.

- 6) **Who at the ATF participated in this decision? What was each person’s exact role in this decision making?**

**Response:** All members of the ATF executive staff, including the Deputy Director, participated in the decision. ATF also worked closely with the Department of Justice.

- 7) **Who at the Justice Department participated in this decision? What was each person’s exact role in this decision making?**

**Response:** ATF worked closely with multiple components of the Department of Justice in the review of whether the National Firearms Act, the Gun Control Act, and interpretative case law provide a basis for promulgation of a regulation applicable to

bump stock devices. As a result of this review, ATF decided to initiate the rulemaking process.

- 8) **Do you have any concern that any forthcoming administrative decision regarding regulating bump stocks under current law would be deemed “arbitrary and capricious,” given past court decisions and the ATF private letter rulings and other decisions? Please explain.**

**Response:** The purpose of the rulemaking process is to allow ATF to consider additional information relevant to the agency’s determination and to clarify whether certain bump stock devices fall within the definition of “machinegun” as set forth in the NFA and GCA. The ability of ATF to defend any forthcoming rulemaking against legal challenges will depend, in part, on ensuring that it is supported by a thorough administrative record. Starting the rulemaking process with an Advance Notice of Proposed Rulemaking allows ATF to collect information that should inform and support whatever decisions are made at the conclusion of the process. ATF will also consider comments submitted to the NRPM before promulgating a final rule.

- 9) **How long do you anticipate this entire process of rulemaking will take?**

**Response:** ATF published an Advance Notice of Proposed Rulemaking (ANPRM) regarding bump stock devices on December 26, 2017, with public comments due by January 25, 2018; the ANPRM is an initial step in the regulatory process that precedes issuance of a Notice of Proposed Rulemaking (NPRM). On March 10, 2018, the Department of Justice announced that it had submitted an NPRM regarding bump stocks to the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) for review under Executive Order 12866. After conclusion of the OIRA review, the Attorney General approved the NPRM on March 23, 2018, and it was published in the Federal Register on March 29, 2018, for a 90-day comment period. The comment period closed at midnight on June 27, 2018. Before determining the content of any final rule, ATF will thoroughly assess comments received during the comment period. Any final rule will also be subject to OIRA review prior to publication. ATF recognizes the important public safety concerns at issue with respect to regulation of bump stock devices. Consistent with President Trump’s February 20, 2018 Presidential Memorandum, ATF intends to complete the process in the fastest possible timeframe consistent with the Administrative Procedures Act.

- 10) **Do you expect that if the ATF regulates bump stocks through regulation that such actions would be subject to court challenge? How long do those types of administrative challenges take – from the point of the legal challenge to ultimate resolution?**

**Response:** The ability of ATF to defend any forthcoming rulemaking against legal challenges will depend, in part, on making sure that it is supported by a thorough



administrative record. That record will include, *inter alia*, comments received in response to the NPRM.

Resolution of challenges to agency rulemaking can be lengthy, in many cases taking several years. The time required for resolution depends on variables that are not easily predicted at this time, including the complexity of the legal issues, the number of persons bringing legal challenges, whether preliminary relief is requested, and the extent to which cases proceed to review beyond the district court level.

**11) How would you characterize the litigation risk for the ATF if it determines that bump stocks are indeed able to be regulated under the Gun Control Act and/or the National Firearms Act?**

**Response:** As with any rulemaking, ATF could face challenges on a number of grounds under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* ATF cannot assess or predict litigation risks at this time.

**12) Would legislation passed by Congress – separate from the Gun Control Act and the National Firearms Act – give the ATF clear authority to ban or regulate bump stocks?**

**Response:** Congress has the authority to provide ATF authority separate from the Gun Control Act and National Firearms Act to ban or regulate bump stocks. ATF will continue to work to enforce existing law and will enforce any changes to the law that may occur on this topic.

**13) When the ATF is given information that a prohibited person has failed a background check and has likely lied on the background check form (Form 4473), what is the process, if any, by which the FBI and/or the ATF alerts local law enforcement? Please describe it in detail.**

**Response:** ATF does not currently have a policy or mandate to alert local law enforcement when a NICS denial (failed background check) occurs in the local law enforcement agency's area of responsibility. However, in the course of investigating NICS denials, ATF offices and agents regularly contact local law enforcement. Regarding delayed denials (cases where NICS was not able to resolve a background check within the statutory three-day period, the transaction was allowed to take place, and subsequently NICS determined that the individual is a prohibited person), ATF will often seek local law enforcement assistance in locating the individual, contacting the individual, and in retrieving or disposing of the firearm in question when lawfully applicable. The FBI routinely enters NICS denials into the National Crime Information Center (NCIC), which is available to state and local law enforcement. The FBI can provide additional information about their processes.

In instances where the United States Attorney's Office declines to prosecute NICS denial cases that ATF has investigated, ATF may refer the case to local, State or District Attorney's Offices for prosecution on applicable State charges (these cases generally involve multiple denials on attempted purchases). Under these circumstances, the ATF office will refer the NICS denial information to local law enforcement, to assist them in filing applicable local charges.

**14) What are some of the policy riders that limit the ATF's ability to do its job effectively to regulate what it needs to regulate and keep guns out of the hands of dangerous persons?**

**Response:** ATF is subject to several specific restrictions on its use of appropriated funds. Some of these restrictions impose limits on ATF's regulatory authority. A few examples include riders that prohibit ATF from using appropriated funds to:

- Require a physical inventory of firearms held by a Federal Firearms Licensee (FFL);
- Consolidate or centralize FFL firearm acquisition or disposition information;
- Electronically retrieve FFL out of business record information by name or personal identification code; and
- Change the definition of "curios or relics" in 27 C.F.R. 478.11.

Notwithstanding these limits, however, ATF exercises its existing legal authority to carry out its mission, including by regulating firearms consistent with its statutory mandates.

**15) How do these policy riders specifically limit the ATF's ability to enforce our nation's gun laws? Please give detailed examples.**

**Response:** ATF is subject to several specific restrictions on its use of appropriated funds. Some of these restrictions impose limits on ATF's regulatory authority. For example, ATF is prohibited from rulemaking to require FFLs to conduct annual inventories. When FFLs conduct annual inventories of their firearms and reconcile those inventories with ATF's acquisition and disposition records, the number of missing firearms diminish, which enhances ATF's ability to investigate firearms trafficking, and streamlines the inspection process. This would in turn allow ATF to conduct inspections more quickly and undertake additional inspections with the same resources. Notwithstanding these limits, however, ATF exercises its existing lawful authority to carry out its mission, including by regulating firearms consistent with its statutory mandates.

**16) Many domestic violence abusers who have been convicted of a misdemeanor crime of domestic violence or who are subject to a protection order are able to stockpile an arsenal of firearms and ammunition despite being prohibited from possessing firearms or ammunition under federal firearms law.**



**Are there changes in the law that would assist law enforcement efforts to prevent the stockpiling of firearms by prohibited persons?**

**Response:** The Gun Control Act prohibits the sale and possession of firearms to such prohibited persons. ATF will continue to work to enforce existing law, and will enforce any changes to the law passed by Congress.

**17) How will the ATF improve its response to cases like these, which are so likely to lead to homicides?**

**Response:** ATF will continue to work with State and local law enforcement in ensuring that prohibited persons do not acquire or possess firearms and ammunition. ATF will also continue to educate those who are engaged in the business of the sale of firearms and ammunition of their responsibilities under the law.

**18) What kind of resources will you pledge to devote to make sure that guns are not as accessible to prohibited domestic abusers who pose a dangerous risk to those around them?**

**Response:** All twenty-five ATF Crime Gun Intelligence Centers monitor intelligence to prevent prohibited individuals from obtaining firearms. ATF works with State and local law enforcement to ensure that prohibited persons do not acquire or possess firearms and ammunition. ATF will also continue to educate those who are engaged in the business of the sale of firearms and ammunition of their responsibilities under the law.

**19) What commitment can you make to have more ATF agents and ATF victim assistants trained and ready to respond to dangerous situations like this?**

**Response:** Trainees at the ATF National Academy receive training in a variety of scenarios they are likely to encounter on the job. ATF is committed to preserving and improving on that training as necessary. ATF is currently working to recruit and train additional victim witness coordinators to supplement the existing cadre who are already trained and ready to respond.

**20) Last year, the ATF released new guidance outlining how and when a gun seller is “engaging in the business” of dealing firearms—and must therefore get a federal license and run background checks on all buyers. The ATF committed to a more robust enforcement of dealers who illegally engage in the business without a license.**

**What has the ATF done to fulfill this commitment since last year? Please share any tangible statistics or anecdotes indicating an increase in investigations.**



**Response:** ATF industry operations investigators (IOIs) participated in 96 gun shows in FY17 to provide guidance on what firearm-related activities require a FFL. During the 96 gun shows, 1,379 copies of ATF publication 5310.2, *Do I Need a License to Buy and Sell Firearms?*, were distributed.

ATF IOIs generated 134 referrals to ATF special agents for unlicensed business operations in FY17. In total, ATF received 458 referrals of information, from internal and external sources, regarding persons engaged in the business without an FFL in FY17. These referrals resulted in twenty-five arrests, the issuance of 182 “cease and desist” letters entitled “Warning Notice of Unlicensed Firearms Dealing in Violation of Federal Law,” and 80 ongoing criminal investigations of individuals or groups dealing in firearms without a license.

**21) How has the ATF changed its approach in order to fulfill this commitment? Has there been an uptick in arrests made for the “engaging in the business” charge?**

**Response:** ATF currently utilizes a variety of strategies to identify persons engaged in the business without an FFL. For example, ATF’s Internet Investigations Center conducts criminal investigations utilizing the internet and social media to identify those individuals who are possibly engaging in the business. ATF has also increased its participation at gun shows to better educate the public about how the Gun Control Act defines engaged in the business and provide ATF Publication 5310.2, *Do I Need a License to Buy and Sell Firearms?*, to attendees. ATF also works with the firearms industry to identify persons potentially engaged in the business without a license.

When appropriate, ATF issues a Warning Notice of Unlicensed Firearms Dealing in Violation of Federal Law letter accompanied with ATF Form 7, Application for Firearms License, to individuals identified through intelligence information of being engaged in the business without a license.

In FY17, ATF arrested 159 people for unlawfully dealing, manufacturing, and/or importing firearms without a license. This is a slight reduction from FY16, where ATF arrested 172 people for the same offense; however, ATF also enhanced pro-active, pre-prosecution enforcement and education initiatives, issuing 182 “cease and desist” letters entitled “Warning Notice of Unlicensed Firearms Dealing in Violation of Federal Law” in FY17. Finally, ATF is engaged in approximately 80 ongoing criminal investigations of individuals or groups dealing in firearms without a license.

### Questions Posed by Senator Klobuchar

- 22) At last week's hearing, I listened to Senator Cortez Masto's testimony on the tragic shooting that took place in her state in October, the largest in our country's history, as well her comments on "bump stock" devices. At least a dozen of the Las Vegas shooter's weapons were outfitted with these devices. I have cosponsored Senator Feinstein's bill to close the loophole that allows this type of device to convert semi-automatic firearms into weapons that work like fully automatic guns, which are already banned for civilian use.

**Can you expand on why bump stock devices – which can exponentially increase a weapon's firing ability – are so dangerous?**

**Response:** Bump stock devices accelerate the rate of fire of a semiautomatic firearm, in some cases permitting a rate of fire comparable to a fully automatic machine gun. As such, these devices, if misused, pose a risk similar to fully automatic weapons to both civilians and law enforcement. The tragic mass shooting in Las Vegas demonstrates the harm that can result from the criminal use of these devices.

- 23) On December 5, ATF announced that it will conduct a rulemaking to clarify whether bump stock devices can be regulated under current law. How did ATF decide to initiate this rulemaking?

**Response:** ATF worked closely with the Department of Justice in the review of whether the National Firearms Act, the Gun Control Act, and interpretative case law provide a basis for promulgation of a regulation applicable to bump stock devices. As a result of this review, ATF decided to initiate the rulemaking process.



### Questions Posed by Senator Leahy

- 24) There are some in the House of Representatives who would like to require that the ATF process requests for individual relief from firearm disabilities. What that means is they want the ATF to devote its scarce investigative resources toward conducting background investigations of felons to determine whether their firearms rights should be restored. I understand that each of these investigations take between 40-100 agent work hours, and there are hundreds of thousands who could request relief.

I am the Vice-Chairman of the Appropriations Committee. I certainly understand the ATF is operating on an extremely tight budget. If the ATF had to conduct a detailed background check for any eligible felon who wants to purchase a firearm, what would be the impact on the ATF?

Response: ATF investigative efforts target the most violent, often repeat, offenders. If the appropriations restriction prohibiting ATF from processing firearm disability relief applications from individuals was lifted, and ATF resumed processing such applicants, it would either have to divert resources from its core investigative focus on violent offenders or would require additional resources.

- 25) A lot of individuals who sell firearms on the gun show circuit or online look an awful lot like they are in the business of selling firearms. In early 2016, President Obama rightly called attention to the "engaged in the business" rule in an attempt to coax more individuals who regularly sell firearms to get a license, and thus conduct background checks on prospective buyers.

What I want to know is: What is the ATF doing right now to ensure that individuals who regularly sell firearms online, at gun shows, or elsewhere, are not abusing this private sale loophole?

Response: ATF has taken several measures in an attempt to diminish the potential of abuse you refer to, and to educate those who may be in violation of the current law. ATF special agents and industry operations investigators (IOIs) work jointly to identify and verify information identifying potential individuals who may be engaging in the business without a license. Special agents are responsible for issuing Cease and Desist letters and Warning Letters to private individuals whose firearms sales may suggest that they are illegally "engaging in the business." IOIs provide ATF representation at gun shows and distribute information defining "engaging in the business," to sellers and purchasers. IOIs also educate the firearms industry, Federal, State, and local law enforcement partners, and the general public. IOIs further provide information through seminars to Federal firearms licensee (FFLs) that helps to identify those individuals potentially engaging in the business, and many of the leads that ATF receives regarding potential individuals engaging in the business are from current FFLs. Further, the ATF Internet

Investigations Center conducts criminal investigations utilizing the internet and social media to identify individuals who are possibly engaging in the business.



### Questions Posed by Senator Tillis

- 26) According to the U.S. Department of Justice Office of Inspector General, beginning in 2003, the number of individuals prosecuted following a National Instant Criminal Background Check System (“NICS”) denial began to decrease dramatically. From 2008 to 2015, the number dropped to an average of 32 prosecutions per year. Similarly, according to the same report, cases referred by ATF that were accepted by U.S. Attorneys for consideration of prosecution also decreased. US Attorney’s Offices accepted 80 percent of ATF field division referrals for consideration in 2002 and 2003, 60 percent in FY 2008, and 38 percent in FY 2013.**

**What caused the drop in prosecutions and acceptance of referrals?**

**Response:** Federal prosecution decisions are rightly made by the United States Attorney’s Office, and we cannot speak on their behalf. However, ATF’s investigative priorities have historically focused on prohibited persons who actually acquired a firearm, rather than those who tried but failed. That said, we recognize that there are NICS standard denial cases that warrant prosecution, and the Attorney General’s March 12, 2018 directive to the United States Attorneys makes that clear. ATF is committed to working with the United States Attorneys to identify appropriate NICS denial cases for prosecution.

- 27) Can you report what the current (or the most available) statistics are regarding the number of individuals prosecuted following a NICS denial?**

**Response:** Between FY12 and FY17, 159 individuals were prosecuted for NICS delayed denials and 79 were prosecuted for NICS standard denials.

- 28) Can you report what the current (or the most available) statistics are regarding the percentage of ATF referrals for consideration accepted by the US Attorney’s Offices?**

**Response:** Between FY12 and FY17, the United States Attorney’s Offices accepted 60 percent of ATF referrals for NICS delayed denials and accepted 72 percent of ATF referrals for NICS/Brady standard denials. Pursuant to the Attorney General’s March 12, 2018 memorandum on enhancing prosecution of NICS denial cases, ATF is working with each United States Attorney’s Office to determine what types of cases should be referred for prosecution, so that this process is both efficient and effective at identifying appropriate cases for prosecution.