

September 07, 2021

Via Federal eRulemaking Portal

The Honorable Marvin Richardson
Acting Director
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Ave, N.E.
Washington, DC 20226

Re: Notice of Proposed Rulemaking
Factoring Criteria for Firearms With Attached “Stabilizing Braces”
Docket No.ATF-2021-0002
RIN 1140-AA55

Dear Acting Director Richardson:

The National Shooting Sports Foundation (“NSSF”) is the trade association for America’s firearm, ammunition, hunting and shooting sports industry. Our nearly 9,000 members are comprised of manufacturers, distributors, retailers, shooting ranges, sportsmen’s organizations, and endemic media. The NSSF advocates on behalf of our industry (“Industry”). We work cooperatively with law enforcement, including the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), to help prevent the criminal and unauthorized access to firearms, encourage the safe and responsible ownership, use, and storage of firearms, and the enjoyment of recreational shooting and hunting.

On behalf of our members, NSSF offers the following public comments on the ATF proposed rule on Factoring Criteria for Firearms With Attached “Stabilizing Braces”: Federal Register Number 2021-12176, published on June 10, 2021 (the “Proposed Rule”).

Intent of Congress

The Proposed Rule is in violation of Congressional intent. The Gun Control Act of 1968 (GCA) and the Firearm Owners Protection Act of 1986 (FOPA) combined, established, and reinforced that a regulatory agency cannot exceed its authority to create new firearm regulations at a whim and likely creating new criminal offenses. The Proposed Rule would accomplish what Congress rejected in the enactment of the GCA. By expanding the regulatory definition of “rifle” with criminal and legal consequences ATF is exceeding the definition of that term enacted by Congress:

Even more serious is the idea that some future Secretary might change or alter a rule or a regulation in order to form it up into a criminal offense, and thus place in the hands of an executive branch administrative official the authority to fashion and shape a criminal offense to his own personal liking and charge a citizen of the United States with the peril of imprisonment for violation thereof.¹

Under Firearms Owners Protection Act (“FOPA”):

Regulations must be necessary as a matter of fact, not merely reasonably necessary as a matter of judgment. The deletion of the term ‘reasonably’ narrows the boundaries of an agency’s discretion, discretion which has been at times exercised in an abusive manner. . . . In addition, the provision ensures that such regulations represent the least restrictive method of carrying out the intent of the law.²

With the above considered, ATF has failed to justify the Proposed Rule and the new regulations on braced pistols. A litmus test showing the prominence of Stabilizing Braces used in crime is missing from the proposal. Having a firearm in commission of a crime is a criminal offense on its own. To justify the Proposed Rule ATF cites news reports suggesting that a braced pistol was misused in just two crimes, albeit with terrible consequences, like any criminal shooting. There is no reason to believe these, or other crimes, would not have occurred but for the existence of braced pistols. There is every reason to believe that these shooters would simply have chosen and used a different firearm to commit their premediated, heinous acts of violence. The mere possibility that someone would shoulder-mount a pistol equipped with a brace, contrary to its design, does not mean the pistol is a “rifle” or a “short-barreled rifle.” It does not change the design of the pistol or intent of the manufacturer, which is the relevant statutory test established by Congress. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992).

The Proposed Rule would not address criminal activity and would ultimately punish law-abiding gun owners and the Industry. The Proposed Rule exceeds the intent of Congress in an attempt to address the *possibility* of isolated misuse of Stabilizing Braces.

Contradictory Historic Guidance

The Proposed Rule was introduced nearly a decade after the then-Firearms Technology Branch (FTB)³ approved SB Tactical’s® design of the “Stabilizing Brace.” The Stabilizing Brace originated as an alternative for disabled shooters, including members of the military and the veteran community. Stabilizing Braces attach to modern large frame pistols and provide a more controlled means of which to shoot and control the pistol. In reliance upon ATF’s determination, and in full view of the ATF, members of the Industry have since manufactured and sold millions of variations of these products both as standalone accessories and equipped on commercially made pistols. This legal commerce has been done in good faith for almost a decade based on ATF’s initial approval and continued guidance. The 2012 determination letter, reference number 903050:MMK 3311/2013-0172, stated that that the accessory as designed would not convert a

¹ 114 Cong. Rec. 14792 (May 23, 1968)

² 131 Cong. Rec., 99th Cong., 1st Sess., at S9171

³ Now known as Firearms and Ammunition Technology Division (“FATD”).

large frame pistol to a rifle or be subject to the National Firearms Act (NFA): “While a firearm so equipped would still be regulated by the Gun Control Act, 18 U.S.C. § 921(a)(3), such a firearm would not be subject to NFA controls.”⁴ Industry and consumers followed this guidance with confidence that ATF would not arbitrarily change their mind and regulate braced pistols as NFA items.

In 2015, three years after their original determination was made, ATF expanded on their guidance with the method in which pistol braces are used but still reaffirmed their original decision that the accessory alone would not change a firearm’s classification. The 2015 determination letter, 907010:MCP 3311/304296, stated that the ATF believes that while braces on pistols do not violate the NFA and reclassify the firearm, if the end user were to shoot the braced pistol with the rear of the brace in contact with the shooter’s shoulder, then the firearm is “remade” and classified as a short-barreled rifle (SBR) and subject to heavy regulation under the NFA. The relevant portion of the comment letter reads as follows:

Further, should an individual utilize the ‘Adjustable Pistol Stabilizing Brace’ on the submitted sample as a shoulder stock to fire the weapon from the shoulder, this firearm would then be classified as a ‘short-barreled rifle’ as defined in the NFA, 26 U.S.C. § 5845(a)(3) because the subject firearm, with attached brace, has then been made or remade, designed or redesigned from its originally intended purpose.⁵

The glaring problem for the Industry and law-abiding American citizens in this matter is the power of ATF to regulate how something is used by the end user rather than the historic practice of regulating objective configurations of firearms. Redesigning a product necessarily requires a physical alteration in either function or appearance.⁶ Use of an accessory in an unintended fashion by an end user does not meet the standard for satisfying the definition of “redesign.”⁷ Manufacturing, distributing, and selling a firearm as a pistol under current law and regulation to then have it be considered “redesigned” based on what part of the body the firearm touches is completely capricious. Compounding this problem are the downstream consequences of such a change in direction: one significant ramification is illegal possession of a short-barreled rifle, which is a felony offense. More importantly, the ATF is tasked with regulating firearms but, in this case, they are regulating the manner in which a person utilizes an accessory for lawful purposes, which is outside of the control of members of the Industry and beyond ATF’s jurisdiction.

A third clarification letter, a reversal in opinion, was published in 2017 from ATF, 90000:GM 5000, which stated, “incidental, sporadic, or situational ‘use’ of an arm-brace” as a

⁴ U.S. DOJ ATF Comment Letter, 903050:MMK 3311/2013-0172, November 26, 2012 (emphasis added)

⁵ U.S. DOJ ATF Comment Letter, 907010:MCP 3311/304296, December 22, 2015

⁶ But the case of two identical braced pistols set on a table in an indoor shooting range with no windows. An ATF official is brought into the range to observe the two pistols and then exits the room. Out of sight of the ATF official, someone raises one of the two braced pistols to their shoulder, fires it once time, and returns it to the table. The ATF official is brought back into the range and asked which of the two braced pistols has been redesigned into a Short Barrel Rifle (“SBR”). Of course, the ATF official would be unable to answer because neither braced pistol has been redesigned.

⁷ See www.merriam-webster.com/dictionary/redesign, defining “redesign” as “to revise in appearance, function, or content”; see also 2015 ATF “OPEN LETTER ON THE REDESIGN OF ‘STABILIZING BRACES’”

shoulder stock did not constitute a “redesign” and would ultimately not fall under the NFA because that is “not consistent with the intent of the NFA.” Due to this statement by ATF, the practice of manufacturing pistols with braces continued based on this guidance, in good faith and in plain sight. As record firearm purchases have been occurring in the United States, the braced pistol continues to be, by all accounts, a configuration “in common use” and consistent with the *District of Columbia v. Heller*.⁸

We would note our Industry’s concern with ATF making classification determinations that our members have detrimentally relied upon to design, manufacture, market and sell legally to law abiding consumers exercising their Second Amendment Rights only to have ATF, years later, rescind and revoke its interpretation declaring previously lawful products as no longer lawful or now regulated. ATF’s rule making on so-called “bump stocks” is a recent example.

Worksheet 4999

The Proposed Rule includes a problematic worksheet, “Worksheet 4999,” as a guide to classify “Stabilizing Brace” equipped pistols. This worksheet aims at categorizing firearms as pistols or SBRs based on the firearm’s configuration with accessories. This is arguably an attempt to regulate accessories of firearms and not firearms themselves. We are troubled that even if a firearm passes ATF’s own arbitrary criteria as set forth in the Worksheet:

The Bureau of Alcohol, Tobacco, Firearms and Explosives reserves the right to preclude classification as a pistol with a ‘stabilizing brace’ for any firearm that achieves an apparent qualifying score but is an attempt to make a ‘short-barreled rifle’ and circumvent the GCA or NFA.⁹

The subjective opinion of an agent or ATF’s Firearms and Ammunition Technology Division (FATD) examiner can easily reclassify a braced pistol that passes ATF’s own criteria into an SBR if either party subjectively deems a particular configuration an attempt to circumvent the law.

The Proposed Rule acknowledges that submission to FATD is not required by law, it is voluntary,¹⁰ but encouraged. Moreover, the Proposed Rule states it is to “allow individuals or members of the firearm industry to evaluate [self-classify] whether a weapon incorporating a ‘stabilizing brace’... will be considered a ‘short-barreled rifle’ or a ‘firearm’ under the GCA and NFA.” An individual or Industry member could apply ATF’s criteria and determine it is a braced pistol only to later be charged by ATF with a felony for possession an SBR.¹¹ This is arbitrary and capricious and raises important Due Process concerns. What if a manufacturer submits a brace equipped firearm to ATF FATD and ATF applies the criteria in Worksheet 4999 and determinates it is a brace equipped pistol, but a retailer later advertises the product in a manner to suggest it is an SBR? Or a consumer post on YouTube a video of them placing the braced pistol to their shoulder and firing it. Is the manufacturer now criminally liable for making and selling

⁸ *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008)

⁹ Proposed Rule 86 FR 30826 at 30841

¹⁰ Proposed Rule 86 FR 30826 at 30826

¹¹ Proposed Rule 86 FR 30826 at 30834

an SBR? Is the product now suddenly reclassified as an SBR despite the actual design and intent of the manufacturer and ATF's own worksheet?

Worksheet 4999 has three sections. Each section is replete with arbitrary values focused on the "mere possibility" or potential for shoulder mounting of a pistol to determine the manufacturer's design and intent. First, a prerequisite that requires a weight of 64 ounces and an overall length between 12 and 26 inches. It is unclear if a braced pistol with an overall weight of less than 64 ounces or length greater than 26 inches would still need to be scored. The previously provided note about circumvention of the GCA and NFA would lead many to suspect that regardless of a lighter weight or greater overall length, ATF may regard a braced pistol as an "attempt to...circumvent the GCA or NFA."¹² Sections Two and Three contain numerical scoring and require a score of less than four in each section to gain a user identified classification of a braced pistol rather than SBR. A score of four or more in either section classifies a firearm as an SBR. Based on our analysis of Worksheet 4999, the calculation methodology will disproportionately produce scores at or above a four resulting in the incorrect classification of braced pistols as rifles and/or SBRs.

Section Two "rear surface area" highlights the vagueness problem.¹³ It speaks of "minimum" and "substantial" surface areas without specifying what that means. What is "minimum" and what is "substantial"? It appears to be left to the subject view of the person applying the criteria. And the Proposed Rule is contradictory and capricious when it says "However, while smaller, less substantial 'stabilizing brace' designs may have reduced surface area, this shouldering area may still be similar to known shoulder stock designs...." The rule speaks of "sufficient" and "could possibly," but "mere possibility" is not "design" and "intended."

Section Three of Worksheet 4999 assigns four points to any firearm "as configured" to weigh over 120 ounces.¹⁴ ATF is not taking into consideration the fact that accessories like sights to aim, silencers to protect hearing, and a flashlight to identify targets in low light environments will likely exceed the 120-ounce threshold. These configurations described are very common for many Americans and are widely considered as ideal for both home defense and recreation. Scoring heavy braced pistols so that they overwhelmingly classified as SBRs is extremely punitive and exclusionary. Heavier firearms produce less recoil, something that is considered highly beneficial among disabled shooters who may be recoil sensitive. Under Worksheet 4999, this type of heavier firearm would score negatively. In many ways, the Proposed Rule is an affront to the purpose and intent of the Americans with Disabilities Act (ADA) due to the recommended restrictions placed on firearms with an accessory expressly designed for disabled Americans. This is done without any consideration, study, or evidence of the effect on the disabled community. The Proposed Rule also lacks any provisions or exemptions for disabled shooters who have an obvious need for Stabilizing Braces.

According to the worksheet's limiting scoring scale associated with adjustability, a Stabilizing Brace with adjustable features to accommodate shooters of different shapes and sizes

¹²Proposed Rule 86 FR 30826 at 30826

¹³Proposed Rule 86 FR 30826 at 30832

¹⁴ *Id.*

is more closely associated with SBRs. This is not only problematic for the shooter but also stifles innovation for the Industry. It is also illogical to assign points for adding items like a “hand stop.” This addition is presumably based on the GCA definition of a handgun which states in part, “a firearm which has a short stock and is designed to be held and fired by the use of a single hand.”¹⁵ All firearms, regardless of classification, should be fired from a safe and secure shooting position. The intent of a manufacturer is not vacated in the objective construction of a pistol when a user opts to shoot the firearm with two hands. To reiterate, this logic falls into ATF’s own 2017 guidance clarified that “incidental, sporadic, or situational ‘use’ of an arm-brace” as a shoulder stock did not constitute a redesign and would ultimately not fall under the NFA because that interpretation is “not consistent with the intent of the NFA.”¹⁶ If a braced pistol that incidentally, sporadically, or situationally is shot with two hands, then it follows the same line of argument that ATF has made with shouldering a pistol brace on occasion.

It is overwhelmingly common to shoot small, concealed carry sized pistols with two hands. The argument has never been made by the ATF that small, concealed carry type pistols should be regulated as SBRs based on the common practice of shooting them with two hands. Certainly, a shooter can shoot them with one hand, but that is not common practice outside of certain training or competition scenarios. Shooting with two hands is prevalent because, regardless of size, a shooter has more control of a firearm. A second hand, or Stabilizing Brace, provides an additional level of control. If a shooter wishes to fire the weapon with one hand, or two, it does not change the objective configuration of the firearm nor the intent of the manufacturer’s design. The same argument can be made for larger braced pistols on the other end of the mass spectrum. While braced pistols can be shot with one or two hands, the objective configuration does not change based on use.

In regard to advertising and Worksheet 4999, the Proposed Rule states, “efforts to advertise, sell, or otherwise distribute ‘short-barreled rifles’ as such will result in a classification as a ‘rifle’ regardless of the points accrued on the ATF Worksheet 4999 because there is no longer any question that the intent is for the weapon to be fired from the shoulder.”¹⁷ It is largely unclear, due to lack of clarification in the Proposed Rule, who is liable if a braced pistol is shouldered by a legal consumer and posted online. Can the ATF take action against the manufacturer for the post by an unrelated third party? If the post is made on social media by the owner and not an active form of advertisement, would the spontaneous or incidental shouldering be an effort to advertise an SBR?

Misrepresentation of Scale

ATF has authority to regulate firearms in the NFA, which are first regulated under the GCA. It is outside the ATF’s authority to arbitrarily reclassify millions of firearms in common use under the GCA as NFA items, especially after almost a decade of legal commerce and reaffirmation in determination letters to manufacturers. According to the Proposed Rule, “Anecdotal evidence from the manufacturers of the affected ‘stabilizing braces’ indicates that the manufacturers have sold between 3 million and 7 million ‘stabilizing braces’ between the years

¹⁵ Gun Control Act of 1968 18 U.S.C. § 921(a)(29)

¹⁶ U.S. DOJ ATF Comment Letter, 90000:GM 5000, March 21, 2017

¹⁷ Proposed Rule 86 FR 30826 at 30834

2013 to 2020 or over the course of eight years.”¹⁸ This estimate already exceeds the “common-use test.”¹⁹ NSSF believes this may be a conservative estimate and lack of effort to conduct a thorough analysis on the scope and financial ramifications of this proposal is inappropriate, at best. Congressional Research Service (CRS) reports:

[U]nofficial estimates suggest that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands, either purchased as accessories or already attached to firearms made at home or at the factory. Altering the classification of firearms equipped with stabilizing braces would likely affect millions of owners.²⁰

The CRS estimate is more in line with NSSF’s estimate based on our understanding of the market and input from our members.

Problematic Options for Affected Persons and Manufacturers

The Proposed Rule offers options in an attempt to assist affected persons and manufactures however these options result in undue hardships:

As mentioned, ATF wants to assist affected persons or companies and is providing additional information to aid them in complying with Federal laws and regulations. Below are options for those persons that may be affected upon publication of a final rule.²¹

These options entail a number of undue hardships and seemingly unconsidered consequences of the Proposed Rule and classification of firearm under the NFA according to Worksheet 4999. The first option for individuals in possession of a Stabilizing Brace is to permanently remove the brace, which is arguably regulation of an accessory since the operative firearm remains unchanged.

The second option is to replace the short barrel with a 16-inch or longer barrel. This could have unintended consequences of the Proposed Rule for braced pistol owners in states that have particular “assault weapon” laws. Installing a rifle length barrel could be prohibited on the state level for some gun owners and ATF is offering this option in respect only to federal firearm laws. If a consumer who possesses a braced pistol ATF would now classify as an SBR were to replace the barrel with a barrel of at least 16 inches so it is no longer an SBR, but a GCA “rifle,” may that consumer also replace the “stabilizing brace” accessory with a traditional stock since they no longer have a pistol and may not desire to have a stabilizing arm brace on their “rifle”?

¹⁸ Proposed Rule 86 FR 30826 at 30845 and 30846

¹⁹ *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (200,000 stun guns in civilian hands meet common-use test)

²⁰ William J. Krouse. (2021). Handguns, Stabilizing Braces, and Related Components (CRS Report No. IF11763) Retrieved from Congressional Research Service website: <https://crsreports.congress.gov/product/pdf/IF/IF11763>

²¹ Proposed Rule 86 FR 30826 at 30843

The third and fourth options, likely the least popular options, are destroying the firearm in question or turning the firearm in to a local ATF office. The final option is to complete and submit an application to make and register an SBR with an ATF Form 1 and a mandatory \$200 tax. Many will find this irrational for a firearm configuration, that has been legal and determined non-NFA for many years, changing classification due to an accessory.²²

This will result in one of, if not the greatest, firearm registration schemes in American history. Federal firearm registrations are illegal under the GCA and 1993 Brady Act. While registration is compulsory under the NFA, changing definitions and regulations to encompass pistols under the NFA is obtuse and problematic. Noncompliance will undoubtedly come with felony charges for those in possession of an unregistered SBR. A particular problem with this severe consequence is administration of Worksheet 4999. The Proposed Rule does not designate who can determine a valid score based on the worksheet and how much time a braced pistol owner or manufacturer has to comply. Again, ATF's note at the top of Worksheet 4999 leads many to speculate, that regardless of score, ATF could determine any pistol with Stabilizing Brace to be an effort to "circumvent"²³ the NFA and thus be an illegal SBR.

In addition to the troublesome options for owners of braced pistols and the arbitrary reclassification of historically non-NFA firearms, the change in policy to not waive the \$200 NFA tax is problematic. In the December 2020 Proposed Rule, 85 FR 82516, which was withdrawn, ATF's proposal included a waiver of the NFA tax stamp for affected Stabilizing Brace owners: "ATF plans to expedite processing of these applications, and ATF has been informed that the Attorney General plans retroactively to exempt such firearms from the collection of NFA taxes if they were made or acquired, prior to the publication of this notice, in good faith."²⁴ No valid or persuasive policy reason is given for this change in now not waiving the tax, which ATF has done in the past, e.g., "street sweeper." This change strikes us as punitive in nature.

Further, Federal Firearm Licensees (FFL) are also subject to limited options of the Proposed Rule which includes incurring a charge to pay the Special Occupational Tax (SOT) and become a Class 2 manufacturer if their product line now has newly classified SBRs. Manufacturers will also need to fill out an ATF Form 2 where applicable, creating more unnecessary obligation on Industry.

Conclusion

Efforts by ATF to again change the factoring criteria for firearms with Stabilizing Braces are arbitrary, capricious, abuse of discretion, and otherwise not in accordance with law. The Proposed Rule exceeds ATF's statutory authority. For these, and other reasons, the Proposed

²² The Proposed Rule indicates one of the options must be taken by individuals before the effective date of the Rule. Should ATF choose to implement this proposal as a Final Rule it would be imperative that ATF provide an adequate time (several months) after publication of any Final Rule and the effective date of the rule in order to permit individuals and industry to select and implement whatever options are set forth in the Final Rule.

²³ Proposed Rule 86 FR 30826 at 30841

²⁴ Proposed Rule 85 FR 82516 at 82519

Rule violates the Administrative Procedures Act²⁵. To the extent a violation the Proposed Rule would constitute a criminal offense the rule would exceed ATF's statutory authority and would be unconstitutional and a violation of the Separation of Powers.

For almost a decade the Industry in plain sight of ATF has operated in good faith that a pistol with a "Stabilizing Brace" does not fall under the regulation of the NFA. It is entirely unclear how ATF came to the finalized list of vague and arbitrary criteria enumerated in Worksheet 4999. The worksheet itself is an amalgamation of historically inconsequential factors resulting in a scoring system designed for users to reliably classify their firearm under the NFA. The worksheet's obvious intent is to precipitate the predetermined and seemingly desired result of SBR classification for all braced pistols. NSSF urges the ATF in the strongest possible terms to withdraw the Proposed Rule and maintain current existing guidance that allows law-abiding gun owners to utilize Stabilizing Braces for all lawful purposes.

Sincerely,



Lawrence G. Keane
Senior Vice President for Government & Public Affairs,
Assistant Secretary & General Counsel

²⁵ Codified by Pub. L. No. 89-554 (1966) in 5 U.S.C. §§ 551-559,701-706.