

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

WILLIAM AKINS,

Plaintiff,

v.

CASE NO: 8:08-cv-988-T-26TGW

UNITED STATES OF AMERICA,

Defendant.

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**ORDER**

This cause comes before the Court on Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment, which is accompanied by the administrative record of the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or "BATFE") (Dkt. 19) and Plaintiff's Response in Opposition, which is accompanied by a Statement of Disputed Facts and exhibits (Dkt. 25). Defendant has also filed a Reply to the Response. (Dkt. 28.)

**Summary Judgment Standard**

The parties have submitted many exhibits for the Court's consideration in these proceedings and, thus, Defendant's instant Motion will be treated as a motion for summary judgment. See Poole v. Rich, 2008 WL 185527, at \*2 (11th Cir. 2008) (reaffirming the general rule that whenever a judge considers matters outside the pleadings in a 12(b)(6) motion, that motion is converted to Rule 56 motion for summary judgment). Summary judgment is appropriate where there is no genuine issue of material

fact. Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (citation omitted). On a motion for summary judgment, the court must review the record, and all its inferences, in the light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Having done so, the Court finds that Defendant's Motion for Summary Judgment is due to be granted. Defendant's memoranda are thorough and well-reasoned and, therefore, portions of them will be incorporated herein.

### **Case Background**

The Gun Control Act ("GCA") prohibits any person from "possess[ing] a machinegun" manufactured after May 19, 1986, subject to a limited exception for law enforcement agencies. 18 U.S.C. § 922(o). Congress drew upon the definition of "machinegun" as found in the National Firearms Act ("NFA"), Internal Revenue Code of 1954, 26 U.S.C. § 5845, which defines the term as follows:

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled, if such parts are in the possession or under the control of a person.

See 18 U.S.C. §§ 921(a)(23), 922(b); 26 U.S.C. § 5845; see also 27 C.F.R. 478.11; 479.11. Manufacturers of machineguns are required to register in accordance with 26 U.S.C. § 5822 and may only manufacture them for the use of a Federal or state department or agency. See 18 U.S.C. § 922(o). Congress has delegated the authority to regulate under the NFA to ATF. See 27 C.F.R. § 479; U.S. v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725, 416 F.3d 977 (9th Cir. 2005) (recognizing delegation of authority to ATF).

In 1998, Plaintiff developed an “apparatus for accelerating the cyclic firing rate of a semi-automatic firearm,” and applied for a patent from the United States Patent and Trademark Office. (Dkt. 12, Ex A.) On August 15, 2000, Plaintiff received Patent No. 6,101,918 for his device, which he subsequently named the “Akins Accelerator.” (Id. at Ex. B; Dkt. 12, ¶ 7.) Plaintiff wrote to the Firearms Technology Branch (“FTB”) of ATF on March 31, 2002, enclosing a copy of his patent abstract, to inquire as to whether the device would be classified as a machinegun. (Dkt. 12, Ex. B.)

On July 28, 2003, FTB asked that Plaintiff submit a sample of the device and on August 21, 2003, Thomas Bowers (“Bowers”), Plaintiff’s business associate, submitted a prototype to FTB. (Dkt. 1, ¶ 15.) FTB examined the Akins Accelerator prototype, installed it in an SKS-type rifle, and test-fired it. (Dkt. 12, Ex. E.) On the second test-firing, the prototype broke. (Id.) Notwithstanding, FTB determined that “the submitted stock assembly does not constitute a machinegun . . . [nor] a part or parts designed and intended for use in converting a weapon into a machinegun.” (Id.) FTB informed Mr.

Bowers of its conclusion in a November 17, 2003 letter, noting that the “weapon did not fire more than one shot by a single function of the trigger.” (Id.)

On January 21, 2004, Bowers submitted a second letter, wherein he expressed “confusion” over the meaning of the November 17, 2003 letter and asked FTB to “clearly state[]” its opinion on the “application of the principle of operation” of the Akins Accelerator, not just on the physical prototype itself. (Dkt. 12, Ex. F.) FTB replied to Mr. Bowers’ letter on January 29, 2004, describing the device’s “proposed theory of operation” as “the application of the movement of the counter recoiling rifle to initiate a rapid succession of semiautomatic fire.” (Dkt. 12, Ex. G.) The letter then stated that the “classification of the stock assembly was rendered despite the breakage of the prototype,” noting that “[t]he theory of operation was clear even though the rifle/stock assembly did not perform as intended.” (Id.) The letter emphasized, however, that its conclusions were “valid provided that when the stock is assembled with an otherwise unmodified SKS semiautomatic rifle, the rifle does not discharge more than one shot by a single function of the trigger.” (Id.) Based on FTB’s classification that the Akins Accelerator was not a machinegun, Plaintiff began mass production and distribution of the devices through Plaintiff’s predecessor in interest, Akins Group, Inc.

On August 18, 2006, a website that Plaintiff was using to sell the Akins Accelerator came to the attention of ATF. (Dkt. 19, R. 25.)<sup>1</sup> The website advertised the

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<sup>1</sup> Citations to pages in the administrative record (Dkt. 19) are signaled throughout this Order with “R.”

device as “Evaluated by FTB/USDOJ/BATFE” and quoted from FTB’s letters and the NFA. (R. 25-26.) Shortly thereafter, an Akins Accelerator customer wrote the FTB and requested “a written determination” of whether the device, “assembled with a standard Ruger 10/22 semiautomatic carbine as described by the manufacturer,” would constitute a machinegun within the NFA.<sup>2</sup> (R. at 27-28.) The letter expressed concern that the earlier letters to Mr. Bowers did not “specifically include the use of the device with a standard Ruger 10/22 semiautomatic carbine.” (*Id.*) Around the same time, FTB received requests to evaluate other devices designed to accelerate the rate of fire of a semiautomatic firearm, including one to be used in conjunction with an AK-47 type semiautomatic rifle. (R. 50-52.)

On September 22, 2006, ATF opened an investigation into the then being sold Akins Accelerator. (*Id.* at R. 54.) ATF obtained a retail-model device on October 6, 2006, and forwarded it to FTB on October 11, 2006. (*Id.*) Following a test-firing of the retail-model device, FTB wrote to Bowers on November 22, 2006, and advised him that it had tested the device with a Ruger 10/22 rifle and “demonstrated that a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.” (Dkt. 12, Ex. H.) The letter also noted that “[t]he Akins device assembled with a Ruger 10/22 is advertised to fire approximately 650 rounds per minute,” and concluded that the device must be

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<sup>2</sup> See 26 U.S.C. § 5845(a) (defining “firearm”).

classified as a machinegun. (Id.) FTB stated that its prior letters “are hereby overruled” and advised Plaintiff to either register its Akins Accelerators on hand as machineguns in accordance with 26 U.S.C. § 5822 or surrender them. (Id.)

Then, on December 13, 2006, ATF issued a new policy statement, ATF Ruling 2006-2, out of concern for the public safety implications of other, similar devices. (Dkt. 12, Ex. I.) In that statement, ATF explained that “conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun as defined in the National Firearms Act and the Gun Control Act.” (Id.) In addition, ATF provided a description of the Akins Accelerator, and held that such a device would be classified as a machinegun. (Id.)

On January 19, 2007, ATF required Plaintiff to remove recoil springs from his personal Akins Accelerators and surrender them. (Dkt. 1, ¶ 35.) On February 6, 2007, Plaintiff, through counsel, requested that FTB reconsider its classification of the Akins Accelerator as a machinegun. (Dkt. 12, Ex. J.) The request for reconsideration asserted that... “[i]f . . . the trigger finger remains in contact with the trigger, only one shot can result until the trigger is released and then pressed again.” (Id.) It also observed that a number of other devices have not been classified as machineguns, including devices that fire two or three shots with a single pull of the trigger. (Id.; R. 132.) The request for reconsideration emphasized that the agency’s original classification of the Akins Accelerator was “consistent” with “long-standing agency interpretations.” (Id.; R. 135.)

In conjunction with his request that ATF reconsider Ruling 2006-2, Plaintiff requested the opportunity “to present [his] case orally” to ATF. (R. 147.) On September 24, 2007, ATF issued a letter upholding that the machine gun classification without a hearing. (Dkt. 12, Ex. K.)

On February 18, 2008, Akins Group, Inc., assigned all rights and interests in claims it may have against the Government to Plaintiff. (Dkt. 1, ¶ 37.) On March 6, 2008, Akins filed a lawsuit in the Court of Federal Claims, requesting compensation under the Takings Clause of the Fifth Amendment, as well as declaratory and injunctive relief reversing ATF’s classification of the Akins Accelerator. See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 1). On May 2, 2008, the United States moved to dismiss the case, arguing with respect to Akins’ declaratory and injunctive relief claims that the Court of Federal Claims lacked jurisdiction to: (1) hear Plaintiff’s due process claim; (2) conduct Administrative Procedures Act (APA”) review of ATF’s ruling; (3) declare 18 U.S.C. § 922(o) unconstitutional; or (4) issue the requested declaratory and injunctive relief. See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 5). In response, Akins withdrew those claims. See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 6).

Plaintiff filed the instant action on May 21, 2008, claiming that ATF/FTB’s actions were arbitrary and capricious and a violation of due process. (Dkt. 1.) Plaintiff seeks relief in the form of: (1) a declaration that the Akins Accelerator is not a machinegun; (2) an injunction prohibiting Defendant from treating the Akins Accelerator as a machinegun

for any purpose; (3) an alternative declaratory ruling that 26 U.S.C. § 5845(b) is unconstitutionally vague on its face and as applied to Plaintiff; (4) alternative injunctive relief prohibiting Defendant from applying 26 U.S.C. § 5845(b) so as to treat the Akins Accelerator as a machinegun; and (5) costs and attorney's fees. (Dkt. 1.)

On July 24, 2008, the Court of Federal Claims dismissed Akins' remaining claims, holding that Akins' takings claims were "barred under the police power doctrine," and further holding that Akins "voluntarily entered an area subject to pervasive federal regulation, in which he could not have an "expectation interest . . . protected by the Fifth Amendment. See Akins v. United States, 82 Fed. Cl. 619, 622-24 (Ct. Fed. Cl. 2008).

### **Standard of Review**

This case is a challenge to ATF's interpretation of 26 U.S.C. § 5845 and its application to the Akins Accelerator. Such final agency actions may be challenged as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2); 5 U.S.C. § 704. If that challenge is successful, the court may "hold [the action] unlawful and set aside agency action, findings, and conclusions." Sierra Club v. Flowers, 526 F.3d 1353, 1360 (11th Cir. 2008). "This standard of review is highly deferential, and presumes the validity of the agency action." Florida Manufactured Housing Ass'n, Inc. v. Cisneros, 53 F.3d 1565, 1572 (11th Cir. 1995); see also Sierra Club v. Van Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) (holding that "this standard is exceedingly deferential").

It is well established that this Court should confine its review to the administrative record. See Garcia v. United States, 2002 U.S. Dist. LEXIS 22704, at \*18 (S.D. Fla. May 8, 2002) (holding that “[i]n an APA case, judicial review is based on an administrative record provided by the defendant agency to the Court”); see generally Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985) (holding that “[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”). A complete administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege. In this case, Defendant has provided the Court with the complete administrative record and Plaintiff with a privilege log explaining the reasons for any redactions.

Ultimately, the reviewing court should only “ensure that the agency came to a rational conclusion, not [] conduct its own investigation and substitute its own judgment for the administrative agency’s decision.” Van Antwerp, 526 F.3d at 1360. Although the agency must have “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” the Court must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

### Discussion

ATF concluded that the Akins Accelerator is a machinegun based on its testfiring of a retail-model Akins Accelerator, installed in a Ruger 10/22 rifle, in accordance with the manufacturer's instructions. Federal law defines a "machinegun" as any weapon which shoots "automatically more than one shot, without manual reloading, by a single function of the trigger." 28 U.S.C. § 5845(b). The definition includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." *Id.* (emphasis added). In the test-firing, FTB determined that "the person firing has to make one initial conscious effort to pull the trigger . . . [and] once the triggering cycle is initiated, the firearm continues to fire without interruption until a second, conscious releasing of the trigger stops the firing sequence." (R. 157). Thus, the Akins Accelerator fires "more than one shot, automatically, without manual reloading, and without any additional conscious action to manipulate the trigger," as set out in 28 U.S.C. § 5845(b).

Plaintiff does not dispute that the purpose of the Akins Accelerator is to make it possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted or until the shooter takes an action to remove his finger from the device. (See Dkt. 25, Statement of Disputed Facts, ¶¶ 3-8.) In fact, Plaintiff acknowledged that the Akins Accelerator "bounces" the rifle back and forth, repeatedly causing the weapon to discharge by "push[ing] it into the finger." (*Id.* at ¶¶ 6-7.) As

Defendant asserts, the reasonableness of ATF's common-sense determination is supported by judicial precedent, legislative history, and the need to protect public safety.

The Supreme Court has adopted the view that "single function of the trigger" is synonymous with "single pull of the trigger." See Staples v. United States, 511 U.S. 600, 603 n.1 (1994). In Staples, the Supreme Court interpreted the NFA definition and concluded that "any fully automatic weapon is a 'firearm' within the meaning of the Act." Id. at 602. As the Court further explained, an automatic weapon is one "that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are 'machineguns' within the meaning of the Act." Id. at 603, n.1. In contrast, the Court "use[d] the term 'semiautomatic' to designate a weapon that fires only one shot with each pull of the trigger . . ." Id. Similarly, in analyzing a weapon that "required only one action-pulling [a user-installed] switch . . . to fire multiple shots," the Fifth Circuit concluded that a "single function of the trigger" should be interpreted as a single action -- the trigger pull. United States v. Camp, 343 F.3d 743, 745 (5th Cir. 2003).

The legislative history of the NFA also confirms that ATF, like the above-cited courts, reasonably reads the phrase "single function of the trigger" as encompassing any "single pull of the trigger." In testimony leading up to the passage of the NFA, the then president of the National Rifle Association equated the phrase "single function of the trigger" with a "single pull of the trigger." As he explained:

The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun.

National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2nd Sess., at 40 (1934).

Furthermore, ATF possesses the authority “to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration.” Gun South Inc. v. Brady, 877 F.2d 858, 862 (11th Cir. 1989). At the same time, however, when “[a]n agency’s view of what is in the public interest” changes, it “must supply a reasoned analysis . . . .”. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983). Without such a reasoned analysis, “[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion.” Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996).

In this case, ATF presents such a “reasoned analysis,” demonstrating that its new interpretation of the phrase “single function of the trigger” is necessary to protect the public from dangerous firearms. In Ruling 2006-2, ATF explains that the motivation for its reconsideration of the earlier letters to Plaintiff came from requests by “several members of the firearms industry to classify devices that are exclusively designed to increase the rate of fire of a semiautomatic firearm.” (Dkt. 12, Ex. I.) The Ruling then

sets forth a mechanical description of how such a device works (using the Akins Accelerator as an example) and reaches the important conclusion: “a single pull of the trigger initiates an automatic firing cycle.” (Id.) Next, it outlines the new policy, equating a “single function of the trigger” with a “single pull of the trigger,” and connecting the new interpretation to the legislative history of the NFA. (Id.) Finally, Ruling 2006-2 recognizes that this interpretation represents a policy change and states “to the extent that previous ATF rulings are inconsistent with this determination, they are hereby overruled.” Id.

Plaintiff claims to have had “legitimate reliance on [ATF’s] prior interpretation;” however, Plaintiff did make changes to the practical operation of the device and its marketing that contributed to ATF’s reconsideration, even if the “theory of operation” of the Akins Accelerator did not change after Plaintiff submitted his prototype . Plaintiff decided to retail a device intended for mounting on a different rifle model than that submitted for testing (the Ruger 10/22 instead of the SKS-type). In conjunction with requests that ATF review similar devices designed for other rifle models, this change highlighted the need for ATF to consider whether its interpretation of “single function of the trigger” remained appropriate. (See R. 159.) This factor certainly diminishes the weight of Plaintiff’s detrimental reliance argument. Notwithstanding, Plaintiff’s reliance interest cannot prevent agency reconsideration where the agency’s original opinion proves erroneous. See Belville Mining Co. v. United States, 999 F.2d 989, 999 (6th Cir. 1993).

The Court agrees with Defendant that in the face of technological innovation of the Akins Accelerator and similar devices, ATF's change of position is appropriate. ATF "must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 863-64 (1984). It is clear to this Court that ATF adopted its new position on the phrase "single function of the trigger" based on its experience and a reasoned analysis and because "[t]he court need only be satisfied that the bureau's policy change . . . [was] not the result of arbitrary and capricious action," ATF's new position is entitled to deference and "it is not [the] court's role[] to determine that the bureau's prior practice was the better position." Gilbert Equip. Co., Inc. v. Higgins, 709 F. Supp. 1071, 1078 (S.D. Ala. 1989) (upholding ATF's classification of a semiautomatic shotgun as "not particularly suitable for or readily adaptable to sporting purposes"); see also Springfield, Inc. v. Buckles, 292 F.3d 813, 819 (D.C. Cir. 2002) (finding that "agency views may change . . . [and] courts may require only a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

Although Plaintiff urges that Defendant's actions violate the Fifth Amendment's Due Process Clause, the APA does not require that ATF provide him with a formal hearing. In considering a procedural due process claim, the "Supreme Court's balancing test essentially requires [the Court] to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action . . . ." Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335

(1976)). Because of the important interests in regulating Plaintiff's device and Plaintiff's actual presentation of his arguments in written form to the agency (see R. 123-R. 136), the Court is convinced after a balancing of interests that Plaintiff has not been deprived of due process. First, although Plaintiff identifies an important interest affected by the reclassification -- his ability to manufacture and sell the Akins Accelerator without registering under 26 U.S.C. § 5822 -- that interest is limited by the pervasive federal regulation of the manufacture and sale of firearms. See Akins v. United States, 82 Fed. Cl. 619, 624 (Ct. Fed. Cl. 2008). As the Court of Federal Claims noted, a business owner beginning manufacture of rapidly-repeating firearms "ought to be aware of the possibility that new regulation might even render his property economically worthless." Id. As Defendant asserts, Plaintiff's interest -- though important -- is lessened by the regulatory environment.

Given the second Eldridge factor, there is little risk of an erroneous deprivation of Plaintiff's interest in this case. The cornerstone of procedural due process is notice and a meaningful opportunity to be heard, and when those conditions are satisfied, there is "no absolute due process right to an oral hearing." See Forjan v. Leprino Foods, Inc., 209 Fed. Appx. 8 (2nd Cir. 2006); see also Raditch v. U.S., 929 F.2d 478, 480 (9th Cir. 1991) (holding that due process principles may be satisfied through "notice and an opportunity to respond," but response may be written or oral). After receiving notice of ATF's new position, Plaintiff presented a lengthy memorandum requesting that the agency reconsider its decision, a process for which he retained representation from two outside counsels.

(See Dkt. 12, Ex. J.) Plaintiff presented 14 pages of supporting legal arguments in his brief. (Id.) In his brief, Plaintiff included most of the legal arguments which he raises now supporting his position. It should also be pointed out that a new hearing before the agency is not the relief Plaintiff seeks for the agency's alleged violation of his procedural due process. Cf. Ray v. Foltz, 370 F.3d 1079, 1085 n.8 (11th Cir. 2004) (observing that the ordinary remedy for a denial of due process is "the grant of the procedures due"). Instead, he seeks a reversal of the agency's classification of the Akins Accelerator altogether. (Dkt. 1, ¶ 9.)

Plaintiff fails to even argue how an oral hearing would have made a difference in the outcome. Despite Plaintiff's urging to the contrary, his memorandum presented only questions of law and statutory interpretation, not factual disputes of the sort that require an oral hearing. See Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964) (stating that "[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved"). He is disputing the FTB's legal interpretations of what constitutes a "trigger function." He fails to identify any mistake of fact in the FTB's understanding of the operation of the Akins Accelerator. In a follow-up letter to the FTB, Plaintiff noted that he sought oral argument "because the public policy implications involved in this case will have long-term effects on the NFA community," not because he needed an opportunity to dispute the facts on which ATF based its decision. (R. 147.) However, inasmuch as Plaintiff had a meaningful chance to present his case to ATF in writing and there is little chance the

agency's decision proved erroneous, the second Eldridge factor supports ATF's determination.

While the Complaint describes Plaintiff's due process claim only as Defendant's alleged failure to provide him with a hearing, he asserts in his Response to Defendant's Motion that "Defendant was required to provide a notice of proposed rulemaking via publication in the Federal Register" before issuing ATF Ruling 2006-2. (Dkt. 25, 6.) However, "the APA's notice and comment requirements apply to substantive rules established through agency rulemaking, but do not apply to interpretive rules." Hi-Tech Pharms., Inc. v. Crawford, 505 F. Supp. 2d 1341, 1351 (N.D. Ga. 2007) (citing 5 U.S.C. § 553(b)). "Interpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979)). As has been discussed, Ruling 2006-2 explains how ATF interprets the definition of "machinegun" contained in 26 U.S.C. § 5845(b) in the context of a device like the Akins Accelerator, and it is, therefore, an interpretive rule to which the APA's notice and comment requirements do not apply.

Finally, the third Eldridge factor weighs strongly in favor of ATF's action. The protection of the public's health and safety is a paramount government interest which justifies summary administrative action . . . [i]ndeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action." Gun South, 877 F.2d at 867 (quoting Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 300 (1981)). Weapons with a high rate of fire are

extremely desirable to criminals, increasing the government's interest in summary action to close off a loophole by which they could be acquired. See generally United States v. Kirk, 1997 U.S. App. LEXIS 12670, at \*n.2 (5th Cir. 1997). As Plaintiff correctly observed in his briefing to the Court of Federal Claims, if the Akins Accelerator is not classified as a "machinegun," it would "not fall under any federal regulatory scheme of any kind." See Akins v. United States, No. 08-136C (Ct. Fed. Cl. 2008) (No. 6). This unhindered capability would be wholly inconsistent with the strict regulation of machineguns imposed by the NFA and the prohibition on post-1986 machineguns imposed by the GCA. See United States v. Golding, 332 F.3d 838, 840 (5th Cir. 2003) (discussing the "risk . . . presented by the inherently dangerous nature of machineguns," as shown by "Congress's decision to regulate the possession and transfer of this specific type of firearm"); United States v. Haney, 264 F.3d 1161, 1168 (10th Cir. 2001) ("banning possession of post 1986 machine guns is an essential part of the federal scheme to regulate interstate commerce in dangerous weapons"). Thus, the Court agrees with Defendant that ATF has a powerful interest in correctly interpreting the statute to close the loophole created by its earlier interpretation of the machinegun definition and preserve the integrity of the system regulating dangerous weapons.

Finally, Plaintiff argues that the definition of machinegun found in 26 U.S.C. § 5845(b) "is unconstitutionally vague." (Dkt. 1, ¶ 43.) Although Plaintiff alleges that the statute is vague both "on its face" and "as applied to Plaintiff," Defendant is correct that this Court need only review the statute as-applied, because "[v]agueness challenges to

statutes not threatening First Amendment interests are examined in light of the facts of the case at hand.” United States v. Awan, 966 F.2d 1415, 1424 (11<sup>th</sup> Cir. 1992) (quoting Maynard v. Cartwright, 486 U.S. 356 (1988)). A statute is unconstitutionally vague “only where no standard of conduct is outlined at all; when no core of prohibited activity is defined.” Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 509 (5th Cir. 2001). On the other hand, a statute is not unconstitutionally vague unless it is “substantially incomprehensible,” and “men of common intelligence must necessarily guess at its meaning.” Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 669 (11th Cir. 1984); United States v. Wilson, 175 Fed. Appx. 294, 297 (11th Cir. 2006).

Plaintiffs’ own allegations support the well-established precedent that 26 U.S.C. § 5845(b), although permitting multiple interpretations, does not fall within this realm of incomprehensibility. Plaintiff’s own actions in communicating repeatedly with ATF suggest that the statute gave him fair notice that Akins Accelerators might well fall within the prohibited standard of conduct. He sufficiently understood the section 5845(b) definition to submit the device to FTB for classification. (Dkt. 12, Exs. B, C.) When Plaintiff began to offer the device for sale, he used ATF’s original opinion as a marketing tool. (See, e.g., R. 196) (noting that “especially important was that the Accelerator™ had received not one, but two approval letters from BATFE through their Firearms Technical Branch”).) The fact that ATF’s initial classification was later deemed in error does not render the statute invalid for vagueness. Lawful statutes may be susceptible of multiple interpretations, and the mere fact that “there may be some ‘close cases’ or difficult

decisions does not render a policy unconstitutionally vague.” Hills v. Scottsdale Unified School Dist. No. 48, 329 F.3d 1044, 1056 (9th Cir. 2003); see also Ford Motor Co. v. Texas Dep't of Transp., 264 F.3d 493, 509 (5th Cir. 2001) (holding that “[a] statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case”).

**ACCORDINGLY**, it is **ORDERED AND ADJUDGED**:

Defendant’s Motion to Dismiss or in the Alternative Motion for Summary Judgment (Dkt. 19) is granted. The Clerk is directed to enter judgment for Defendant, terminate any pending motions, and close this case.

**DONE AND ORDERED** at Tampa, Florida, on September 23, 2008.

*s/Richard A. Lazzara*  
**RICHARD A. LAZZARA**  
**UNITED STATES DISTRICT JUDGE**

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Counsel of Record