

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INNOVATOR ENTERPRISES, INC.,)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 13-0581 (JDB)
)	
B. TODD JONES, ACTING DIRECTOR,)	
BUREAU OF ALCOHOL, TOBACCO,)	
FIREARMS AND EXPLOSIVES,)	
)	
Defendant)	

DEFENDANT’S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant, B. Todd Jones, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF” or “Agency”), by and through undersigned counsel, respectfully moves the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff’s Complaint on the grounds that Plaintiff failed to state a claim upon which relief can be granted. In the alternative, Defendant moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in Defendant’s favor.

In support of this motion, Defendant respectfully submits the attached Memorandum of Points and Authorities. A proposed Order consistent with this motion is attached hereto.

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
D.C. Bar #447889

DANIEL F. VANHORN
Chief, Civil Division
D.C. Bar #924092

By: /s/ Marian L. Borum
MARIAN L. BORUM
Assistant United States Attorney
D.C. Bar #435409
555 Fourth Street, N.W.
Washington, DC 20530
(202) 514-6531 (office)
(202) 514-8780 (facsimile)
Marian.L.Borum@usdoj.gov

Of Counsel:

Mark A. Vetter
Senior Attorney
Office of Chief Counsel (Litigation)
Bureau of Alcohol, Tobacco, Firearms & Explosives
United States Department of Justice

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Defendant)	
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**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff filed this civil action for judicial review pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, and for declaratory judgment, pursuant to 28 U.S.C. § 2201(a). *See* Complaint, ¶ 1. Plaintiff alleges that Defendant, through the actions of the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), Firearms Technology Branch (“FTB”), improperly determined that Plaintiff’s “Stabilizer Brake” was a firearm silencer. *Id.* at ¶ 23. Plaintiff seeks declaratory judgment that the “Stabilizer Brake” is not a firearm silencer or muffler, and that FTB’s determination was arbitrary and capricious. *Id.* at ¶ 5.

II. STATEMENT OF RELEVANT FACTS

Plaintiff is a corporation established under the laws of Nevada, “which develops new technologies.” *Id.* at ¶ 4. Plaintiff submitted a prototype of its “Stabilizer Brake” to FTB on or about August 2, 2012, to determine if the device was a silencer within the meaning of 18 U.S.C.

§ 921(a)(24).¹ Id. at ¶ 9. See Administrative Record (“AR”): 1-13. Plaintiff described the purpose of the Stabilizer Brake as an attachment to the muzzle of a firearm barrel which would reduce the recoil and the muzzle rise of the firearm. Plaintiff also stated that the Stabilizer Brake redirected the amount of noise from the firearm’s report away from the shooter, thus dampening the noise from the shooter’s perspective, but increasing the noise from the target’s perspective.

FTB evaluated the prototype submitted by Plaintiff. By correspondence dated September 14, 2012, FTB informed Plaintiff that it had conducted its evaluation and determined that the prototype was a silencer within the meaning of § 921(a)(24).² See AR: 14-17. FTB classifies silencers based upon the physical characteristics of the submitted device by comparing it against known silencer devices. FTB noted in its correspondence that Plaintiff’s stabilizer incorporated an expansion chamber, a ported inner tube, and an end cap, all of which are consistent with known silencers. FTB also has sound-monitoring equipment that it can use to demonstrate the *effectiveness* of a silencer; however, sound tests are not used to *classify* a silencer as such. In Plaintiff’s case, FTB based its classification of the device as a silencer based solely upon its physical characteristics and did not use the sound-monitoring equipment to test the device’s effectiveness at sound reduction and/or redirection.

III. LEGAL STANDARDS

A. Motion to Dismiss

In a motion to dismiss, under Fed. R. Civ. P. 12(b)(6), the court looks to whether the complaint, with the facts accepted as true, “state[s] a claim that is plausible on its face.” Bell

¹ In paragraph 9 of the Complaint, Plaintiff indicated that a copy of the letter was attached. See Complaint, ¶ 9. No copy was included with the electronic filing with the Court. Therefore, Defendant has attached, to this motion, a copy of the letter FTB received from Plaintiff. AR: 1-2.

² In paragraph 10 of the Complaint, Plaintiff indicated that a copy of the letter was attached. See Complaint, ¶ 10. No copy was included with the electronic filing with the Court. Therefore, Defendant has attached, to this motion, a copy of the letter FTB sent to Plaintiff. AR: 14-15.

Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (abrogating prior standard which required the moving party to show that plaintiff can prove no set of facts in support of its claim which would entitle it to relief); see Aktieselskabet v. Fame Jeans, Inc., 525 F.3d 8 (D.C. Cir. 2008). See also, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (applying Twombly to all civil cases). Although a plaintiff only needs to set out sufficient details to make out a claim to proceed past the pleading stage, it is also “possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.” Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1116 (D.C. Cir. 2000). Furthermore, the Court does not need to accept legal conclusions couched as factual allegations. See Bostic v. U.S. Capitol Police, 644 F. Supp. 2d 106, 109 (D.D.C. 2009) (quoting Trudeau v. Fed. Trade Comm’n, 456 F.3d 178, 193 (D.C. Cir. 2006)).

As a general rule, on a Rule 12(b)(6) motion, the Court must limit its review to the facts contained within the four corners of the Complaint. See Fed. R. Civ. P 12(d) (requiring the Court to convert a 12(b)(6) motion to one under Rule 56 for summary judgment if outside matters are considered); Hinton v. Corr. Corp. of Am., 624 F. Supp. 2d 45, 46 (D.D.C. 2009) (same). In evaluating the sufficiency of the complaint, the Court considers only “the facts alleged in the complaint, any documents either attached to or incorporated in the complaint, and matters of which [the Court] may take judicial notice.” See EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). However, matters are not considered “outside” the pleadings if the plaintiff attaches the matters as an exhibit or incorporates them by reference in the complaint. Hinton, 624 F. Supp. 2d at 46 (citing Gustave-Schmidt v. Chao, 226 F. Supp. 2d 191, 196 (D.D.C. 2002), Matters considered not “outside” the pleadings also include documents “upon which the plaintiff’s complaint necessarily relies” even if the document is

produced not by the plaintiff in the complaint, but by the defendant in a motion to dismiss. Id. (citing Cortec Indust., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir.1991) (add'l citation omitted)).³

B. Motions for Summary Judgment

Where there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,” summary judgment is required by Rule 56(a) of the Federal Rules of Civil Procedure. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (interpreting Rule 56(c), the prior version of Rule 56(a)); Gaujacq v. EDF, Inc., 601 F.3d 565, 575 (D.C. Cir. 2010). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson, 477 U.S. at 248. “By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Id. at 247-248 (emphasis in original).

“The burden on the moving party may be discharged by ‘showing’ -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party’s case.” Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must make a sufficient showing on an essential element of his case to establish a genuine dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See Matsushita Elec. Indus. Co. v. Zenith

³ As such, in this motion to dismiss, the Court may consider AR:1-13 and AR: 14-17 which were referred to in Plaintiff’s Complaint and, apparently, were intended to be attached to the filing. Marshall v. Honeywell Tech. Solutions, Inc., 536 F. Supp. 2d 59, 65 (D.D.C. 2008) (“[W]here a document is referred to in the complaint and is central to the plaintiff’s claim, such a document attached to the motion papers may be considered without converting the motion [to dismiss] to one for summary judgment.”) (internal quotation and citation omitted).

Radio Corp., 475 U.S. 574, 586 (1986); Burke v. Gould, 286 F.3d 513, 517-20 (D.C. Cir. 2002) (requiring a showing of specific, material facts). “[T]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Anderson, 477 U.S. at 252. See Carney v. Am. Univ., 151 F.3d 1090, 1093 (D.C. Cir. 1998) (the burden of persuasion always remains with the plaintiff, who in opposing a motion for summary judgment has the burden of pointing to some “affirmative evidence” establishing a factual dispute); see also Laningham v. Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (the non-moving party is “required to provide evidence that would permit a reasonable jury to find” in its favor). The “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

When a party seeks review of agency action under the Administrative Procedure Act (“APA”) “[t]he entire case on review is a question of law, and only a question of law,” and can be resolved on the administrative record in the context of a motion for summary judgment. Marshall Cnty Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); see Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001); Univ. Med. Ctr. v. Shalala, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999). In such record review cases, the district court generally does not resolve factual issues or duplicate agency fact-finding efforts, but instead functions as an appellate court addressing a legal issue. James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996). Sierra Club v. Mainella, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (citing Richards v. INS, 554 F.2d 1173, 1177 n. 28 (D.C. Cir. 1977) (rejecting argument that summary judgment was improper due to issue of material fact because the matter

involved review of an administrative decision)). For this reason, the normal standard of review for a summary judgment motion, which requires a district court to decide whether there is any “genuine issue of material fact,” see Fed. R. Civ. P. 56(a), does not apply. See Se Conference v. Vilsack, 684 F.Supp.2d 135, 142 (D.D.C. 2010); Calloway v. Harvey, 590 F. Supp. 2d 29, 35 (D.D.C. 2008) (quoting Sierra Club, 459 F. Supp. 2d at 89-90) (The standard set forth in Rule 56 does not apply “because of the limited role of a court in reviewing the administrative record.”); see Local Civil Rule 7(h)(2) (statement of undisputed material facts not required for cases “in which judicial review is based solely on the administrative record”). To the contrary, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” Camp v. Pitts, 411 U.S. 138, 142 (1973).

Summary judgment, therefore, is the mechanism through which the Court decides whether as a matter of law the agency action under review is supported by the administrative record and is otherwise consistent with the APA standard of review. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.”). “Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas ‘the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.’” Sierra Club, 459 F. Supp. 2d at 90 (quoting Occidental Eng’g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir.1985)).

IV. ARGUMENT

A. Plaintiff Has Admitted That the “Stabilizer Brake” Was Designed “for” the Reduction of Sound.

Congress delegated to the Attorney General the responsibility of administering the provisions of the Gun Control Act. In addition, Congress gave the Attorney General the specific responsibility of licensing and regulating the firearms industry. See e.g., 18 U.S.C. § 923(a) (requiring the Attorney General to issue firearms licenses to qualified applicants). Pursuant to 28 U.S.C. § 599A, Congress established the ATF within the Department of Justice and gave it responsibility to investigate firearms violations.

The National Firearms Act (“NFA”), (Chapter 53, Title 26 of the United States Code), imposes a registration requirement and a tax upon the manufacture and transfer of firearms. Furthermore, the Gun Control Act of 1968 (“GCA”), (Chapter 44, Title 18 of the United States Code), criminalizes the illegal manufacture, transfer, and possession of firearms. Title 18, United States Code, Section 921 (a)(3)(C), defines a firearm as:

. . . (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.

18 U.S.C. § 921(a)(3)(C) (emphasis added). Pursuant to 18 U.S.C. § 921(a)(24), “[t]he terms ‘firearm silencer’ and ‘firearm muffler’ mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.”. The NFA incorporates the GCA definition by reference and states, in 26 U.S.C. § 5845(a)(7), in relevant part, that

[t]he term “firearm” means . . . (7) any silencer (as defined in [section 921 of Title 18, United States Code](#))

26 U.S.C. § 5845(a)(7).⁴ Within ATF, the Firearms Technology Branch determines what is or is not a “firearm” under the NFA and GCA.

In its Complaint, Plaintiff states that it “designed and built a device [called] a ‘Stabilizer Brake’ which attaches to the muzzle of a rifle and . . . substantially reduces recoil, reduces muzzle rise, and redirects noise away from the shooter.” Complaint, ¶8. Plaintiff claims that the FTB was incorrect when it determined that:

the ‘Stabilizer Brake’ was a firearm muffler or firearm silencer within the meaning of 18 U.S.C. § 921(a)(24) solely because it ‘incorporates an expansion chamber, a ported inner tube, and an end cap, which are characteristics of known firearm silencers.

Id. at ¶10. Plaintiff argues that “[t]he ‘Stabilizer Brake’ does not reduce total sound, but increases sound at the front of the rifle and decreases sound at that shooter’s position.” Id. at ¶8.

Plaintiff contends that the FTB was in error because it “conducted no test of the ‘Stabilizer Brake’ to determine if it silenced, muffled, or diminished the report of a portable firearm”

Id. at ¶11.

However, the statutory language of the GCA does not provide a certain level of noise reduction that must be achieved to make a determination of whether a device is or is not a silencer. The statute is absent of any absolute/quantitative reference (e.g., a certain decibel reduction) or relative/qualitative reference (e.g., “substantial reduction”). Instead, the language

⁴In whole, 26 U.S.C. § 5845(a)(7) states that:

[t]he 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.

26 U.S.C. § 5845(a)(7) (emphasis added).

of the statute implicitly looks to the purpose of the device: “any device *for* silencing, muffling, or *diminishing* the report of a portable firearm.” 18 U.S.C. § 921(a)(24) (emphasis added).

Based upon the representations of Plaintiff in its Complaint, and as described in its submission to FTB, Plaintiff essentially acknowledges that its “Stabilizer Brake” is a firearms silencer.

More specifically, Plaintiff treats the whole report of the rifle when it fires a bullet as being a defined amount. In the absence of the brake stabilizer device, the sound energy of the report would emit from the rifle in a specific pattern, with some of the sound energy travelling back along the length of the rifle itself and towards the shooter; some sound energy traveling along the same path as the bullet/projectile towards the target; and the remainder of the sound energy traveling perpendicular to the direction of the rifle barrel.

Plaintiff then claims that when the shooter attaches the brake stabilizer device, the overall quantum of sound energy released during the discharge of a bullet does not diminish, but that the brake stabilizer re-directs that sound energy. Specifically, it claims that the device “does not reduce total sound, but increases sound at the front of the rifle and *decreases sound at the shooter’s position.*” Complaint, ¶ 8 (emphasis added). As Plaintiff claims, to maintain the total sound energy at a constant rate, the increase in sound energy in front of the rifle (*i.e.*, from the target’s perspective) must be accompanied by a proportionate diminution of the sound energy in the direction of the shooter. Thus, Plaintiff created this device “for” the purpose of “diminishing” the report of the firearm from the shooter’s perspective. See Complaint, ¶ 8 (Stabilizer Brake “redirects noise away from the shooter.”) Therefore, by Plaintiff’s own admission, the “Stabilizer Brake” falls within the definition of a silencer under the GCA.

In repeated cases, the Supreme Court and the lower courts have made the first (and often last) focus of statutory interpretation to be “the language of the statute.” Barnhart v. Sigmon

Coal Co., 534 U.S. 438, 450 (2002). The Court’s reliance upon the statutory text is not a new concept. In United States v. Public Utilities Comm’n. of Cal., the Court stated that “[w]here the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation.” 345 U.S. 295, 315 (1953). See also Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (“[t]he law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.” (citing Public Util. Comm’n of Cal., 345 U.S. at 319 (Jackson, J., concurring))). Moreover, this Circuit has noted,

the Supreme Court’s frequent reminder that canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others . . . that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete”).

Public Citizen, Inc. v. Rubber Mfrs. Ass’n, 533 F.3d 810, 816 (D.C. Cir. 2008). Therefore, because Plaintiff, admittedly, has created the Stabilizer Brake for the purpose of diminishing the report of the firearm from the shooter’s perspective, the Stabilizer Brake is a firearm silencer within the plain meaning of the language of 18 U.S.C. § 921(a)(24). Hence, Plaintiff’s Complaint should be dismissed.

B. FTB Properly Classified Innovator's Brake Stabilizer as a Silencer.

Even if Plaintiff’s Complaint is not dismissed, Defendant should be granted summary judgment because Plaintiff’s Stabilizer Brake is still a silencer. Under the APA standard of review, a court must only “hold unlawful and set aside agency action, findings, and conclusions” when they are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), in excess of statutory authority, id. § 706(2)(C), or “without observance of procedures required by law,” id. § 706(2)(D). The scope of review is “narrow,”

and “[t]he court is not to substitute its judgment for that of the agency.” Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983).

The arbitrary and capricious standard is “[h]ighly deferential,” and “presumes the validity of agency decisions.” AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000). Deference is especially appropriate in areas that are “complex and highly technical.” Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991); *see, e.g.*, Am. Farm Bureau Fed’n v. EPA, 559 F.3d 512, 519 (D.C. Cir. 2009); Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 233 (D.C. Cir. 2008). It is well settled that when courts review legal challenges to an agency’s interpretation of a statute it administers, they must use the two-part test adopted by the Supreme Court in Chevron, USA, Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842 43 (1984).

Under the first part of the Chevron test, the court must determine whether Congress has directly spoken to the precise question at issue. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Id. Under the second part of the test, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁵ Id. at 843. In reviewing an agency’s interpretation of its authority under a statute it administers, the court will uphold that interpretation as long as it is a reasonable interpretation of the statute. See EPA v. Nat’l Crushed Stone Ass’n, 449 U.S. 64, 83 (1980) (“When construing statutes, we show ‘great deference to the interpretation given the statute by the officers or agency charged with its administration.’”); Vill. of Bergen v. FERC, 33 F.3d 1385, 1389 (D.C. Cir. 1994). An agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation being interpreted.” Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (internal

⁵ “[T]he Court does not simply impose its own construction on the statute” Id. at 843.

quotation and citations omitted). See Vineland Fireworks Co., Inc. v. ATF, 544 F.3d 509, 514 (3d Cir. 2008) (deferring to ATF’s interpretation of a willful violation of the explosives statutes which Congress delegated to ATF authority to administer); Firearms Import/Export Roundtable Trade Group (FAIR) v. Jones, 854 F. Supp. 2d 1, 15 (D.D.C. 2012), aff’d, 498 Fed. Appx. 50 (D.C. Cir. 2013) (applying Chevron to ATF’s interpretation of the GCA and finding interpretation to meet both prongs of test).

In order to satisfy the APA standard of review, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Motor Vehicle Mfrs Ass’n, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); accord Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006). The administrative record, however, need not include explicit discussion of every factor that is relevant to the agency’s decision so long as the bases for the agency’s policy choices are otherwise clear from the nature and context of the challenged action. See Domtar Maine Corp. v. FERC, 347 F.3d 304, 312 (D.C. Cir. 2003), cert. denied, 541 U.S. 1029 (2004). “While [the court] may not supply a reasoned basis for the agency’s action that the agency itself has not given, [the court should] uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (internal citation omitted). “If the agency’s reasons and policy choices . . . conform to certain minimal standards of rationality . . . the [agency decision] is reasonable and must be upheld.” Olson v. Clinton, 602 F. Supp. 2d 93,100 (D.D.C. 2009) (internal quotations and citations omitted).

i. Under Chevron’s First Analytical Step, the Stabilizer Brake is a Silencer.

Under Chevron’s first analytical step, Plaintiff’s Stabilizer Brake is a silencer. The definition of a silencer under 18 U.S.C. § 921(a)(21) is clear. It is: “[1] any device [2] for [3] silencing, muffling, or diminishing [4] the report [5] of a portable firearm” The language “any device” paints a broad-brush stroke that removes any doubt that Congress intended only a narrow category of devices to fit its definition. When Congress uses the term “any,” it is expansive and is meant to cover “one or some indiscriminately of whatever kind.” Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997), Webster’s Third New International Dictionary, 97 (1976)). Next, Congress used the word “for” to describe the devices, then followed it with the present participles silencing, muffling, and diminishing, which are separated by the disjunctive “or.” A present participle indicates a “present, continuing action[,]” (Am. Gas & Electric Co. v. SEC, 134 F.2d 633, 648 (D.C. Cir. 1941) (Stevens, J., dissenting)), while the disjunctive indicates that each term “should be given separate meanings, unless the context dictates otherwise.” Ass’n of Private Sector Colleges and Univs. v. Duncan, 681 F.3d 427, 451 (D.C. Cir. 2012). While all three terms indicate a reduction in sound, the context suggests that the difference among them is a matter of magnitude or degree. “Silence” is the “absence of any sound or noise;” “muffle” means to “deaden (sound) by wrappings or other means;” and “diminish” means “to make or cause to seem smaller, less, less important, etc.; lessen; reduce.” See www.dictionary.com.⁶ Reading these terms along with the word “for” shows that Congress intended that the purpose of the device was to reduce the sound, but that Congress did not require that abatement of sound to be to any significant or measurable

⁶See also Meriam-Webster.com (muffle: “to wrap or pad with something to deaden the sound[;]” diminish: “to make less or cause to appear less.”)

degree. See United States v. Crooker, 608 F.3d 94, 97 (2d Cir. 2010) (the “ordinary connotation of the word [‘for’] is one of purpose”).

The “report” is the loud noise⁷ caused when the rifle is fired and the firing pin detonates the chemicals within the bullet cartridge, which leads to a rapid expansion of propellant gas that expels the bullet from the rifle. Finally, the rifle itself is a “portable firearm,” which can be carried. Hence, a review of the language makes clear that § 921(a)(24) defines the silencer as essentially any device that has as its purpose the reduction of the sound of the gunshot to a greater or lesser extent. See FAIR, 854 F. Supp. 2d at 16 (“At Chevron step one, the Court examines that plain meaning of the text, ‘looking to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’”) (citing Blackman v. D.C., 456 F.3d 167, 176 (D.C. Cir. 2006); Burns v. Alcala, 420 U.S. 575, 580-81 (1975) (The general rule is that words of a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary.)

Clearly, then, Congress has directly spoken to the precise question at issue, and the Stabilizer Brake falls within the definition of a silencer. Therefore, in accordance with Chevron’s first analytical step, the Court should give effect to the expressed intent of Congress and the Agency should be granted summary judgment. Moreover, because Plaintiff has specifically pled in its Complaint that, from the perspective of the shooter, the Stabilizer Break was designed for the purpose of reducing the gunshot sound, it is properly considered a silencer.

⁷ See www.dictionary.com (report: “a loud noise as from an explosion.”)

ii. Under Chevron’s Second Analytical Step, Innovator’s Stabilizer Brake is a Silencer.

Even if it is determined that Congress has not directly addressed the question at issue, under the second step of the Chevron analysis, FTB’s decision that the Stabilizer Brake is a silencer was based on a permissible construction of the statute. Again, “[a] court must affirm an agency’s decision if a rational basis for the decision is presented, which is based on consideration of the relevant factors” Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981). Upon receipt of the device from Plaintiff, an FTB Firearms Enforcement Officer (“FEO”) photographed and disassembled the device, and analyzed its various component parts. Consistent with FTB’s practices, the component parts were compared to a list of common characteristics of known silencers, and the FEO concluded that the device was a silencer, a conclusion with which the FTB Chief agreed.

When FTB analyzed Plaintiff’s submitted stabilizer brake, as it does with similar submissions, it does not perform the analysis in a vacuum or as a matter of first impression. FTB has seen silencers in the past and has noted characteristic trends among them. These characteristics have been identified based upon ATF’s and FTB’s collective wisdom in the field of silencers, which are located in FTB’s Standard Operating Procedure (SOP) for Evidence Examination of Silencers.⁸ Therefore, FTB has compiled a list of common characteristics of known silencers, to include the following non-exhaustive list:

⁸ Innovator did not submit its Stabilizer Brake for evidence purposes, but rather for classification purposes. See AR: 1. FTB has a Standard Operation Procedure (“SOP”) for the *Examination of Non-Evidentiary Firearms Samples*. See Exhibit 1. But, this SOP does directly address silencers. Therefore, FTB applies the procedural steps of receiving and analyzing a putative silencer under the Non-Evidentiary Firearms Samples SOP, but applies the substantive determinations of what constitutes a silencer from the SOP entitled, *Evidence Examination of Silencers*. See Exhibit 2.

- Ported inner tube(s)
- Expansion chambers
- Baffles or washers which create separate expansion chambers
- Sound-dampening material such as foam, steel wool, and other materials
- End caps
- Encapsulators

As the September 14, 2012 correspondence to Plaintiff noted, FTB also can use sound-monitoring equipment to test a silencer. However, that sound test does not affect a classification; it only shows the effectiveness of a putative silencer device. Because FTB bases its determination on a device's *purpose* and not its *effectiveness*, a sound test is irrelevant. Hence, based upon FTB's analysis of the device submitted by Plaintiff and the comparison of the characteristics of that device to known silencers, FTB properly concluded that Plaintiff's device was a silencer. Therefore, even if the language of 18 U.S.C. § 921(a)(24) were silent or ambiguous with respect to what a silencer is, under the second part of the Chevron test, the Agency's conclusion was based upon a reasonable interpretation of the statute.⁹ See EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. at 83 (great deference should be given to the interpretation of a statute by the Agency charged with its administration).

⁹ This analysis comports with the Court's analysis in United States v. Schrum, 346 F. Supp. 537 (E.D. Va 1972). In Schrum, the court rejected the defendant's assertion that a silencer had to "substantially" reduce the report in order to fit with the NFA's definition. The court noted that "[a]lthough the two silencers in question functioned, they were not particularly effective[.]" noting that, at a demonstration during trial, the sound level was not substantially diminished to the human ear whether the silencer was used or not. Id. at 538-39. Focusing, in part, on the terms "for" and "diminishing" in both Webster's Dictionary and ATF's regulation at the time, the court looked to the purpose of the design and disregarded the effectiveness. Id. at 539.

The relevant regulation at the time was 26 C.F.R. § 179.11, which was re-codified as 27 C.F.R. § 479.11. The definition in this regulation is nearly identical to the language of the current statute, 18 U.S.C. § 921(a)(24).

Therefore, the Agency's interpretation of the statute it administers should be controlling, and summary judgment should be granted in the Agency's favor.¹⁰

V. CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In the alternative, summary judgment should be granted in Defendant's favor as Defendant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
D.C. Bar #447889

DANIEL F. VANHORN
Chief, Civil Division
D.C. Bar #924092

By: /s/ Marian L. Borum
MARIAN L. BORUM
Assistant United States Attorney
D.C. Bar #435409
555 Fourth Street, N.W.
Washington, DC 20530
(202) 514-6531/(202) 614-8780 (fax)
Marian.L.Borum@usdoj.gov

Of Counsel:

Mark A. Vetter
Senior Attorney
Office of Chief Counsel (Litigation)
Bureau of Alcohol, Tobacco, Firearms & Explosives
United States Department of Justice

¹⁰ Plaintiff's request for declaratory relief should be denied as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 31st day of July, 2013, service of the foregoing, and the attached, was made, via the Court's Electronic Mail System and First Class Mail, to Plaintiff's counsel as follows:

Dan M. Peterson
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
dan@danpetersonlaw.com

/s/ Marian L. Borum
MARIAN L. BORUM
Assistant United States Attorney

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INNOVATOR ENTERPRISES, INC.,)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 13-0581 (JDB)
)	
B. TODD JONES, ACTING DIRECTOR,)	
BUREAU OF ALCOHOL, TOBACCO,)	
FIREARMS AND EXPLOSIVES,)	
)	
Defendant)	

ORDER

Upon consideration of Defendant’s Motion to Dismiss, Plaintiff’s Opposition, and the entire record herein, it is this _____ day of _____, 2013,

ORDERED that Defendant's Motion to Dismiss be and is hereby GRANTED; and it is

FURTHER ORDERED that the above-captioned action be and is hereby DISMISSED with prejudice.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INNOVATOR ENTERPRISES, INC.,)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 13-0581 (JDB)
)	
B. TODD JONES, ACTING DIRECTOR,)	
BUREAU OF ALCOHOL, TOBACCO,)	
FIREARMS AND EXPLOSIVES,)	
)	
Defendant)	

ORDER

Upon consideration of Defendant’s Motion for Summary Judgment, Plaintiff’s Opposition, and the entire record herein, it is this _____ day of _____, 2013,

ORDERED that Defendant's Motion be and is hereby GRANTED; and it is

FURTHER ORDERED that the above-captioned action be and is hereby DISMISSED with prejudice.

United States District Judge

Copies to:

Marian L. Borum
Assistant United States Attorney
555 Fourth Street, N.W.
Civil Division
Washington, D.C. 20530

Dan M. Peterson
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030

INNOVATOR ENTERPRISES, INC.,

Plaintiff

v.

**B. TODD JONES, ACTING DIRECTOR
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,**

Defendant

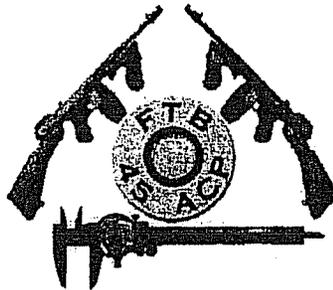
Civil Action No. 13-0581 (JDB)

EXHIBIT 1



**U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives**

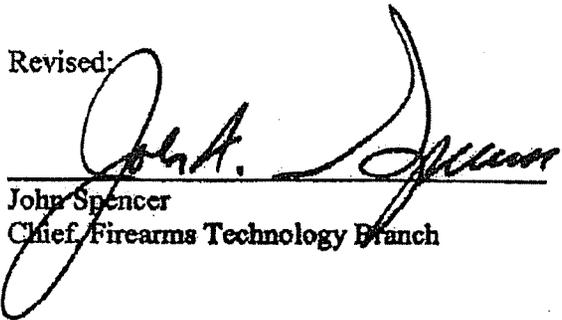
FIREARMS TECHNOLOGY



BRANCH

**Standard Operating Procedures:
Examination of Non-Evidentiary Firearm Samples**

Revised:


John Spencer
Chief, Firearms Technology Branch

8-29-11
Date

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1.0 OBJECTIVE

1.1 Mission

The Firearms Technology Branch (FTB) provides expert technical support to ATF, other Federal agencies, State and local law enforcement, the firearms industry, Congress, and the general public. FTB is responsible for rendering findings regarding the classification of suspected illegal firearms and newly designed firearms. FTB maintains an extensive firearms reference collection, as well as technical firearms reference files, a library, and firearms databases. This Branch is also responsible for the technical evaluation of firearms to determine if they meet the requirements for importation into the United States. Further, FTB provides the U.S. Department of Justice, State prosecutors' offices, District Attorneys' offices, and military courts with expert firearms testimony. This testimony includes the identification and origin of firearms and other matters relating to firearms and the firearms industry.

1.2 Purpose

To establish procedures for the Firearms Enforcement Officers (FEOs) when conducting examinations of non-evidentiary firearm samples submitted to FTB. These firearms are submitted for a variety of reasons to include determining importability into the United States and for classification under the Gun Control Act of 1968 (GCA) or National Firearms Act (NFA). The examination of all non-evidentiary firearm samples will be documented.

A separate Standard Operating Procedures (SOP) has been established for FEOs when conducting silencer examinations. For these procedures, please refer to the FTB Evidence Examination of Silencers SOP.

1.3 Benefit

To promote quality and consistent FTB examinations of non-evidentiary firearm samples.

2.0 RECEIVING THE FIREARM SAMPLE

2.1 Assignment

The Firearms Enforcement Specialist (FES) will provide a color-coded case folder for the firearm sample to the assigned FEO. The sample will remain in the FEO evidence storage area until it is needed for examination.

NOTE: When the FEO takes custody, the FEO is responsible for the condition, location, and storage of the firearm sample.

2.2 Rendering the Firearm Sample Safe

Per the FTB Evidence Handling and Processing SOP, a firearm should be rendered safe by the FES during in-processing. However, each FEO is still responsible for ensuring that the firearm has been rendered safe.

- 2.2.1 The FEO will ensure that a yellow chamber checker flag or zip tie has been placed into the barrel of the firearm to indicate that the weapon has been rendered safe.
- 2.2.2 **If a yellow chamber checker flag or zip tie has not been placed into the barrel of the firearm, the FEO will treat the firearm as loaded until it has been rendered safe:**
 - 2.2.2.1 The FEO will always keep the muzzle pointed in a safe direction and always keep his/her finger(s) off the trigger and outside the trigger guard until the firearm has been rendered safe.
 - 2.2.2.2 If the firearm has a magazine or other source of ammunition, the FEO will remove it if applicable.
 - 2.2.2.3 The FEO will perform an open breech inspection of the chamber, and any other visual or physical inspection deemed necessary, to ensure the firearm is unloaded.
 - 2.2.2.4 If a loaded firearm is submitted to the FTB, the FEO will clear the weapon in the FTB test firing range (refer to the FTB Indoor Firing Range SOP for the proper use and care of the firing range).
 - 2.2.2.5 The FEO will insert a yellow chamber checker flag or a zip tie into the barrel of the firearm to indicate that the firearm has been rendered safe.
 - 2.2.2.6 The FEO will notify the Branch Chief (or Acting Branch Chief) when a loaded firearm is submitted to the FTB.

3.0 FIREARM SAMPLE EXAMINATION

3.1 Initial Examination

- 3.1.1 The FEO will examine all documentation accompanying the firearm sample.
- 3.1.2 The FEO will confirm that the firearm sample is properly identified and documented, and that he/she understands the submitter's request.
 - 3.1.2.1 The FEO may confer with FTB employees to clarify any issues.
 - 3.1.2.2 The FEO may contact the submitter to clarify any issues.

3.1.3 The details in the submitter's request will provide the basis for the examination and the response provided to the requestor. The FEO may address such details as:

3.1.3.1 Is the sample a semiautomatic copy of a machinegun?

3.1.3.2 Is the sample a semiautomatic firearm made from a set of machinegun parts and a new receiver?

3.1.3.3 Was the receiver of the sample made from a destroyed receiver?

3.1.3.4 Is the sample being submitted for an import evaluation?

3.1.3.5 Is the sample based on (or a copy of) another firearm?

3.1.3.6 Is the sample a new firearm design?

3.1.4 The FEO will determine whether the sample is safe for examination. Some examples of unsafe conditions are:

3.1.4.1 Poor construction and assembly.

3.1.4.2 Many receivers welded together from scrapped machinegun receivers. If these welds do not appear to be safe, the firearm sample will not be test fired.

3.1.4.3 Obstructed bore or chamber.

3.1.5 If it is determined that the firearm sample is unsafe to fire, it will not be test fired.

3.1.6 If a firearm cannot be disassembled, it will not be evaluated.

3.1.7 A firearm must be complete and functional in order to be evaluated.

NOTE: Incomplete designs, mock-ups, blanks, or drawings, provide insufficient detail and can be easily changed prior to construction of a final product. Accordingly, official classifications for these types of submissions cannot be provided.

3.2 Required Documentation of Physical Characteristics

The FEO will document design features, physical characteristics, and any other information which directly affects the classification of a particular firearm sample. These design features, physical characteristics, and other information may include:

- 3.2.1 Manufacturer or Importer
- 3.2.2 Markings
- 3.2.3 Caliber/gauge
- 3.2.4 Serial number
- 3.2.5 Selector switch positions
- 3.2.6 Machinegun features
- 3.2.7 Test fire information
- 3.2.8 Function test findings
- 3.2.9 Barrel length
- 3.2.10 Overall length
- 3.2.11 Reference material
- 3.2.12 Additional documentation as necessary to classify the firearm sample

NOTE: Both external and internal modifications should be noted and compared to an original firearm of the same model when applicable.

3.3 Photographs

- 3.3.1 Except as provided below, the FEO may, in the FEO's discretion, photograph the firearm sample as received, as modified for testing, and/or in a disassembled state.
- 3.3.2 The FEO shall photograph the firearm sample as received, modified, or disassembled, if of a unique, novel, or forensically significant design and/or construction. Such firearm samples may include:
 - 3.3.2.1 New firearm models
 - 3.3.2.2 Prototypes

4.0 FIREARM SAMPLE FUNCTION TESTING

A firearm sample function test consists of the examination of the functioning capabilities of a particular firearm to determine if the firearm is capable of firing a shot.

4.1 Physical Checks

4.1.1 The FEO will verify the positions and function of all the safety devices.

4.1.2 The FEO will document any obvious abnormalities, alterations, and adaptations, or if any parts are missing, broken, loose, etc.

4.1.3 The FEO will check for any barrel obstructions.

NOTE: A removed obstruction will be kept with the firearm sample.

4.2 Action (Exterior)

4.2.1 The FEO will observe whether the exterior action operates normally or if there are any malfunctions or abnormalities in the function of the firearm.

4.2.2 The FEO will document any indications that the firearm is functioning as a machinegun.

4.3 Test Cycling with Dummy Cartridges

It will be at the FEO's discretion to perform a test cycle of the firearm sample with dummy cartridges. In place of using live ammunition, dummy cartridges can be used to safely test the feeding, extraction, and magazine function of the firearm.

4.3.1 Select the proper dummy ammunition for the firearm.

4.3.1.1 The caliber of the firearm can be determined using the following techniques:

4.3.1.1.1 Barrel inspection

4.3.1.1.2 Chamber inspection

4.3.1.1.3 Measuring the chamber with headspace gauges

4.3.1.1.4 Casting of chamber

4.3.1.1.5 Markings on firearm

CAUTION: When using dummy rounds, always observe proper safety procedures and verify that the round is actually a dummy round before placing it into the firearm.

- 4.3.2 The FEO will observe the loading of a dummy cartridge and note if the cartridge will fire when closing the bolt or slide with a primed case.

4.4 Checking the Function of the Extractor, Ejector, and Firing Pin

The FEO will check the operability of the extractor, ejector, and firing pin.

4.5 Action (Internal)

- 4.5.1 If the firearm sample will be test fired (Section 6.0), the FEO should attempt to test fire the sample as received.
- 4.5.2 The FEO may disassemble the firearm sample for internal examination prior to test firing.
 - 4.5.2.1 The FEO will check for any broken or worn parts, or any signs of tampering or modification of parts.
 - 4.5.2.2 The FEO will determine if any factory-type machine gun parts or conversion parts have been installed and document the findings.

5.0 EVALUATION OF IMPORTED FIREARMS

FTB supports the ATF Imports Branch and the imports industry by evaluating and testing firearms to determine if they meet the requirements for importation. These sample firearms are imported on a conditional import directly to FTB for evaluation. To qualify for importation under 18 U.S.C. § 925(d)(3), a firearm must be of a type generally recognized as particularly suitable for or readily adaptable to sporting purposes.

Handguns are evaluated against an objective set of factoring criteria developed in 1969 by the Treasury Firearms Evaluation Panel. Modified assault-type rifles are evaluated on the information contained in the Report and Recommendation of the ATF Working Group based on the Importability of Certain Semiautomatic Rifles (July 1989), the Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles (April 1998), and the ban on importation of rifles that are capable of accepting Large Capacity Military Magazines. Shotguns are evaluated on the information contained in the ATF Study on the Importability of Certain Shotguns (January 2011).

5.1 Restricted Importation

The following firearms will not be approved for importation into the United States (except as provided for in 18 U.S.C. § 925(a)(1)):

- 5.1.1 NFA firearms (26 U.S.C. § 5845)
- 5.1.2 Semiautomatic rifles with at least one of these features:

- a. Ability to accept a detachable magazine
- b. Folding/telescoping stock
- c. Pistol grip
- d. Ability to accept a bayonet
- e. Flash suppressor
- f. Bipod
- g. Grenade launcher
- h. Night sights

5.1.3 Semiautomatic rifles possessing all three of the following non-sporting characteristics:

- a. The rifle constitutes a semiautomatic version of a machinegun.
- b. The rifle is chambered to accept a centerfire cartridge case having a length of 2.25 inches or less.
- c. The weapon has the ability to accept a detachable large-capacity magazine or can be easily modified to accept such a magazine with only minor adjustments to the rifle.

5.1.4 Shotguns with at least one of these features:

- a. Folding, telescoping, or collapsible stock
- b. Bayonet lug
- c. Flash suppressor
- d. Magazine over five rounds or a drum magazine
- e. Grenade-launcher mounts
- f. Integrated rail systems (other than on top of the receiver or barrel)
- g. Light-enhancing devices
- h. Excessive weight (greater than 10 pounds for 12 gauge or smaller)
- i. Excessive bulk (greater than 3 inches in width and/or greater than 4 inches in depth)
- j. Forward pistol grips or other protruding parts designed or used for gripping the shotgun with the shooter's extended hand

5.1.5 Firearms that were manufactured in or are being exported from any of the countries listed as a proscribed country under 27 CFR § 447.52 of the Arms Export Control Act.

5.1.6 Firearm models or parts for these models not stipulated in the Voluntary Restraining Agreement. [27 CFR § 447.52]

5.2 Importation Exceptions

The following items are exempt from ATF's importation controls and permit requirements.

- 5.2.1 Antique firearms.
- 5.2.2 Importations by agencies of the U.S. Government.
- 5.2.3 The importation of components for items being manufactured under contract for the Department of Defense.
- 5.2.4 The importation of articles (other than those which would be "firearms" as defined in 18 U.S.C. 921(a)(3)) manufactured in foreign countries for persons in the United States pursuant to Department of State approval.
- 5.2.5 Sporting shotgun parts other than firearm frames or receivers or barrels.
- 5.2.6 Air guns, pellet guns, starter guns, and flare guns, provided they are not "firearms" as defined in 18 U.S.C. § 921(a)(3) and do not have tear gas dissemination capability.
- 5.2.7 Firearm accessories such as gun cases, slings, and cleaning kits.

5.3 Importation Evaluation

- 5.3.1 Check for proper function.

Note: If the firearm does not function properly, suspend examination and request an additional sample from the importer.

- 5.3.2 Check for required markings. Guidance on how a firearm must be marked is found under Title 18 U.S.C. § 923(i), 27 CFR § 478.92(a) and 27 CFR § 479.102.

NOTE: Title 27 CFR § 478.122(a) provides a licensed importer with 15 days from the date of acquisition to comply with the required marking requirements.

- 5.3.2.1 Serial number must be on the frame/receiver

NOTE: If frame/receiver is constructed of polymer, the serial number must be on a metal plate cast into the polymer.

- 5.3.2.2 Manufacturer

- 5.3.2.3 Country of origin

- 5.3.2.4 Name, city, and State of importer

5.3.2.5 Caliber

5.3.2.6 Model designation, if assigned

5.3.3 Determine the frame construction. If the specific material the frame is constructed of cannot be determined, the FEO will request that the importer provide identification of the specific alloy and its properties.

5.3.4 If a pistol is a semiautomatic version of a machinegun, the FEO will ensure that the receiver is not modified from a machinegun receiver.

5.4 Determining the Importability of a Pistol

Pistols must meet size and safety requirements and accrue at least a qualifying 75-point value specified on ATF E-Form 4590.5, Factoring Criteria for Weapons (Exhibit 1).

5.4.1 Prerequisites

5.4.1.1 The pistol must have a positive, manually operated safety device.

NOTE: An automatic safety as described in firing pin block or lock (Section 5.4.6.5) also qualifies.

5.4.1.2 Combined length and height measurement must not be less than 10 inches with the height (right angle measurement to barrel without magazine or extension) being at least 4 inches and the length being at least 6 inches.

5.4.1.2.1 Length is measured parallel to the axis of the bore.

5.4.1.2.2 Height is measured at a 90-degree angle to the axis of the bore.

5.4.2 Overall Length

5.4.2.1 In assigning a point value for overall length, round the measured length to the next lowest 1/4 inch (i.e. 6 5/8 inches will be rounded to 6 1/2 inches).

5.4.3 Frame Construction

5.4.3.1 Assign an appropriate point value.

Note: Zinc, zamac, die-cast aluminum, and polymer get 0 points.

5.4.4 Weapon Weight

- 5.4.4.1 Prior to weighing the weapon, inspect it for weights that may have been added to the grips or frame.

NOTE: If weights have been pinned, glued, or screwed to the weapon, remove them prior to weighing.

- 5.4.4.2 Insert an unloaded magazine and weigh the weapon on a precision scale.

- 5.4.4.2.1 The FEO will follow the appropriate manufacturer's operating procedures for the precision scale when weighing the firearm sample.

- 5.4.4.2.2 Due to the sensitivity of precision scales, the sample will be weighed twice. Take the average of the two results and round the measured weight to the next lowest whole ounce (i.e. 16 1/2 ounces will be rounded to 16 ounces).

5.4.5 Caliber

- 5.4.5.1 Assign an appropriate point value.

NOTE: If a pistol is offered in different calibers, factoring criterion must be done on each model. Weight of the weapon may change with each caliber.

5.4.6 Safety Features

- 5.4.6.1 Locked Breech Mechanism

- 5.4.6.1.1 Points are given for a mechanical or gas-locking system.

- 5.4.6.1.2 No points are given for blowback or delayed blowback.

- 5.4.6.2 Loaded Chamber Indicator

- 5.4.6.2.1 Points are given for signal pin, window cutout in chamber, or a moving extractor.

- 5.4.6.2.2 Extractor must be marked to indicate loaded position (wording or color).

- 5.4.6.3 Grip Safety

- 5.4.6.4 Magazine Safety

- 5.4.6.5 Firing Pin Lock or Block

- 5.4.6.5.1 Can be automatic (i.e. SIG, Glock, etc.) or manual (i.e., French Model 1935, etc.) in operation.
- 5.4.6.5.2 Any automatic operating safety, which only unlocks or brings the firing pin in line with the hammer at the moment of hammer fall, qualifies as a firing pin block (i.e., SIG P230, etc).
- 5.4.6.5.3 Trigger block safety does not count as a firing pin lock or block.

5.4.7 Miscellaneous Equipment

- 5.4.7.1 External Hammer
- 5.4.7.2 Double Action
- 5.4.7.3 Drift Adjustable Target Sight
 - 5.4.7.3.1 Sight that is adjusted by drifting it from side to side.
 - 5.4.7.3.2 Sight may be either front or rear.
- 5.4.7.4 Click Adjustable Target Sight
 - 5.4.7.4.1 Sight that is adjustable for windage and/or elevation by means of a screw.
 - 5.4.7.4.2 Sight does not have to audibly "click."
 - 5.4.7.4.3 If a pistol has click adjustable rear sight and drift adjustable front sight, point credit is given only for click adjustable sight.
- 5.4.7.5 Target Grips
 - 5.4.7.5.1 Must have a raised or indented thumb rest.
- 5.4.7.6 Target Trigger
 - 5.4.7.6.1 Vertically grooved to provide more positive trigger control.

5.5 Determining the Importability of a Revolver

Revolvers must meet size and safety requirements and accrue at least a qualifying 75-point value specified on ATF E-Form 4590.5, Factoring Criteria for Weapons (Exhibit 1).

5.5.1 Prerequisites

5.5.1.1 Must pass a safety test (Section 5.6).

5.5.1.2 Must have an overall frame length (with conventional grips) of 4 1/2 inches minimum.

5.5.1.2.1 The measurement is the length from the corner of the butt to the end of the frame with the barrel parallel to the butt.

5.5.1.2.2 The overall length is not a diagonal measurement.

5.5.1.2.3 For single action revolvers with detachable grip frames/backstraps, count the grip frame/back strap in overall frame length.

5.5.1.3 Must have a barrel length of at least 3 inches.

5.5.2 Barrel length

5.5.2.1 Measure from muzzle end of the barrel to front face of the cylinder.

5.5.2.1.1 Round the measured length to the next lowest 1/4 inch (i.e. 4 5/8 inches will be rounded to 4 1/2 inches).

5.5.2.1.2 If a detachable muzzle brake is present, remove prior to measurement.

5.5.3 Frame Construction:

5.5.3.1 Assign an appropriate point value.

NOTE: Zinc, zamac, die-cast aluminum, and polymer get 0 points.

5.5.4 Weapon Weight

5.5.4.1 Prior to weighing the firearm sample, inspect it for weights that may have been added to the grips or frame.

NOTE: If weights have been pinned, glued, or screwed to the firearm, remove them prior to weighing.

5.5.4.2 Weigh the firearm on a precision scale.

5.5.4.2.1 The FEO will follow the appropriate manufacturer's operating procedures for the precision scale when conducting the weighing.

5.5.4.2.2 Due to the sensitivity of precision scales, the sample will be weighed twice. Take the average of the two results and round the measured weight to the next lowest whole ounce (i.e., 16 1/2 ounces will be rounded to 16 ounces).

5.5.5 Caliber

5.5.5.1 Assign an appropriate point value.

NOTE: If a pistol is offered in different calibers, factoring criterion must be done on each model. Weight of the weapon may change with each caliber.

5.5.6 Miscellaneous Equipment

5.5.6.1 Drift Adjustable Target Sight

5.5.6.1.1 Sight that is adjusted by drifting it from side to side.

5.5.6.1.2 Sight may be either front or rear.

5.5.6.2 Click Adjustable Target Sight

5.5.6.2.1 Sight that is adjustable for windage and/or elevation by means of a screw.

5.5.6.2.2 Sight does not have to audibly "click."

5.5.6.2.3 If a revolver has click adjustable rear sight and drift adjustable front sight, point credit is given only for click adjustable sight.

5.5.6.3 Target Grips

5.5.6.3.1 Must have a raised or indented thumb rest.

5.5.6.4 Target Hammer and Target Trigger

5.5.6.4.1 Target hammer must be wider than standard spur.

5.5.6.4.2 Target trigger must be vertically grooved and wider than standard.

5.5.6.4.3 Weapon must have both target hammer and trigger to receive point credit.

5.5.6.4.4 Removable trigger shoes and removable hammer boots do not qualify.

5.5.7 Safety Test (Section 5.6)

5.6 Revolver Safety Drop Test

5.6.1 Required Drop Test Equipment:

5.6.1.1 Prefabricated drop tube.

5.6.1.2 Precision scale.

5.6.1.3 Drop weight that can be adjusted to match the weight of the revolver being tested.

5.6.2 Test Procedure

5.6.2.1 Weigh the revolver on a precision scale.

5.6.2.1.1 The FEO will follow the appropriate manufacturer's operating procedures for the precision scale when conducting the weighing.

5.6.2.2 Fill a drop weight with lead shot to equal the weight of the revolver.

5.6.2.3 Use a primed cartridge case.

5.6.2.3.1 DO NOT USE A LOADED ROUND OF AMMUNITION.

5.6.2.3.2 DO NOT USE INERTIA BULLET PULLER ON RIMFIRE AMMUNITION.

5.6.2.4 Place the primed cartridge case in one of the chambers and rotate the cylinder so that the loaded chamber is in line with the firing pin.

5.6.2.5 Place the revolver, with the hammer forward and the safety engaged, below the drop fixture.

5.6.2.5.1 If the hammer has a safety notch, place the hammer in the safety notch.

5.6.2.5.2 The revolver will be pointed straight down in line with the drop tube.

- 5.6.2.5.3** Use a small vice to support the revolver.
 - 5.6.2.5.4** This set-up assists with determining if the weapon fired during the test. Certain primers, particularly rim fires, are difficult to hear if they fire. If paper is used between the muzzle and the floor, it will have a flash burn if the weapon fires during the drop test.
 - 5.6.2.6** Place the cross pin in the drop tube and insert the pre-measured weight.
 - 5.6.2.6.1** Adjust the drop fixture so the bottom of the tube is even with the hammer spur.
 - 5.6.2.6.2** The distance from the cross pin to the bottom of the tube needs to be 36 inches (replicating the approximate height from the ground to a holstered firearm).
 - 5.6.2.7** To prevent the dropping weight from moving the weapon out of the vice, support the weapon by holding the grip.
 - 5.6.2.8** Pull the cross pin and allow the weight to drop.
 - 5.6.2.9** After each drop, check the primer for indentation; check the hammer spur for deformation or breakage; and check the interior of the frame in the area of the safety bar for material deformation or set back.
 - 5.6.2.9.1** If the hammer deforms or breaks such that a direct blow from the dropping weight cannot be achieved, suspend the test, complete the write up and notify the company in writing of the failure.
- NOTE: If the company wants another test performed on a like sample, they must submit another sample.
- 5.6.2.10** If the revolver fails the test, indicate on which drop the weapon fired in your response to the submitter.
 - 5.6.2.11** For a successful test, the revolver must withstand five drops of the weight without firing.
 - 5.6.2.12** Upon successful completion of a drop test, fire the primed cartridge/ primer to ensure that ammunition used in the test was not defective.

5.6.2.12.1 If the primer does not fire, request a new sample for retest.

WARNING: DO NOT CONDUCT ADDITIONAL TESTING ON PRESENT SAMPLE.

6.0 FIREARM SAMPLE TEST FIRING

Refer to the FTB Indoor Firing Range SOP for the proper use and care of the firing range. If the FEO is unable to test the firearm sample due to construction and/or safety issues, the FEO will not proceed further.

6.1 Preliminary Test Firing

- 6.1.1 The FEO will check for any barrel obstructions.
- 6.1.2 If there is reason to doubt the safety of the firearm or the ammunition used in it, the FEO may decide not to fire the firearm or to test fire the firearm remotely.
- 6.1.3 Select the proper ammunition for the firearm. The caliber of the firearm sample can be determined using the following techniques:
 - 6.1.3.1 Barrel inspection.
 - 6.1.3.2 Chamber inspection.
 - 6.1.3.3 Measuring the chamber with headspace gauges.
 - 6.1.3.4 Casting of chamber.
 - 6.1.3.5 Markings on firearm.
- 6.1.4 Load and fire one round of ammunition to determine operability of the firearm.
- 6.1.5 Inspect the spent casing of the test-fired cartridge for any uncharacteristic deformation.
- 6.1.6 If determined operable, proceed to the corresponding test firing procedures.

6.2 Test Firing Routine Firearm Samples

The FEO will conduct test firing activity to the extent necessary to determine the capability of the firearm.

6.3 Test Firing Suspected Semiautomatic Firearm Samples

The FEO will conduct test firing activity to the extent necessary to determine the capability of the firearm to fire (after the first shot) with each successive function of the trigger without manual reloading.

6.4 Test Firing Suspected Machinegun Firearm Samples

6.4.1 The FEO will conduct test firing activity to the extent necessary to confirm the capability of a given device to fire more than one shot, automatically, without manual reloading, with a single function of the trigger.

6.4.2 When test firing suspected machineguns which operate by "Hammer follow" or similar conditions, the FEO will utilize a variety of appropriate ammunition for testing.

6.4.2.1 When available, several types of both military surplus and commercial ammunition should be utilized in order to thoroughly demonstrate the capability of a "Hammer follow" machinegun to fire automatically.

6.4.2.2 Differences in primer sensitivity between military surplus and commercial ammunition may affect live fire test results, and extra attention must be given to documenting test firing results in "Hammer follow" cases.

6.5 Documenting Test Firing Results

6.5.1 Number of cartridges expelled

6.5.2 Ammunition caliber

6.5.3 Date of testing

6.5.4 Additional information may include:

6.5.4.1 Misfires

6.5.4.2 Modifications

6.5.4.3 Cleaning of the firearm

7.0 Classification Letter

7.1 Review Process

- 7.1.1 All information pertaining to the firearm sample will be entered into the Classification Letter as it is gathered. This information will include:
 - 7.1.1.1 A summary of the type of examination being requested.
 - 7.1.1.2 A description of the item being evaluated.
 - 7.1.1.3 A description of the findings of the evaluation.
 - 7.1.1.4 A complete synopsis of the results of the examination.
- 7.1.2 Completion of the letter and the firearm examination will coincide.
- 7.1.3 The FEO will forward the letter to the FTB Writer/Editor for review.
- 7.1.4 The FEO will review the Writer/Editor's comments and modify the letter if appropriate.
- 7.1.5 The FEO will sign the letter.
- 7.1.6 The FTB Chief will perform a secondary review of the letter and sign.

7.2 After Approval

- 7.2.1 The Classification Letter will be date stamped.
- 7.2.2 Two copies of the letter will be produced.
- 7.2.3 One copy of the letter will be kept by the FEO for his/her records, and one copy will be included with the firearm sample when it is returned.

8.0 RETURNING THE FIREARM SAMPLE

8.1 Shipping the Firearm Sample

- 8.1.1 The firearm sample will be returned to the submitting party unless directed otherwise.

NOTE: If a firearm sample is received for import evaluation and does not meet the requirements, it will not be returned to the submitting party.

- 8.1.2 The FEO will ship the firearm sample by common or contract carrier. The FTB will use only a carrier with the ability to track the shipment. Unless otherwise directed, shipment will be conducted at the submitting party's expense.

9.0 REFERENCES AND EXHIBIT

9.1 References

1. ATF Safety and Security Information for Federal Firearms Licensees, ATF Publication 3317.2.
2. Federal Firearms Regulations Reference Guide, ATF Publication 5300.4.
3. Report and Recommendation of the ATF working Group on the Importability of Certain Semiautomatic Rifles, July 1989.
4. Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles, April 1998.
5. ATF Study on the Importability of Certain Shotguns, January 2011.

9.2 Exhibit

Exhibit 1 ATF E-Form 4590.5 Factoring Criteria for Weapons

Exhibit 1 ATF E-Form 4590.5, Factoring Criteria for Weapons

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Factoring Criteria for Weapons

NOTE: The Bureau of Alcohol, Tobacco, Firearms and Explosives reserves the right to preclude importation of any revolver or pistol which achieves an apparent qualifying score but does not adhere to the provisions of Section 925(d)(3) of Amended Chapter 44, Title 18 U.S.C.

Pistol			Revolver		
Model:			Model:		
Prerequisites			Prerequisites		
1. The pistol must have a positive manually operated safety device. 2. The combined length and height must not be less than 10" with the height (right angle measurement to barrel without magazine or extension) being at least 4" and the length being at least 6".			1. Must pass safety test. 2. Must have overall frame (with conventional grips) length (not diagonal) of 4 1/2" minimum. 3. Must have a barrel length of at least 3".		
Individual Characteristics	Point Value	Point Sub Total	Individual Characteristics	Point Value	Point Sub Total
Overall Length For Each 1/4" Over 6"	1		Barrel Length (Muzzle to Cylinder Face) Less than 4" For Each 1/4" Over 4"	0 1/2	
<u>Frame Construction</u>			<u>Frame Construction</u>		
Investment Cast or Forged Steel	15		Investment Cast or Forged Steel	15	
Investment Cast or Forged Hrs Alloy	20		Investment Cast or Forged Hrs Alloy	30	
Weapon Weight W/Magazine (unloaded) Per Ounce	1		Weapon Weight (Unloaded) Per Ounce	1	
<u>Caliber</u>			<u>Caliber</u>		
.22 Short and .25 Auto	0		.22 Short to .25 ACP	0	
.22 LR and 7.62MM to .380 Auto	3		.22 LR and .30 to .38 S&W	3	
9mm Parabellum and Over	10		.38 Special	4	
<u>Safety Features</u>			.357 Mag and Over	5	
Locked Breech Mechanism	5		<u>Miscellaneous Equipment</u>		
Loaded Chamber Indicator	5		Adjustable Target Sights (Drift or Click)	5	
Grip Safety	3		Target Grips	5	
Magazine Safety	5		Target Hammer and target Trigger	5	
Firing Pin Block or Lock	10		<u>Safety Test</u>		
<u>Miscellaneous Equipment</u>			A double action revolver must have a safety feature which automatically (or in a single action revolver by manual operation) causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge. The safety device must withstand the impact of a weight equal to the weight of the revolver dropping from a distance of 36" in a line parallel to the barrel upon the rear of the hammer spur, a total of 5 times.		
External Hammer	2				
Double Action	10				
Drift Adjustable Target Sight	5				
Click Adjustable Target Sight	10				
Target Grips	5				
Target Trigger	2				
Score Achieved (Qualifying Score is 75 Points)			Score Achieved (Qualifying Score is 75 Points)		

ATF E-Form 4590.5 (11/10/13)
Revised March 2008

INNOVATOR ENTERPRISES, INC.,

Plaintiff

v.

**B. TODD JONES, ACTING DIRECTOR
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,**

Defendant

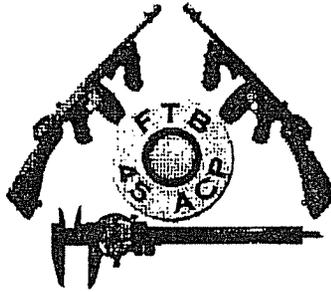
Civil Action No. 13-0581 (JDB)

EXHIBIT 2



**U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives**

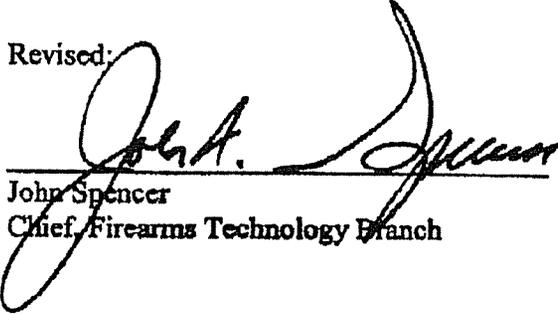
FIREARMS TECHNOLOGY



BRANCH

**Standard Operating Procedures:
Evidence Examination of Silencers**

Revised:


John Spencer
Chief, Firearms Technology Branch

8-29-11
Date

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1.0 OBJECTIVE

1.1 Mission

The Firearms Technology Branch (FTB) provides expert technical support to ATF, other Federal agencies, State and local law enforcement, the firearms industry, Congress, and the general public. FTB is responsible for rendering findings regarding the classification of suspected illegal firearms and newly designed firearms. FTB maintains an extensive firearms reference collection, as well as technical firearms reference files, a library, and firearms databases. This Branch is also responsible for the technical evaluation of firearms to determine if they meet the requirements for importation into the United States. Further, FTB provides the U.S. Department of Justice, State prosecutors' offices, District Attorneys' offices, and military courts with expert firearms testimony. This testimony includes the identification and origin of firearms and other matters relating to firearms and the firearms industry.

1.2 Purpose

To establish procedures for the Firearms Enforcement Officers (FEOs) when conducting evidence examinations of suspected firearm silencers. Commonly used terms for a firearm silencer may include silencer, suppressor, and firearm muffler. The examination of all firearm silencers submitted to the FTB will be documented.

If a suspected silencer is received with a firearm, please refer to the FTB Evidence Examination of Firearms Standard Operating Procedures (SOP) for further guidance. A separate SOP has also been established for the Firearms Enforcement Specialist (FES) when receiving, processing and returning evidence (FTB Evidence Handling and Processing SOP).

1.3 Benefit

To promote quality and consistent implementation of FTB silencer examinations.

2.0 RECEIVING EVIDENCE

2.1 "Expedite" Evidence

The FES will hand carry Expedite evidence to the assigned FEO with an orange case folder placed within a yellow expedite folder.

2.1.1 The FEO will verify that the documentation corresponds to the evidence.

2.1.2 The FEO will initial and date the corresponding entry in the FTB evidence bound book and the ATF Form 3400.11 Evidence Identification Tag(s) (Exhibit 1). When the FEO takes custody, the FEO is responsible for the condition, location, and storage of the evidence.

- 2.1.3 The FEO will verify that the FTB Work Plan Worksheet (Exhibit 2) has been completed up to step 6 by the FES. During the evidence examination, the FEO is responsible for completing the rest of the Worksheet.

2.2 Routine Evidence

The FES will provide an orange case folder for the evidence to the assigned FEO. The evidence will remain in the FTB secured evidence staging area until it is needed for technical examination.

- 2.2.1 When the FEO is ready to obtain the evidence, the FEO will compare the documentation in the orange folder to the evidence to ensure they correspond before taking custody.
- 2.2.2 The FEO will initial and date the corresponding entry in the FTB evidence bound book and the ATF Form 3400.11 Evidence Identification Tag(s) (Exhibit 1). Once the FEO takes custody, the FEO is responsible for the condition, location, and storage of the evidence.
- 2.2.3 The FEO will verify that the FTB Work Plan Worksheet (Exhibit 2) has been completed up to step 6 by the FES. During the evidence examination, the FEO is responsible for completing the rest of the Worksheet.

3.0 HANDLING EVIDENCE

3.1 Handling Contaminated Evidence

Evidence arriving at FTB may have been exposed to contaminants, including blood and/or chemicals. Ammunition fired through a firearm silencer with lead primers or lead bullets will leave lead dust behind that can also cause health problems from over-exposure. When handling evidence **that is contaminated**, the following safety precautions must be followed. The FEO will alert the office as to the receipt of contaminated evidence sent in from the field.

- 3.1.1 Protective equipment such as powder free rubber gloves must be worn. If necessary, the FEO may wear more than one pair of protective rubber gloves to handle the evidence.
- 3.1.2 At the discretion of the FEO, safety glasses may be worn when handling contaminated evidence.
- 3.1.3 Upon completion of handling contaminated evidence, hands, forearms, and any contacted areas must be immediately and thoroughly washed with warm, soapy water and/or hand sanitizer.

3.2 Rendering Evidence Safe

If a firearm silencer is received with a firearm, the firearm will need to be rendered safe before beginning the examination. Per the FTB Evidence Handling and Processing SOP, a firearm should be rendered safe by the FES during in-processing. However, each FEO is still responsible for ensuring that the firearm has been rendered safe.

- 3.2.1 The FEO will ensure that a yellow chamber checker flag or zip tie has been placed into the barrel of the firearm to indicate that the weapon has been rendered safe.
- 3.2.2 **If a yellow chamber checker flag or zip tie has not been placed into the barrel of the firearm, the FEO will treat the firearm as loaded until rendered safe.**
 - 3.2.2.1 The FEO will always keep the muzzle pointed in a safe direction and always keep his/her finger(s) off the trigger and outside the trigger guard until the firearm has been rendered safe.
 - 3.2.2.2 If the firearm has a magazine or other source of ammunition, the FEO will remove it if applicable.
 - 3.2.2.3 The FEO will perform an open breech inspection of the chamber, and any other visual or physical inspection deemed necessary, to ensure the firearm is unloaded.
 - 3.2.2.4 If a loaded firearm is submitted to the FTB, the FEO will clear the weapon in the FTB test firing range (refer to the FTB Indoor Firing Range SOP for the proper use and care of the firing range).
 - 3.2.2.5 The FEO will insert a yellow chamber checker flag or a zip tie into the barrel of the firearm to indicate that the firearm has been rendered safe.
 - 3.2.2.6 The FEO will notify the FTB Branch Chief (or Acting Branch Chief) when a loaded firearm is submitted to the FTB.

4.0 DOCUMENTING EVIDENCE

4.1 Report of Technical Examination

- 4.1.1 The FEO will document the examination on ATF Form 3311.2 Firearms Technology Branch Report of Technical Examination (Exhibit 3).
- 4.1.2 All information pertaining to the classification of evidence will be documented on the Report of Technical Examination as it is gathered.

- 4.1.3 Completion of the Report of Technical Examination will coincide with the completion of the evidence examination.

4.2 External Examination

The FEO will document external features, physical characteristics, and any other information which directly affects the classification of the evidence. These external features, physical characteristics, and other information may include:

4.2.1 External features

- 4.2.1.1 Front end cap

- 4.2.1.2 Rear end cap

- 4.2.1.3 Outer tube or body

4.2.2 Markings

4.2.3 Manufacturer

4.2.4 Serial number

4.2.5 Reference Material

- 4.2.6 Reference silencer, firearm and/or parts used from the FTB National Reference Collection (if available)

- 4.2.7 Additional information requested by the case agent

- 4.2.8 Additional documentation as needed to classify the evidence

4.3 Internal Examination

The FEO may disassemble the evidence for internal examination, but (except for safety reasons) disassembly should always be preceded by photography of the evidence (Section 4.4) and a function test. The FEO will document internal features, physical characteristics, and any other information which directly affects the classification of the evidence. These internal features, physical characteristics, and other information may include:

- 4.3.1 Sound Impulse Reduction Testing

- 4.3.2 Internal features

- 4.3.2.1 Baffles

4.3.2.2 Ported tube

4.3.2.3 Wipes

4.3.2.4 Bleed holes

4.3.2.5 Expansion chambers

4.3.2.6 Baffling material

4.3.3 Reference material

4.3.4 Reference silencer, firearm and/or parts used from the FTB National Reference Collection (if available)

4.3.5 Additional information requested by the case agent

4.3.6 Additional documentation as needed to classify the evidence

4.4 Photographs

4.4.1 Except as provided below, the FEO may, in the FEO's discretion, photograph the evidence as received, as modified for testing, and/or in a disassembled state.

4.4.2 The FEO shall photograph evidence as received, modified, or disassembled, if of a unique, novel, or forensically significant design and/or construction. Such evidence may include:

4.4.2.1 New silencer models

4.4.2.2 New silencer technology

5.0 FUNCTION TESTING

5.1 Sound Impulse Reduction Testing

5.1.1 The FEO will follow the appropriate manufacturer's operating procedures for the test measuring equipment when conducting the testing.

NOTE: The calibration date of the test measuring equipment will be included on the test results.

5.1.2 Prior to testing, the FEO will calibrate the microphone.

- 5.1.3 The FEO will position the microphone approximately 90 degrees from the muzzle of the firearm to optimize the sound-pressure level recordings, while maintaining maximum safety.
- 5.1.4 During testing, the position of the firearm, test measuring equipment, and microphone will remain constant.
- 5.1.5 Refer to Section 6.0 for test firing procedures.
- 5.1.6 After testing, the FEO will confirm the prior calibration of the microphone to verify the validity of the results.
- 5.1.7 The FEO will record the results of the Sound Impulse Reduction Testing on the Report of Technical Examination.

6.0 TEST FIRING

Refer to the FTB Indoor Firing Range SOP for the proper use and care of the firing range. If the FEO is unable to test the evidence due to evidence construction and/or safety issues, the FEO will contact the case agent before proceeding further.

6.1 Silencer Received without a Firearm

- 6.1.1 In all instances, the FEO should attempt to test fire the evidence as received.
- 6.1.2 If the silencer is received in a non-functioning condition (missing or broken parts) and the FEO determines the evidence can be readily restored, the FEO should attempt to do so before test firing.
 - 6.1.2.1 The FEO will check for any obstructions within the silencer before test firing.

NOTE: A removed obstruction will be kept with the evidence.

- 6.1.2.2 The FEO will contact the case agent if the evidence requires modification to test fire.
- 6.1.3 If requested by the case agent, every effort will be taken to test the silencer on a particular firearm (make, model, caliber, barrel length, etc.). If no particular firearm is requested, the FEOs will decide which firearm to use for test firing.

NOTE: The FEO may use an adaptor to attach the silencer to the firearm.

- 6.1.4 If there is reason to doubt the safety of the firearm or the ammunition used in it, the FEO may decide not to fire the firearm or to test fire the firearm remotely.

6.1.5 The FEO will select the proper ammunition for the firearm.

6.1.5.1 When test firing with .22LR caliber ammunition in a pistol or short-barreled rifle, standard velocity or sub-sonic velocity ammunition should be utilized instead of high-velocity ammunition.

6.1.5.2 Ammunition utilized during the testing should be from the same manufacturer, lot, and/or box.

6.1.6 The FEO will load and fire one round of ammunition to determine operability of the firearm.

6.1.7 If the silencer is determined operable, the FEO will perform Sound Impulse Reduction Testing with and without the silencer.

6.2 Silencer Received with Firearm (Removable)

6.2.1 In all instances, the FEO should attempt to test fire the evidence as received. If necessary, clean and lubricate the submitted firearm to facilitate functioning.

6.2.2 If the evidence is received in a non-functioning condition (missing or broken parts) and the FEO determines the evidence can be readily restored to fire, the FEO should attempt to do so before test firing.

6.2.2.1 The FEO will check for any obstructions within the silencer and firearm before test firing.

NOTE: A removed obstruction will be kept with the evidence.

6.2.2.2 The FEO will contact the case agent if the evidence requires modification to test fire.

6.2.3 If there is reason to doubt the safety of the firearm or the ammunition used in it, the FEO may decide not to fire the firearm or to test fire the firearm remotely.

6.2.4 Select the proper ammunition for the firearm. The FEO will determine if the firearm is chambered for the ammunition recommended by the manufacturer or if the firearm has been rechambered for a different cartridge.

6.2.4.1 The caliber of the firearm can be determined using the following techniques:

6.2.4.1.1 Barrel inspection

6.2.4.1.2 Chamber inspection

6.2.4.1.3 Measuring the chamber with headspace gauges

6.2.4.1.4 Casting of chamber

6.2.4.1.5 Markings on firearm

6.2.4.2 If ammunition is submitted with the firearm, it may only be used for test firing with approval from the case agent.

6.2.4.3 When test firing with .22LR caliber ammunition in a pistol or short-barreled rifle, standard velocity or sub-sonic velocity ammunition should be utilized instead of high-velocity ammunition.

6.2.4.4 Ammunition utilized during the testing should be from the same manufacturer, lot, and/or box.

6.2.5 The FEO will load and fire one round of ammunition to determine operability of the firearm.

6.2.6 If determined operable, the FEO will perform Sound Impulse Reduction Testing with and without the silencer.

6.3 Silencer Received with Firearm (Permanently Attached)

6.3.1 In all instances, the FEO should attempt to test fire the evidence as received. If necessary, clean and lubricate the submitted firearm to facilitate functioning.

6.3.2 Every effort will be made to closely replicate the evidence firearm without a silencer (make, model, caliber, barrel length, etc.).

6.3.3 If the evidence is received in a non-functioning condition (missing or broken parts) and the FEO determines the evidence can be readily restored to fire, the FEO should attempt to do so before test firing.

6.3.3.1 The FEO will check for any obstructions within the silencer and firearm before test firing.

NOTE: A removed obstruction will be kept with the evidence.

6.3.3.2 The FEO will contact the case agent if the evidence requires modification to test fire.

6.3.4 If there is reason to doubt the safety of the firearm or the ammunition used in it, the FEO may decide not to fire the firearm or to test fire the firearm remotely.

6.3.5 Select the proper ammunition for the firearm. The FEO will determine if the firearm is chambered for the ammunition recommended by the manufacturer or if the firearm has been rechambered for a different cartridge.

6.3.5.1 The caliber of the firearm can be determined using the following techniques:

6.3.5.1.1 Barrel inspection

6.3.5.1.2 Chamber inspection

6.3.5.1.3 Measuring the chamber with headspace gauges

6.3.5.1.4 Casting of chamber

6.3.5.1.5 Markings on firearm

6.3.5.2 If ammunition is submitted with the firearm, it may only be used for test firing with approval from the case agent.

6.3.5.3 When test firing with .22LR caliber ammunition in a pistol or short-barreled rifle, standard velocity or sub-sonic velocity ammunition should be utilized instead of high-velocity ammunition.

6.3.5.4 Ammunition utilized during the testing should be from the same manufacturer, lot, and/or box.

6.3.6 The FEO will load and fire one round of ammunition to determine operability of the firearm.

6.3.7 If determined operable, the FEO will perform Sound Impulse Reduction Testing on the submitted firearm and a comparable firearm without silencer.

6.4 Documenting Test Firing Results

The FEO will document the test firing results in the Report of Technical Examination.

6.4.1 Number of cartridges expelled

6.4.2 Ammunition caliber

6.4.3 Date of testing

6.4.4 Additional information may include:

6.4.4.1 Misfires

6.4.4.2 Modifications

6.4.4.3 Cleaning of the firearm

7.0 EVIDENCE OUT PROCESSING

7.1 Evidence Report Log Out: Review Process

7.1.1 The FEO will forward the Report of Technical Examination to the FTB Writer/Editor for review.

7.1.2 The FEO will review the Writer/Editor's comments and modify the Report of Technical Examination if appropriate.

7.1.3 The FEO will sign the Report of Technical Examination.

7.1.4 The FTB Assistant Chief will review the Report of Technical Examination.

7.1.5 The FTB Chief will perform a secondary review of the Report of Technical Examination and sign.

7.2 Evidence Report Log Out: After Approval

7.2.1 The Report of Technical Examination will be date stamped.

7.2.2 Three copies of the Report of Technical Examination will be produced.

7.2.3 The original report will be sent to the ATF Agent by U.S. mail.

7.2.4 One copy of the Report of Technical Examination will be maintained in the evidence folder, one copy will be kept by the FEO for his/her records, and one copy will be included with the evidence when it is returned.

8.0 EVIDENCE SHIPPING

The FEO will determine if the shipping box and packaging received with the evidence will be able to maintain the integrity of the evidence if used again for shipment.

8.1 Shipping Box and Packaging Reusable

The FEO will ship the evidence by common or contract carrier. The FTB will use a carrier with the ability to track the shipment.

8.2 Shipping Box, Packaging Material, or Both Require Replacement

8.2.1 The FEO will replace the shipping box, packaging material, or both to ensure the integrity of the evidence during shipment.

8.2.2 The FEO will ship the evidence by common or contract carrier. The FTB will use a carrier with the ability to track the shipment.

9.0 REFERENCES AND EXHIBITS

9.1 References

1. ATF Safety and Security Information for Federal Firearms Licensees, ATF Publication 3317.2.
2. Federal Firearms Regulations Reference Guide, ATF Publication 5300.4.
3. Forensic Examination Guidelines for Silencers, Scientific Working Group for Firearms and Toolmarks.

9.2 Exhibits

- Exhibit 1 ATF Form 3400.11, Evidence Identification Tag.
- Exhibit 2 FTB Work Plan Worksheet.
- Exhibit 3 ATF Form 3311.2, Firearms Technology Branch Report of Technical Examination.

Exhibit I ATF Form 3400.11, Evidence Identification Tag

Front

Evidence Identification Tag

U.S. Department of Justice
Bureau of Alcohol, Tobacco,
Firearms and Explosives

1. Case Number _____ 2. Date _____

3. Office Location _____ 4. Exhibit No. _____

5. Description of Article _____

6. Taken From Received From

7. Found At (Person or Location) Received by (Print or Type Name)

8. Signature _____

9. Witness _____

10. Special Instructions _____

ATF Form 3400.11
Revised November 2004

Back

Evidence Identification Tag (cont'd)

Date	Signature	Purpose of Custody Change
	RECEIVED	
	FIREARMS TECHNOLOGY BRANCH	
	Received by: (Signature)	
	Print Name and Title	
	Received by: (Signature)	
	Print Name and Title	
	Received by: (Signature)	
	Print Name and Title	
	Received by: (Signature)	
	Print Name and Title	

ATF Form 3400.11
Revised November 2004

Exhibit 2 FTB Work Plan Worksheet

	<p style="text-align: center;">Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives <i>Firearms Technology Branch</i> 244 Reed Road Martinsburg, WV 25405 Telephone: (304) 616-4300 Facsimile: (304) 616-4301</p>
WORK PLAN	
<p>The Firearms Enforcement Officer (FEO) must document the results of each step beginning with step 6 and continuing through step 13 contained within this work plan as the steps are performed. The documentation may include but is not limited to notes, photographs, or sketches. The steps may be documented within the ATF Form 3311.2 Report of Technical Examination without the use of additional notes. This work plan is a guide for the FEO to utilize to complete an evidence examination. The FEO should ensure that he/she follows the appropriate FTB Procedure based upon the type of evidence being examined.</p>	
<input type="checkbox"/>	1. Receive evidence;
<input type="checkbox"/>	2. Verify and include the FTB number here: _____;
<input type="checkbox"/>	3. Perform safety check of physical item(s);
<input type="checkbox"/>	4. Verify items of evidence are consistent with the written evidence transmittal ATF Form 3311.3 and the evidence tag(s);
<input type="checkbox"/>	5. Sign evidence transmittal tag(s);
<input type="checkbox"/>	6. Verify submitters request;
<input type="checkbox"/>	7. Begin completing top portion of the ATF Form 3311.2, Report of Technical Examination;
<input type="checkbox"/>	8. Begin examination (see appropriate FTB Guidelines based upon the type of firearm being examined);
<input type="checkbox"/>	9. Perform initial physical examination and notate any external physical modifications(s) (see appropriate FTB Guidelines based upon the type of firearm being examined);
<input type="checkbox"/>	10. If necessary, perform research utilizing ATF sources to include but not limited to National Reference Library, National Reference Collection, database, J-File, internet research etc.;
<input type="checkbox"/>	11. If possible, fire the weapon before disassembly;
<input type="checkbox"/>	12. After firing weapon, disassemble and notate any internal modifications that have been made to the evidence item;
<input type="checkbox"/>	13. Formulate conclusion; and
<input type="checkbox"/>	14. Place a copy of all documentation utilized in the formulation of the examination in the file folder with a copy of the final report. All hand written or typed case notes should go in a pink envelope and marked "case notes" and then sealed by the FEO.
Signed: _____	dated: _____

Exhibit 3 ATF Form 3311.2, Firearms Technology Branch Report of Technical Examination

U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives		Firearms Technology Branch Report of Technical Examination	
		Firearms Technology Branch 344 Needy Road Martinsburg, WV 25401 Phone: 304-268-1699 Fax: 304-268-1701	
To: Special Agent Bureau of Alcohol, Tobacco, Firearms and Explosives		Date: IN # RE: FTB #	
Date Exhibits Received:	Type of Examination Requested:		
Delivered By:	Test, Examination, Classification		
ATF Form 3311.2 Revised April 2004			