NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030

NRA-ILA

COMMENTS OF THE NATIONAL RIFLE ASSOCIATION ON ATF'S PROPOSED RULE 2021R-08

September 8, 2021

Denise Brown
Office of Regulatory Affairs,
Enforcement Programs Services,
Bureau of Alcohol, Tobacco, Firearms, and Explosives,
U.S. Department of Justice,
99 New York Ave. NE,
Washington DC 20226

Via electronic submission to regulations.gov

Re: ATF's Notice of Proposed Rulemaking Docket Number ATF 2021R-08

Since 2012, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has repeatedly recognized that the attachment of certain devices, commonly known as stabilizing braces, to pistols and certain other firearms does not necessarily subject those firearms to the provisions of the National Firearms Act ("NFA").

As recently as December 2020, ATF reiterated this position:

> In recent years, some manufacturers have produced and sold devices designed to be attached to large and/or heavy pistols which are marketed to help a shooter "stabilize" his or her arm to support single-handed fire ("braces"). ATF was advised by the first manufacturer to submit an arm brace for classification that the intent of the arm brace was to facilitate one-handed firing of the AR15 pistol for those with limited strength or mobility due to a handicap, and to reduce bruising

> to the forearm when firing with one hand. According to this manufacturer, the brace concept was inspired by the needs of disabled combat veterans who still enjoy recreational shooting but could not reliably control heavy pistols without assistance. Consequently, ATF agrees that there are legitimate uses for certain "stabilizing braces."

85 Fed. Reg. 82516 (Dec. 18, 2020).

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil-rights organization and is widely recognized as America's foremost defender of Second Amendment rights. It was founded in 1871, by Union officers who, based on their experiences in the Civil War, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA has approximately five million members, and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement.

Many NRA members possess firearms with attached stabilizing braces, and their freedom to do so would be hindered by ATF2021R-08 (the "Proposed Rule") because it would subject nearly all configurations of those firearms to the taxation and registration requirements of the NFA. 86 Fed. Reg. 30826 (June 10, 2021). For most of the last decade, the firearm industry, NRA members, and other American gun owners have relied on ATF's decisions that the attachment of a stabilizing brace does not automatically subject a firearm to regulation under the NFA. With the Proposed Rule, ATF abandons this consistency and puts the millions of gun owners who have relied on its position in serious legal jeopardy.

The Proposed Rule would create a set of "factoring criteria" to determine whether certain firearms with attached stabilizing braces are or are not subject to regulation under the NFA. The creation of clear standards is much needed in this area. Firearms manufacturers, stabilizing brace manufacturers, and gun owners, including many NRA members, have struggled to comply with

ATF's existing *ad hoc* approach to stabilizing brace regulation. However, the approach taken by ATF with the Proposed Rule seems to be an effort to categorically ban firearms with stabilizing braces rather than a legitimate attempt to provide clarity to regulated individuals and entities.

The Proposed Rule fails to explain when the new set of factors should be applied, uses factors that are extremely difficult to understand and subject to arbitrary application, doesn't adequately address effects on existing owners of brace-equipped firearms, and would result in taxation inconsistent with the applicable statutory framework. For these reasons, the Proposed Rule violates the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(2)(A)-(C); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Discussion

I. Whatever Framework ATF Uses, It Must Be Consistent With the Law

Firearms that fall within regulation of the NFA are subject to substantially more regulation than those firearms that do not. Most notably, anyone wishing to acquire or make an NFA firearm must apply, register, and usually pay a making or transfer tax to possess those firearms. 26 U.S.C. §§ 5811, 5821, 5841. Some of these firearms are also subject to additional regulation under the Gun Control Act ("GCA"). For example, owners of destructive devices, machineguns, short-barreled shotguns, or short-barreled rifles, must generally receive approval from the attorney general before transporting their firearms across state lines. *See* 18 U.S.C. § 922(a)(4).

In addition to these federal requirements, many states adopt the federal classifications of certain firearms. Classification of certain firearms under the NFA may result in these firearms becoming contraband in some states.

The primary federal statutory law governing the potential application of the NFA to brace-equipped firearms[1] is the definition of "rifle:"

> The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. § 5845(c).

ATF may not depart from this unambiguous definition. "When the words of a statute are unambiguous, then … 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (citations omitted).

The pertinent part of the definition for brace-equipped pistols is whether or not they are "designed or redesigned, made or remade, and intended to be fired from the shoulder." 26 U.S.C. § 5845(c).

Rifles with barrels of less than 16 inches in length or less than 26 inches in overall length are generally regulated under the NFA. 26 U.S.C.A. § 5845(a).

ATF has attempted to claim that the use of a particular firearm could result in it being "redesigned" seemingly based on the intent of the user. *See* ATF, Open Letter on the Redesign of "Stabilizing Braces," (Jan. 16, 2015). If ATF moves forward with the regulation of firearms with

[1] The definition of "shotgun" would also be applicable, but ATF has decided for the first time with the Proposed Rule that braces cannot be used on smooth bore firearms. "These criteria and worksheet do not apply to firearms with a smooth bore that use shotgun ammunition. These types of firearms, commonly referred to as 'pistol grip shotguns,' were never designed to be fired from one hand (e.g., Mossberg Shockwave, Remington Tac-14.) ATF has always classified these weapons as GCA 'firearms,' not shotguns or pistols, as they do not incorporate a stock, like a shotgun, and are not designed to be fired from one hand, like a pistol. Thus, the addition of a 'stabilizing brace' does not assist with single-handed firing, but rather redesigns the firearm to provide surface area for firing from the shoulder. 86 Fed. Reg. at 30,828-29. ATF's reasoning seemingly wouldn't apply to semi-automatic smooth bore firearms with stabilizing braces, but the Proposed Rule completely excludes these firearms from consideration as anything other than shoulder-fired weapons.

stabilizing braces, attempts to apply the statute based on the intent of users of a particular firearm should be avoided.

When read in context, it is clear that "intended to be fired from the shoulder" means the intent of the person who "designed or redesigned [or] made or remade" the firearm. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

With the Proposed Rule, ATF is seeking to expand the definition of "rifle" by amending the regulatory definitions of rifle to include:

> "any weapon with a rifled barrel equipped with an accessory or component purported to assist the shooter stabilize the weapon while shooting with one hand, commonly referred to as a "stabilizing brace," that has objective design features and characteristics that facilitate shoulder fire, as indicated on Factoring Criteria for Rifled Barrel Weapons with Accessories commonly referred to as "Stabilizing Braces," ATF Worksheet 4999, published on [EFFECTIVE DATE OF THE FINAL RULE].

86 Fed. Reg. at 30,851.

While administrative agencies may be given some discretion when applying the statutes they are charged with enforcing,[2] "[i]f 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." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (internal page numbers omitted).

[2] The rule of lenity, rather than agency deference, should apply in this case because these definitions form the basis for criminal statutes. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 462 (6th Cir.), reh'g en banc granted, opinion vacated, 2 F.4th 576 (6th Cir. 2021).

The same rule applies when Congress has provided a statutory definition for a particular term. "Such an explicit reference to a statutory definition demonstrates a Congressional intent to forestall interpretation of the term by an administrative agency and acts as a limitation on the agency's authority." *Royce v. Hahn*, 151 F.3d 116, 123 (3d Cir. 1998).

ATF cannot simply add to the clear and unambiguous definition of "rifle" provided by Congress. It is also unnecessary. A framework for evaluating firearms could be applied without any change to the regulatory definitions.

II. The Proposed Rule Doesn't Identify When It Should be Applied

The Proposed Rule doesn't give clear guidance on when the factoring criteria should be applied. ATF states that the factoring criteria are "for rifled barrel weapons with accessories commonly referred to as "Stabilizing Braces." That only begs the question of what is a "stabilizing brace"? That is what the factoring criteria purport to answer.

The confusion is only made worse by ATF's claim that "ATF proposes to use ATF Worksheet 4999 to determine if a firearm is designed and intended to be fired from the shoulder . . . ." 86 Fed. Reg. at 30,830. This seems to indicate that the test must be applied to all firearms to determine if they are designed and intended to be fired from the shoulder.

This omission from the Proposed Rule raises numerous questions for gun owners and the firearms industry in any attempt to apply the factoring criteria. For example, if a gun owner improvised their own stabilizing device by simply taping the receiver extension of an AR-pattern pistol to their forearm, would the factoring criteria be applied to that pistol? And, if they would, and that firearm failed the factoring criteria because perhaps it was too light, or maybe too heavy,

then how would ATF defend the conclusion that such a pistol is designed and intended to be fired from the shoulder?

Without a clear indication of when the factoring criteria should apply, many absurd results like this example will arise from the Proposed Rule as it is currently drafted. If ATF finalizes a rule, it should clearly indicate when the new factoring criteria should be applied.

III. The Factoring Criteria

The factoring criteria in the Proposed Rule are broken into three components. First, there are two prerequisites. If the firearm fails these, then it is automatically considered to be designed and intended to be fired from the shoulder. Second, the accessory itself is evaluated. Finally, the entire configuration of the weapon is examined. 86 Fed. Reg. at 30,830-34.

The vast majority of the factors suffer from the same defect; they are not objective factors despite ATF's repeated claims to the contrary.

ATF has a history of using subjective standards against regulated entities. In *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, a rocketry association challenged ATF's classification of a material as an "explosive" because the reaction of the material was "*much faster* than the reaction achieved by what is more commonly associated with burning . . . ." 437 F.3d 75, 79-80 (D.C. Cir. 2006).[3]

The court found that ATF had not given the association a workable standard to operate under:

[3] Attorney General Garland, then serving as a circuit judge, joined this opinion.

> Obviously, there is such a wide potential for disparity among the substances potentially classified as explosives that the vague description "much faster" conveys no information at all.
>
> ATFE's relational definition suffers from a further methodological flaw: it designates no points of comparison. In order to say that one item burns "much faster" than another, one would need to know the speed at which each item burns. But ATFE has never pointed to evidence establishing the data points necessary to make a comparison. For one thing, ATFE has not stated the burn velocity of APCP in the form relevant to this regulation.

Id. at 82.

Like the vague standard used by ATF in *Tripoli Rocketry*, it is hard to see how ATF could employ the proposed factoring criteria in a way that gun owners could use them to determine if a particular firearm is "designed or redesigned, made or remade, and intended to be fired from the shoulder . . . ." 26 U.S.C. § 5845(c).

Many of the criteria are also simply factors that ATF considers features of known shoulder stocks. ATF attempted to use the same "known features" approach to classify firearm silencers, but it was rejected by a reviewing court.

> As a general matter, relying *"solely* on the physical characteristics of the device," is a flawed method for classifying putative silencers. To be sure, physical characteristics may be one important factor. But basing a decision "solely" on such characteristics has the potential to be significantly overinclusive or underinclusive. For example, imagine a device designed for the sole purpose of muffling all sound emitted by a gunshot, and that was 100% effective at doing so—in other words, the world's greatest silencer. If this device relied on a novel or innovative design that did not contain many "physical characteristics" that are "characteristics of known firearm silencers," the agency would apparently not classify it as a silencer—despite the fact that it eliminates all noise produced by a gunshot. By the same token, Innovator claims to have invented a "Stabilizer Brake" for the purpose of reducing recoil, which happens to have three physical characteristics in common with those of "known silencers." But that does not mean that the Stabilizer Brake is actually capable of (or designed for) "diminishing the report of a portable firearm," 18 U.S.C. § 921(a)(24), which is the analysis the agency is supposed to be performing under the statute.

> Even if this general approach of relying "solely" on physical characteristics were sound, the agency did not perform a scientific or rigorous comparison of physical characteristics. Instead, it consulted a list of six characteristics that are allegedly common to "known silencers," and then, if the submitted device has some (unstated) number of those characteristics (here, three out of six was enough), it is a "firearm silencer." But where did that list of six characteristics come from? The agency never explains whether those six characteristics are present in all (or most?) silencers. The agency never explains whether there are other common characteristics that do not appear on its list. And the agency never explains how many characteristics in common are necessary to be classified as a "firearm silencer." What if a device has an "encapsulator" and an "end cap"—is it a silencer? What about a device that is attached to the muzzle of a rifle, and is full of "sound dampening material," but has none of the other five physical characteristics—is it a silencer? The agency's approach leaves Innovator (as well as other regulated parties, and reviewing courts) guessing.

Innovator Enterprises, Inc. v. Jones, 28 F. Supp. 3d 14, 25 (D.D.C. 2014) (internal citations omitted).

ATF should not rely on the same test for pistol braces that a federal court already rejected for firearm silencers.

a. The Prerequisites

Before the general factoring criteria may even apply, the Proposed Rule first sets two prerequisites regarding the total physical characteristics of a firearm. These are "weapon weight" and "overall length."

1. Weapon Weight

ATF notes that popular "traditional" pistols weigh about 39 ounces when loaded. 86 Fed. Reg. at 30,830. The Proposed Rule also correctly notes that stabilizing braces are useful when stabilizing larger and heavier pistols.[4] *Id*. But, it then proposes an arbitrary floor of 64 ounces for

[4] ATF takes a "Goldilocks" approach to weapon weight because a firearm that is too heavy would be considered incompatible with braced use under Section III of the factoring criteria. 86 Fed. Reg. at 30,834.

any firearm to even be considered as a pistol when equipped with a stabilizing brace. *Id*. There are several problems with this limit. It's quite the jump from 39 ounces given as a common example of a "traditional" pistol to the 64 ounce weight floor.

This weight floor also undermines one of the primary needs for stabilizing braces that ATF identifies: assisting shooters with a disability in firing large format pistols. *Id*. at 30,827. Holding nearly four pounds extended at arms-length with enough precision to accurately aim a firearm is difficult for any shooter. Limiting weight in this way isn't consistent with the purpose of stabilizing braces. It is also not indicative that a firearm is designed and intended to be fired from the shoulder. ATF should discard, or at least substantially lower, the weight floor.

2. Overall Length

The second prerequisite provides that "[f]irearms possessing an overall length between 12 and 26 inches may be considered pistols for which a 'stabilizing brace' could reasonably be attached to support one-handed fire." *Id*. at 30,831. Like the weight floor, the overall length limitation would exclude firearms with attached braces from being considered pistols even where there is little evidence that they are designed and intended to be fired from the shoulder.

For example, two identically configured AR-15 pistols that only differ in barrel length would receive different classifications under the proposed overall length limit. This type of arbitrary line-drawing is exactly what the Administrative Procedures Act prohibits.

ATF also recognizes that braces assist in firing longer barreled pistols with only one hand, but then categorically prohibits the use of braces on many pistols that need a brace for safe one-handed firing due to their longer barrels.

Any final rule should not include the proposed overall length limitation because it creates arbitrary results and isn't determinative in whether a particular firearm is designed and intended to be fired from the shoulder.

b. Accessory Characteristics

The second step in the factoring criteria looks to the characteristics of the attached stabilizing accessory. Under the Proposed Rule, various features will result in points being awarded to a particular firearm because of its features. If an accessory receives four or more points, it will not be considered a stabilizing brace.

1. Accessory Design

The Proposed Rule begins the supposedly "objective" factoring criteria with an entirely subjective standard. In the accessory design section, ATF will award an accessory zero points if it is "not based on a known shoulder stock design," one point if it "incorporates shoulder stock design feature(s)," and two points if it is "based on a known shoulder stock design." *Id*. at 30,832.

ATF gives some examples of "shoulder stock design features" as "adjustment levers or features that allow for the length of the device to be varied in a manner similar to an adjustable shoulder stock, sling mounts,[5] or hardened surfaces . . . ." *Id*.

[5] ATF notes that "[t]he location of a sling or quick detach (QD) mount is an indicator as to the intended use of the accessory. A sling attachment at the rear of the device could be a deterrent from shouldering the weapon, whereas some accessories incorporate QD mounts consistent with known shoulder stock designs." 86 Fed. Reg. at 30,832 n.16. This note highlights the subjective nature of this standard. A sling mount might either add or subtract points based on ATF's own determination of its utility.

These features can provide as much, or more, utility for stabilizing braces as they do for shoulder stocks. The user of a brace-equipped pistol who only has the use of one arm must often rely on a sling to stabilize the firearm while the user is reloading or clearing a stoppage. Sling mounts are not indicative of intent to fire a particular firearm from the shoulder.

Adjustable-length-brace designs also allow multiple users to use the same firearm. Users with different length forearms can use different length braces. And the further back a brace is supported on the user's forearm, the greater the stabilizing effect created due to the increased leverage. Adjustable length within the realm of potential end user forearm length should not determine whether a particular design is intended to be fired from the shoulder.

"Hardened surfaces" in an area that could be used to fire a weapon from the shoulder may be indicative of design intent, but ATF must give a usable standard. *See Tripoli Rocketry Ass'n, Inc*., 437 F.3d at 82. Just as a standard of "much faster" was not sufficient to determine when a material explodes, "hardened" gives no point of reference for manufacturers or gun owners to apply. *Id*.

ATF also appears to be claiming that it may use the "accessory design" standard to award points based on the overall physical appearance of a brace. Manufacturers may wish to take advantage of their existing trade dress when designing pistol braces. If ATF believes that there are objective features in that appearance that are indicative of intent to be fired from the shoulder, then it must identify those features. Simply claiming that a design may receive points on its physical appearance without identifying how that appearance is indicative of intent to be fired from the shoulder is arbitrary and capricious in violation of the APA.

2. Rear Surface Area

While the rear surface area of a device may be indicative of its design and intent to be shouldered, ATF fails to provide a workable standard. An objective surface area standard would likely be one measured in square inches, but the Proposed Rule instead will award the following points in the rear surface area criteria: Zero points for "device incorporates features to prevent use as a shouldering device." *Id*. at 30,830. One point for "minimized rear surface lacking features to discourage shouldering." *Id*. Two points for "rear surface useful for shouldering a firearm." *Id*. And, three points for "material added to increase rear surface for shouldering." *Id*.

It isn't clear how any manufacturer or gun owner is supposed to use such vague and subjective standards. This is especially true where surface area is something that is easily measured and given an objective standard.

Beyond the lack of objectivity, if a brace "incorporates features to prevent use as a shouldering device," then that should conclusively control that it is not designed and intended to be fired from the shoulder.

ATF should provide an actual objective standard if it moves forward with a rear surface area standard in a final rule.

3. Adjustability

The Proposed Rule provides that an adjustable design will receive two points and a nonadjustable design will receive zero points. As discussed above in more detail, adjustability can provide utility for pistol braces, so it should not be factored against a design that is of a length reasonable for use on expected end user's forearms. Also, by including adjustability in two separate sections, adjustable designs will receive double points under the Proposed Rule.

Any final rule should not factor adjustability against a design if it is of a length that is reasonable for use as a stabilizing brace.

4. Stabilizing Support

In this section, the Proposed Rule identifies the three main ways that existing designs provide stabilizing support. The designs are "counterbalance," "fin-type," and "cuff-type." *Id*. at 30,832-33. Evaluating designs based on their type may be a reasonable way to identify their utility for shoulder-fire, but the Proposed Rule does so in an extremely arbitrary manner.

The Proposed Rule would award one point to a "counterbalance design that folds creating rear contact surface," but a "fin-type" than doesn't have an arm strap, or a "cuff-type" that "fails to wrap around arm" would each receive two points. ATF notes that

> [T]here is no forearm stabilizing purpose in a Counterbalance design that folds closed such that it can no longer be used as a "stabilizing brace." Indeed, this type of design may create rear surface area such that the "stabilizing brace" may be suitable only as a shoulder stock when closed. The folding feature of the Counterbalance design stands in contrast to the purported intent of the device.

Id. at 30,832.

Fin-type and cuff-type designs receive more points for simply lacking certain features that make them more useful for stabilizing than a counterbalance design does for a feature that ATF has identified as being suitable only as a shoulder stock. This is clearly an arbitrary and capricious distinction.

The examples given for cuff-type designs are also very confusing. ATF determined that the SB-Mini design partially wrapped around the user's forearm. *Id*. at 30,835. But, for its evaluation of the SBA3 brace, ATF determined that the brace failed to wrap around the user's forearm. *Id*. at 30,837.

The SBA3 brace clearly "partially" wraps around the user's forearm,[6] but apparently not "partially" enough for ATF. The example given by ATF exemplifies the arbitrary nature of this standard. If ATF is convinced that the degree that a cuff-type brace engages a user's forearm is relevant to its use, then it must provide a standard that can be applied by manufacturers and gun owners.

This wouldn't be difficult. The regulation could require cuff-type braces to be measured on a cylinder of a particular size. ATF could then provide a reasonable percentage for a brace to wrap "partially" around the cylinder.

The existing standard proposed for stabilizing support is unworkable and contradictory and should not be included in any final rule.

c. Configuration of Weapon

The next set of criteria address the entire firearm in its complete configuration. As with the accessory features, firearms are awarded points for the factors and a firearm must have fewer than four points in this section to be considered a pistol with a stabilizing brace under the Proposed Rule.

1. Length of Pull

ATF proposes awarding zero points to a firearm with a length of pull under 10-1/2 inches, one point to a length of pull between 10-1/2 and 11-1/2 inches, two points to a length of pull between 11-1/2 and 12-1/2 inches, three points to a length of pull between 12-1/2 and 13-1/2 inches, and four points for anything longer than 13-1/2 inches. *Id*. at 30,833. While this is

[6] *See* SBA3 Product Page *available at* https://www.sb-tactical.com/product/sba3/

actually an objective standard, there are legitimate reasons why various users may need longer braces. As discussed above in more detail, different users will need different length braces to provide optimum stability.

Braces are more effective when they interact with the user's forearm close to the elbow. This positioning provides optimum leverage to the brace to counteract the weight of the firearm. Users with longer forearms should not be penalized by ATF's arbitrary length determinations. If a brace is of a reasonable length to be attached to a person's forearm, then it should not be penalized under the factoring criteria.

ATF should also clarify how it intends to measure length of pull. This measurement is traditionally made in a straight line from the trigger to the back end of the firearm. However, ATF has in the past made evaluations where it measured length of pull on an angle to the bottom of a pistol brace. This measurement will always be longer than the traditional straight-line method.

2. Attachment Method

ATF begins this section with the conclusory statement that "[a] 'stabilizing brace's' attachment method often provides critical insight as to how a firearm is intended to be used." *Id*. No explanation is given to support this statement, other than pointing out how certain methods of attachment affect other criteria that ATF has already identified as indicative of an intent to fire a weapon from the shoulder.

The attachment method has nothing to do with a device's utility to be fired from the shoulder. ATF penalizes attachment methods in this section that offer adjustment or increase the

length of pull. But those factors are already covered, and penalized, in other sections. ATF even claims that folding adapters are indicative of intent to shoulder. *Id*.

A folding adapter simply allows for a more compact firearm for storage or transport. It has no bearing on the utility to use the firearm to fire from the shoulder. Any final rule should not consider a device's attachment method as relevant to whether or not a firearm is designed and intended to be fired from the shoulder.

3. "Stabilizing Brace" Modifications/Configuration

In this section, ATF again begins with an odd claim: "'Stabilizing brace' accessories that have been modified from their original configuration will accrue additional points." *Id*. It's understandable that a brace that is modified to increase its utility for shouldering would accrue additional points, but surely all modifications wouldn't fall into that category.

Some of the criteria in this section are also too vague to apply. A firearm will receive four points, and therefore be automatically considered a shoulder-fired design, if it has a "'brace' accessory modified for shouldering." *Id*. This fails to give manufacturers and gun owners any specificity on what types of modifications are prohibited.

Another factor in this section would award four points for a "'cuff-type' design with the strap removed." *Id*. Does this mean that an NFA firearm may be made if the strap on cuff-type brace becomes damaged and must be removed to be replaced?

Modifications to firearms that aid in shouldering are relevant to determining whether a firearm is designed and intended to be fired from the shoulder, but any final rule should include clarity on what specific modifications might meet this standard and should only include those modifications that are actually relevant to use as a shoulder-fired weapon.

4. Peripheral Accessories

For the last section, the Proposed Rule looks to accessories that are included on the firearm. As ATF notes, these are "often added by the end user . . . ." *Id*. at 30,834. These accessories should not be relevant in an evaluation of how a firearm has been "designed" or "made." While ATF has attempted to claim that end users can "redesign" a firearm by simply using it a certain way, that application of the statute would clearly "stretch" the term "well beyond what the statutory text can naturally bear." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008).

If a consumer physically modifies a firearm, that is one thing, but it is entirely another for ATF to claim that the firearm is redesigned or remade simply by including sights or an optic on the firearm. ATF even goes so far as to penalize firearms that have either no sights or do have sights. 86 Fed. Reg. at 30,834.

ATF will also award four points to any firearm with a "secondary grip." "Further, the presence of any secondary grip on a weapon with a 'stabilizing brace' accessory changes the classification from a one-handed to a two-handed weapon, thereby disqualifying it from being classified as a "braced pistol," and resulting in the subject firearm accruing 4 points. *Id*. at 30,384. Nearly all AR-15 pistols include a "handguard" around the barrel and gas system. The handguard is in addition to the pistol grip for the user's fire control hand. Does this qualify as a "secondary grip," and therefore preclude any AR-15 pistol from being used with a stabilizing brace under the Proposed Rule?

In this section, ATF also includes a weight limit of 120 ounces. *Id*. This is after ATF admitted that the purpose of stabilizing braces is to fire heavier pistols. "Stabilizing support is a

vital characteristic because it provides evidence to evaluate the purported purpose of the attached device, which is to provide shooters with forearm support for firing large, heavy handguns." *Id*. at 30,382 (emphasis added). ATF cannot claim that stabilizing braces are only needed on heavy pistols to justify its lower weight limit of 64 ounces only to claim that many pistols are too heavy to be considered for use with a stabilizing brace.

d. The "Catch-all" Provision

Even if a particular firearm manages to make it through the byzantine factoring criteria without being considered an NFA firearm, the Proposed Rule reserves the right to classify it as an NFA firearm anyways.

> Even if a weapon accrues less than 4 points in each section, attempts by a manufacturer or maker to circumvent Federal law by attaching purported "stabilizing braces" in lieu of shoulder stocks may result in classification of those weapons as "rifles" and "short-barreled rifles." While some manufacturers have recognized that there is a market advantage in designing and selling "short-barreled rifles" as "pistols" to customers seeking to avoid tax and registration requirements, "stabilizing braces" are not a method by which the Federal statutes may be circumvented. Therefore, 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.

Id. at 30,384.

With this provision, ATF abandons any appearance of objectivity or consistency in the Proposed Rule. If ATF may continue to classify any firearm with an attached stabilizing brace as an NFA firearm, then the Proposed Rule exposes NRA members and other American gun owners to criminal prosecution at the whim of the ATF.

IV. ATF's Change in Position

The Proposed Rule represents a clear change in position for ATF on stabilizing braces. Many designs that have been determined by the ATF to not be subject to the NFA in the past via private letter ruling will fail the factoring criteria. *See, e.g.*, FTISB Letter 304,679 (Oct. 3, 2016) *available at* https://gearheadworks.com/wp-content/uploads/2018/12/Mod-2-Approval-Letter.pdf. Yet, ATF has not acknowledged or explained this change in position.

"A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). With the Proposed Rule, ATF isn't even "display[ing] awareness that it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

There are four things that an agency must do when changing a policy under the APA: (1) the agency must show "awareness that it is changing [its] position"; (2) that "the new policy is permissible under the statute"; (3) that the agency "believes" the new policy is better; and (4) "good reasons" for the new policy. *Id.* at 515-16.

ATF completely fails to offer any explanation, let alone a reasoned one, for why numerous brace designs that it once determined to not be subject to the NFA now will be. Because ATF has failed to comply with the Supreme Court's clearly established requirements for an agency changing its position, the Proposed Rule is in violation of the APA.

V. Effect on Existing Owners

The Congressional Research Service recently estimated that there are 10-40 million[7] stabilizing braces in circulation. William J. Krouse, Cong. Research Serv., *Handguns, Stabilizing*

[7] ATF puts the estimate much lower at only three million stabilizing braces. 86 Fed. Reg. at 30,828.

Braces, and Related Components, (April 19, 2021) *available at*

https://crsreports.congress.gov/product/pdf/IF/IF11763. The Proposed Rule gives the millions of Americans who lawfully acquired firearms with stabilizing braces in accordance with ATF's prior application of the law only five options:

> (1) Permanently remove or alter the "stabilizing brace" such that it cannot be reattached, thus converting the firearm back to its original pistol configuration (as long as it was originally configured without a stock and as a pistol) and thereby removing it from regulation as a "firearm" under the NFA. Exercising this option would mean the pistol would no longer be "equipped with" the stabilizing brace within the meaning of the proposed rule.
>
> (2) Remove the short barrel and attach a 16-inch or longer barrel to the firearm thus removing it from the provisions of the NFA.
>
> (3) Destroy the firearm. ATF will publish information regarding proper destruction on its website, www.atf.gov.
>
> (4) Turn the firearm into your local ATF office.
>
> (5) Complete and submit an Application to Make and Register a Firearm, ATF Form 1 ("Form 1"). As part of the submission, the $200 tax payment is required with the application. Pursuant to 27 CFR 479.102, the name, city, and state of the maker of the firearm must be properly marked on the firearm. All other markings, placed by the original manufacturer, should be adopted. Proof of submission of the Form 1 should be maintained by all possessors. Documentation establishing submission of Form 1 includes, but is not limited to, eForm submission acknowledgement, proof of payment, or copy of Form 1 submission with postmark documentation.

86 Fed. Reg. at 30,843-44 (internal page number omitted).

The first option seems to indicate that the Proposed Rule would prohibit many stabilizing brace owners from simply removing the brace from their firearm. Limiting this option to firearms that were "originally configured without a stock and as a pistol" is a clear reference to ATF's application of *United States v. Thompson/Ctr. Arms Co.* 504 U.S. 505 (1992). In ATF Ruling 2011-4, ATF held that

> [A] firearm, as defined by 26 U.S.C. 5845(a)(4), is made when a handgun or other weapon with an overall length of less than 26 inches, or a barrel or barrels of less

> than 16 inches in length, is assembled or produced from a weapon originally assembled or produced only as a rifle. Such weapons must be registered and are subject to all requirements of the NFA.

By applying this ruling to the first option, ATF appears to claim that any firearm that was originally manufactured with a stabilizing brace and would be a "rifle" under the factoring criteria of the Proposed Rule cannot ever be considered a "pistol." Accordingly, owners of such firearms cannot avail themselves of the option of simply removing the stabilizing brace from their firearm.

If this is ATF's position, then the agency needs to make it much clearer than a single parenthetical reference in the Proposed Rule. This minor reference does not comport with the notice required under the APA. *See MCI Telecommunications Corp. v. F.C.C.,* 57 F.3d 1136, 1141-43 (D.C. Cir. 1995) (*holding* that "[A]n agency may not turn the provision of notice into a bureaucratic game of hide and seek" (Internal citations omitted)).

Options two through four are either extremely complicated or costly for most gun owners or completely destroy the value of their lawfully acquired property.

Option five simply doesn't make sense. It would allow gun owners to file an application to "make and register a firearm."[8] For those already in possession of firearms with stabilizing braces, no firearm is being "made." ATF's own regulation defines "make" to mean "manufacturing (other than by one qualified to engage in such business under this part), putting

[8] Requiring NFA registration and taxation also raises several tax issues. The firearms equipped with stabilizing braces that gun owners already possess have been subject to the federal excise tax. 26 U.S.C. § 4181. But, firearms subject to taxation under the NFA are exempt from the excise tax. 26 U.S.C. § 4182(a). If required to register and pay the NFA tax on firearms equipped with stabilizing braces, then gun owners will be subject to double taxation contrary to the law.

together, altering, any combination of these, or otherwise producing a firearm." 27 C.F.R. § 479.11.

Since no firearm is being produced, ATF cannot ask gun owners to submit such an application. Falsely claiming to "make" a firearm that already exists could put gun owners in legal jeopardy. As ATF's own application form notes:

> Any person who violates or fails to comply with any of the requirements of the NFA shall, upon conviction, be fined not more than $10,000 or be imprisoned for not more than 10 years, or both. Any firearm involved in a violation of the NFA shall be subject to seizure and forfeiture. *It is unlawful for any person to make or cause the making of a false entry on any application* or record required by the NFA knowing such entry to be false.

Application to Make and Register a Firearm, OMB No. 1140-0011 *available at* https://www.atf.gov/file/11281/download (emphasis added).

Even if it were lawful for gun owners to use the application to make and register a firearm in this way, for many, it simply isn't an option. Many states prohibit the possession of short-barrel rifles. Gun owners in those states cannot register their firearms in violation of state law.

Because the proposed rule leaves some gun owners with no option but to dispose of their lawfully-acquired firearm, it also potentially violates the Takings Clause. *See Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138-39 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018).

VI. Reliance on ATF's Prior Position

The Supreme Court recently made clear that an agency action may be "arbitrary and capricious" because if fails to account for the reliance interests of those affected by the action.

See Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1914-15 (2020).

The Proposed Rule puts millions of otherwise law-abiding Americans in danger of federal criminal prosecution. Manufacturers, dealers, NRA members, and other firearm owners have all relied on ATF's past decisions on stabilizing braces when exercising their fundamental right to manufacture, and own Constitutionally-protected arms. The Proposed Rule fails to address these interests entirely.

ATF is "required to assess whether there [are] reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns. *Id.* at 1915. Because ATF has completely failed to address these interests in the Proposed Rule, it is "arbitrary and capricious."

Conclusion

Large portions of the Proposed Rule are in violation of the APA, unconstitutionally vague, or simply unworkable for gun owners and the firearm industry. For these reasons, ATF should abandon this clearly unlawful Proposed Rule. Firearm manufacturers and gun owners do need an actual objective set of rules for stabilizing braces, but those rules must be consistent with the law and usable by those Americans who choose to own firearms with stabilizing braces.

Signed,

Josh Savani
Director
Research & Information Division
NRA-ILA