GUN OWNERS OF AMERICA

GUN OWNERS FOUNDATION

DOCKET NO. ATF 2021R-08
"FACTORING CRITERIA FOR FIREARMS WITH ATTACHED 'STABILIZING BRACES'"

COMMENTS OF

GUN OWNERS OF AMERICA, INC.

AND

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I. Introduction

On June 10, 2021, ATF published a "Notice of Proposed Rulemaking" in the Federal Register, entitled "Factoring Criteria for Firearms with Attached 'Stabilizing Braces'" 2021R–08, 86 Fed. Reg. 30826 ("NPRM"). ATF has sought public comment on its proposal by September 8, 2021.

These comments are submitted on behalf of Gun Owners of America, Inc. and Gun Owners Foundation. Gun Owners of America, Inc. ("GOA") is organized and operated as a nonprofit membership organization that is exempt from federal income taxes under Section 501(c)(4) of the U.S. Internal Revenue Code. GOA was formed in 1976 to preserve and defend the Second Amendment rights of gun owners and has become one of the nation's leading Second Amendment advocacy organizations, with more than two million members and supporters nationwide. Gun Owners Foundation ("GOF") is organized and operated as a nonprofit legal defense and educational foundation that is exempt from federal income taxes under Section 501(c)(3) of the U.S. Internal Revenue Code. GOF is supported by gun owners across the country.

The NPRM is entirely arbitrary and capricious, effecting a complete policy change as to how the ATF treats firearm stabilizing braces, yet failing even to acknowledge (much less provide justification for) that tectonic shift. Masquerading as a helpful rulemaking "to assist" gun owners and the firearms industry in complying with the law, in reality the NPRM is designed with the obvious and specific intent to largely outlaw the use of stabilizing braces on firearms, threatening millions of current owners with imprisonment and putting a large segment of the gun industry out of business entirely.

In order to accomplish this goal, the NPRM creates "Worksheet 4999," which contains three sections of analysis, each more restrictive than the last, designed to ensure that virtually no stabilizing brace is eligible for use on a non-rifle firearm, and thereafter ensuring that most firearms do not qualify to even use an allowed stabilizing brace. After all of that, ATF reserves unto itself the unbridled discretion to override the results of the worksheet at any time and for any reason, creating a system where no person or company could possibly rely on anything the agency says.

In setting up this impossible new regime, the NPRM conflicts with numerous existing ATF policies as to how firearms are analyzed, repudiates all prior agency guidance and classification letters on stabilizing braces, and rewrites the language of the statute Congress enacted. For those reasons and others, discussed in more detail below, the NPRM should be withdrawn.

II. The NPRM Fails Even to Acknowledge — Much Less to Justify — ATF's Changed Course on Stabilizing Braces and Is thus Arbitrary and Capricious.

The NPRM is entirely inconsistent as to whether the NRPM is meant to explain *existing* ATF standards by which firearms with stabilizing braces are classified at present, or instead proposes to adopt entirely *new* standards by which ATF will make such classifications in the future. For example, the NPRM claims to provide "the criteria that *FATD considers* when evaluating firearm samples that are submitted with an attached 'stabilizing brace' or similar component or accessory," but also claims that it "*proposes* factors" and "ATF *proposes to use* ATF Worksheet 4999." NPRM at 30826, 30828, 30830 (emphasis added); *see also* at 30829 ("new worksheet to be used by ATF"). *See also* NPRM at 30847 ("[p]roviding clarity to the public and industry on *how ATF enforces* the provisions of the NFA through this proposed rule....").

ATF's failed prior stabilizing brace "Notice," issued and then withdrawn in December of 2020, was similarly obtuse on this issue.[1] For example, the prior Notice stated that the agency "is publishing the objective factors *it considers* when evaluating firearms with an attached stabilizing brace," and alleged that "[t]his compilation of relevant objective factors is *consistent with what has been applied* in evaluations of firearms with an attached stabilizing brace previously conducted by FATD...." *Id.* at 82519 (emphasis added) (also noting that "FATD applied objective factors" and "ATF is publishing this list of objective factors"); at 82520 (Notice "intended only to provide clarity to the public regarding *existing requirements*....). However, like the current NPRM, the Notice also claimed that ATF's so-called "objective factors" were merely being "*proposed*." *Id.* (emphasis added).

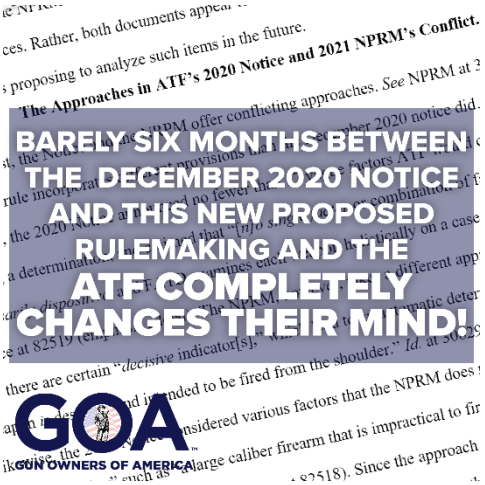
Contrary to ATF's claims in both the NPRM and the Notice, it seems obvious that **neither** the Notice **nor** the NPRM merely restates existing protocol for ATF's analysis of firearms using stabilizing braces. Rather, both documents appear to offer entirely new (and conflicting) ways by which ATF is proposing to analyze stabilizing braces in the future.

A. The Approaches in ATF's 2020 Notice and 2021 NPRM's Conflict.

First, the Notice and the NRPM offer conflicting approaches. *See* NPRM at 30850 ("this proposed rule incorporates different p rovisions than the December 2020 notice did…."). For example, the 2020 Notice announced no fewer than 17 vague factors ATF would consider in

[1] Gun Owners of America, Inc. submitted comments to ATF about its December 2020 Notice.

making a classification, and claimed that "[*n*]*o single factor* or combination of factors *is necessarily dispositive*, and FATD examines each weapon holistically on a case-by-case basis." Notice at 82519 (emphasis added). The NPRM, however, takes a different approach, claiming that there are certain "*decisive* indicator[s]," which lead to an automatic determination that "the weapon *is* designed and intended to be fired from the shoulder." *Id.* at 30829 (emphasis added). Likewise, the 2020 Notice considered various factors that the current NPRM does not consider, such as "type and caliber" and "a large caliber firearm that is impractical to fire with one hand because of recoil or other factors" (Notice at 82518). Since the approach taken in the December 2020 Notice is inconsistent with — and in fact directly contradicts — the approach now taken in the NPRM, they cannot *both* represent the way ATF currently analyzes stabilizing brace firearms.[2]



B. Both the Notice and the NPRM Conflict with Prior ATF Guidance.

Second, both the Notice and the NPRM conflict with past ATF guidance on stabilizing braces. For example, the NPRM claims that alleged "complexities" involved with stabilizing braced firearms "cannot serve merely to exempt all firearms with purported 'stabilizing braces' from classification as 'rifles.'" Similarly, the 2020 Notice purported to clear up an alleged "misunderstanding by some that a pistol assembled with any item purported to be a stabilizing

[2] The NPRM appears to admit as much, admitting that "this proposed rule incorporates different provisions than the December 2020 notice did, including a series of objective factors...." *Id.* at 30850.

brace still would be considered a 'pistol' regardless of other characteristics." Notice at 82519. Yet these statements directly conflict with prior ATF guidance on stabilizing braces. In its very first stabilizing brace classification letter, ATF opined that "the submitted forearm brace, when attached to a firearm, does not convert that weapon to be fired from the shoulder and would not alter the classification of a pistol or other firearm ... ***a firearm so equipped ... would not be subject to NFA controls***." ATF Letter of Nov 26, 2012 (emphasis added); *see also* ATF letter dated March 21, 2017 entitled "Reversal of ATF Open Letter on the Redesign of 'Stabilizing Braces'" at 2 ("the use of stabilizing braces, as designed, would not create a short-barreled rifle when attached to a firearm."). In other words, past ATF letters have approved of various stabilizing braces no matter the firearm on which they are used, while the Notice and NPRM claim that only particular configurations of firearms may use various braces. The NPRM thus represents a 180-degree policy shift on this issue.

C. The NPRM Would Overrule All Previous Classification Letters.

Third and relatedly, the current NPRM implicitly purports to overrule past ATF classification letters with respect to stabilizing braces, further indicating that ATF is adopting an *entirely new protocol* for dealing with stabilizing braces. The NPRM claims that "some makers or manufacturers ... may have received a classification for a firearm that would be considered a NFA firearm under these criteria," and recommends that "any maker or manufacturer who has received a classification prior to the effective date of the rule is encouraged to resubmit the firearm with the attached 'stabilizing brace' to ensure that the prior classification is consistent with this new rule." NPRM at 30829. In other words, ATF is not willing to stand behind any of its prior classifications. Of course, if the NPRM simply explained ATF's *existing* procedures for

examining stabilizing brace firearms, there would be no need for manufacturers to resubmit anything which had already been approved by ATF.

D. The NPRM Constitutes a Blanket Ban on the Use of Stabilizing Braces.

Fourth, the NPRM clearly proposes to ban the use of stabilizing braces entirely, revoking all past ATF guidance on the subject, because the NPRM *assumes that all firearms equipped with stabilizing braces would be subject to one of the five "corrective actions"* laid out in the NPRM. *Id.* at 30843. To be sure, the NPRM obliquely refers to firearms "that would qualify as a 'short-barreled rifle'" and "affected 'stabilizing braces'" (NPRM at 30844, 30846), but at the same time makes clear that the NPRM applies to all "current owners of firearms with 'stabilizing braces,'" and ATF's cost estimates are based on the *total* number (3 to 7 million) of stabilizing braces estimated to be in circulation. *See* Regulatory Impact Analysis ("RIA") at 36. ATF thus implicitly assumes that *every stabilizing brace in existence is covered by the NPRM*, in spite of its promises to the contrary.

It thus seems obvious that *neither* the factors in the December 2020 Notice, *nor* the factors in the NPRM, represent *existing* ATF standards for classifying firearms with stabilizing braces. Quite to the contrary, the NPRM proposes to adopt an *entirely new regime* for analyzing firearms with stabilizing braces, which certainly will conflict with and thus overrule past agency classification letters on the subject.

E. The NPRM Fails to Meet the "Basic Procedural Requirements" of Administrative Rulemaking.

As the U.S. Supreme Court has made clear, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions," and "where the agency has failed to provide even that minimal level of analysis, its action is arbitrary

and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Moreover, while "[a]gencies are free to change their existing policies," they may do so only "as long as they provide a reasoned explanation for the change." *Id. See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

In the NPRM, ATF is clearly changing its existing policies and procedures as to how it analyzes firearms with stabilizing braces, going even so far as to repudiate all of its existing guidance on the matter. Yet the agency has failed to recognize this change, clothing the NRPM and Notice as merely announcing existing policies. By failing even to acknowledge its change in direction, the agency cannot possibly be seen to have provided a "reasoned explanation for the change," and thus the NRPM is arbitrary and capricious. *See FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515, 129 S. Ct. 1800, 1811 (2009) ("the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio*…").

F. The NPRM Glosses Over ATF's Arbitrary Creation of Millions of New Felons.

The NPRM is entirely unclear as to whether ATF believes itself to be engaged in an interpretive or legislative rulemaking. If the NPRM is *legislative*, then ATF (lacking any statutory authority) has made up a new federal crime for something that it admits was *not* unlawful before, thus grossly usurping Congress' powers to legislate. On the other hand, if the NPRM is merely *interpretive*, then it would be ATF's position is that many (if not most or all) firearms with stabilizing braces h*ave always been* unregistered short-barreled rifles. However,

unlike ATF's 2018 bump stocks rulemaking, the NPRM does not purport to exercise the agency's prosecutorial discretion or offer amnesty, nor does it purport to create a grace period for gun owners to comply with ATF's demands.

As its first option for compliance, ATF claims that a person may "permanently remove or alter the 'stabilizing brace' such that it cannot be reattached, thus converting the firearm back to its original pistol configuration…." NPRM at 30843 (termed "Scenario 4 at 30846). However, ATF claims this is so *only* "as long as [the firearm] was originally configured without a stock and as a pistol." *Id*. Presumably, this would mean that a person who bought a firearm from a dealer already configured with a stabilizing brace would not be able to use this option, because ATF would opine that such a firearm was a short-barreled rifle as "originally configured." Rather, only someone who had built his own firearm, or who added a stabilizing brace to a pistol that did not have one, would be able to remove it. *See also* ATF Ruling 2011-4. Since the majority of firearms affected by the NPRM likely were purchased from dealers with braces already attached, the applicability of Scenario 4 is severely limited.

Alternatively, ATF claims that "current unlicensed possessors" may apply and register their purportedly illegal short-barreled rifles under the NFA (Scenario 3). *Id*. at 30843, 30846. But this option directly conflicts with ATF's existing position on this issue, which is that:

> Title II amended the NFA to cure the constitutional flaw pointed out in *Haynes* [*v. United States*, 390 U.S. 85 (1968)]. First, the requirement for possessors of unregistered firearms to register was removed. Indeed, under the amended law, there is no mechanism for a possessor to register an unregistered NFA firearm already possessed by the person.

Chapter 9 of ATF's NFA Handbook similarly reports that "Generally, unregistered firearms may not be lawfully received, possessed, or transferred. They are contraband subject to seizure and forfeiture. Violators are also subject to criminal prosecution."

Finally, ATF claims that a gun owner could "remove the short barrel and attach a 16-inch or longer barrel" (Scenario 2), "destroy the firearm," or "turn the firearm … into ATF to be destroyed" (Scenario 1). *Id*. at 30843, 30846. But, like the other scenarios discussed above, they overlook the fact that ATF believes "current unlicensed possessors" and manufacturers to have committed federal criminal violations, having unlawfully received, transferred, and/or possessed unregistered NFA firearms.

To be sure, ATF would be hard-pressed to successfully prosecute the manufacturer of a firearm equipped with a pistol brace, or a gun owner who possessed such a weapon, because ATF for years has permitted and encouraged the use of stabilizing braces through issuance of numerous favorable classification letters. Since the NPRM blatantly reverses ATF's position on stabilizing braces, federal prosecution for prior possession seems unlikely. However, various states along with the District of Columbia ban possession of short-barreled rifles entirely, even if they are registered with ATF pursuant to the NFA. *See, e.g.*, D.C. Official Code § § 7–2501.01(14) and (17). In other words, ATF's promise of no federal prosecution is no guarantee that a person could not be charged at the state or local level, including for past possession. According to 27 CFR § 479.101, "*No firearm may be registered* by a person unlawfully in possession of the firearm *except during an amnesty period* established under section 207 of the Gun Control Act of 1968 (82 Stat. 1235)." Section 207, in turn, provides that

> (d) The Secretary of the Treasury, after publication in the Federal Register of his intention to do so, is authorized to establish such periods of amnesty, not to exceed ninety days in the case of any

> single period, and immunity from liability during any such period, as the Secretary determines will contribute to the purposes of this title.

Under ATF's own interpretation of the law, it would appear that the only way for existing, alleged short-barreled rifles to be legally registered under the NFA is through the creation of an amnesty as provided by law.

III. The NPRM Proposes a Test that Virtually No Stabilizing Brace and Virtually No Firearm Will Pass.

Purportedly in order "*to assist* affected persons and industry members ... *to aid* them in complying with Federal laws and regulations" (NPRM at 30829) (emphasis added), the NPRM proposes a **two**-page worksheet, consisting of **three** Sections, each consisting of as many as **four** subparts, each of which contain as many as **nine** factors that must be considered, plus an **additional** catch-all test which reserves the power to ATF to invalidate all of the above. Together, the proposed framework requires an (at least) 47-part analysis in order for law-abiding gun owners to attempt to determine whether a *particular* firearm, with a *particular* stabilizing brace, in a *particular* configuration, will be considered merely a GCA firearm or instead an NFA short-barreled rifle. As ATF makes repeatedly clear, this analysis will need to be repeated for each firearm in every possible configuration that exists, or if a firearm's configuration changes in even a minor way.

Although clothed with the assertion that the Worksheet 4999 is designed to provide "objective" criteria to the industry and the public, in reality ATF has designed a test *so complex* that ordinary gun owners will be unable to undertake it, *so detailed* that any minute change to the configuration of a firearm could change its entire classification, and *so absurd* in application that virtually every stabilizing brace and virtually every firearm utilizing a brace would be classified as a short-barreled rifle under the NFA. The NPRM and Worksheet 4999 are in no way based on

or derived from the statute that Congress enacted. Rather, they represent a bureaucratic hatchet job designed to wipe out a politically unpopular segment of the firearms industry and community.

A. Proposed Form 4999 Section I — Prerequisites.

In order even to qualify for ATF's Worksheet 4999, the NPRM claims that a firearm "must weigh at least 64 ounces" and "must have an overall length between 12 and 26 inches." NPRM at 30830. The NPRM claims that these are "prerequisites" necessary for a determination that "the firearm ... will even be considered a suitable weapon for the brace." *Id.* at 30831.

First, ATF claims that firearms lighter than 64 ounces "are more easily held and fired with one hand without the need for a 'stabilizing brace.'" NPRM at 30831. As the Worksheet 4999 states, this weight is determined by weighing an *unloaded* firearm and with "accessories removed."[3] But even so, this one-size-fits-all metric of 64 ounces makes little sense in application, especially when measured without ammunition or accessories.[4]

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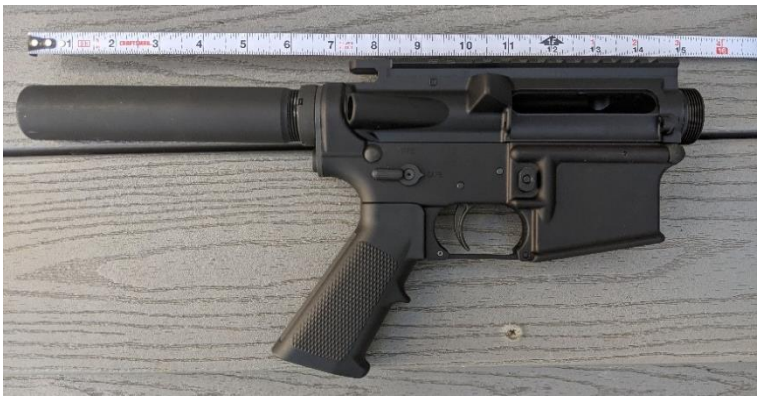
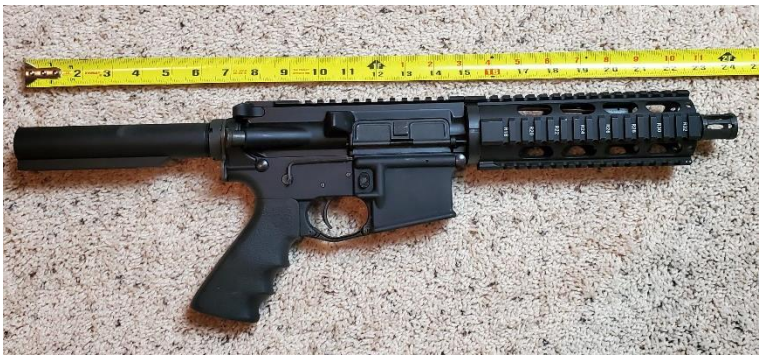
[3] Confusingly, the NPRM gives as examples of weight an "*unloaded* 1911-type pistol [which] weighs approximately 39 ounces," but also a "*fully loaded* ... polymer Glock 17 [which] weighs 39 ounces." *Id.* (emphasis added). This conflicts with ATF's statement that firearms are to be "weighed with magazine-unloaded / accessories removed." NPRM at 30831. What's more, it is worth noting that a "fully loaded ... Glock 17" **does not weigh anywhere close to 39 ounces**, but rather only 32.28 ounces. Hopefully, the nation's firearm "experts" at ATF will not be working with a similar 15 percent margin of error when deciding who to recommend for federal prison.

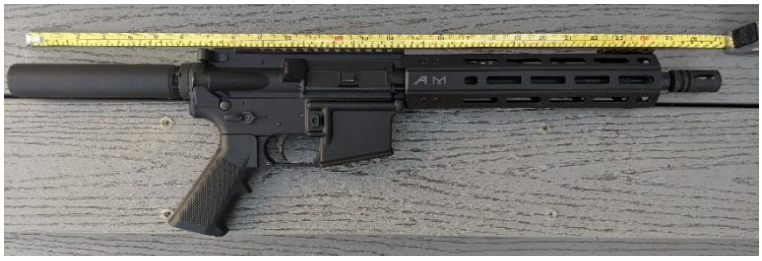
[4] For example, an unloaded Glock 21 (45 ACP) weighs 29 ounces, far below ATF's 64-ounce threshold. However, when various accessories are added (*e.g.*, a suppressor, piston/booster, and threaded barrel might add 15 ounces, while a rail mounted light adds 4.1 ounces, and a fully loaded magazine with 17-round Kriss extension adds another 29 ounces). Suddenly, what started as an "unloaded" 29-ounce handgun now weighs in at over 4.8 pounds when loaded and configured. Meanwhile, a handgun such as the Thompson Center Encore Pro Hunter Pistol in .308 Win is advertised at 4.5 pounds unloaded, and loading a single round of ammunition does not add significantly to that. Under the NPRM's requirement that a pistol must weigh at least 64 ounces in order to utilize a stabilizing brace, *the 4.5-pound Thompson would qualify, while the 4.8-pound Glock would not.*

Second, ATF claims that "[f]irearms with an overall length of less than 12 inches are considered too short to indicate any need for a 'stabilizing brace,'" while "firearms exceeding 26 inches in overall length are impractical and inaccurate to fire one handed, even with a 'stabilizing brace,' due to imbalance of the weapon." *Id.* at 30832. As an example, ATF alleges that "[t]he AR-type pistol has an overall length between 18 and 25 inches, depending on barrel length (due to the necessary inclusion of the buffer tube)." *Id.* at 30831. But ATF's measuring is as bad as its weighing, raising numerous questions as to the agency's level of expertise in using scales and yard sticks. Indeed, there is no commercially available (or any at all aside from experimental prototypes) AR-15 pistol that is as short as 18 inches, or anywhere close to it. Indeed, measuring from the rear of a standard-length pistol buffer tube to the front of a standard upper receiver yields 14.5 inches.



Adding in a 7.5-inch barrel – the *shortest* generally available barrel length for an AR-15 – plus a flash hider, means that the shortest realistic AR-15 for most gun owners will be a *bare minimum* of 24 inches long — without a stabilizing brace.





Realistically, a significant percentage (if not a majority) of

AR-15 pistols on the market use barrels that are 10.5 inches or longer which means that, when using a flash hider or compensator, most pistols likely are (presumably this is not a coincidence) just over the NPRM's 26-inch maximum.

In other words, many of the most common type of pistols on which stabilizing braces are used fail the very first step of ATF's test.

Thus, at first glance it might seem as if these ATF metrics (minimum 64 ounces and between 18 and 26 inches) are arbitrary and capricious. Unfortunately, they are even worse than that. Rather, these numbers appear to have been carefully calculated to achieve the agency's political objective — to knock out many popular pistols, declaring them entirely ineligible to use stabilizing braces. ATF's 64-ounce weight requirement, for example, would eliminate most braces used on traditional shorter handguns (such as the Micro-Roni used on Glocks), while ATF's 26-inch limit would eliminate many if not most longer handguns patterned on rifle designs, such as AR-15 pistols. Compounding the problem, as made evident by inaccurate claims in the NPRM, ATF does not appear even to be able to accurately weigh or measure common firearms, bringing into question how the NPRM would be applied in practice.

B. Proposed Form 4999 Section II — Accessory Characteristics.

If a particular firearm (unloaded and with accessories removed) qualifies under the prerequisites in Section I, the NPRM permits it to then move to analysis under Section II of Worksheet 4999. However, just as Section I was designed to eliminate virtually every firearm, Section II is designed to eliminate virtually every stabilizing brace.

1. Common Characteristics Do Not Transform Braces into Stocks.

Preliminarily, the NPRM claims that "[f]or FATD to determine that a weapon with an attached 'stabilizing brace' is not, in fact, designed and intended to be fired from the shoulder,

the accessory must not have the characteristics of a shoulder stock." *Id.* at 30832. ATF does not bother to explain why this is so. In fact, ATF admits that "'stabilizing braces' sometimes share close similarities with known stocks...." *Id.* at 30832. ATF thus devises a test whereby "the more features a purported 'stabilizing brace' has in common with known shoulder stock designs, the more points it will accumulate." *Id*.

On the contrary, it is simply not the case that Thing A possessing certain characteristics of Thing B makes Thing A the same as Thing B. Rather, this is what is known as a "false analogy," perhaps best elucidated by Monty Python and the Holy Grail's witch trial. For example, a stabilizing brace does not become a stock simply because it is (a) made of plastic, (b) mounts to a buffer tube and (c) is black in color, even though those are characteristics of many rifle stocks.

Nevertheless, ATF penalizes between 1 and 3 points for braces that have varying amounts of "rear surface area," on the theory that rifle stocks also have "rear surface area" so that they can be shouldered to fire.[5] ATF claims that "there is no advantage ... to include substantial surface area on the rear of the design...." *Id.* at 30832. But ATF elsewhere admits that "rear surface area" might actually be a design feature of a stabilizing brace in order to "envelop[] the shooter's arm ... allowing one-handed firing of a large pistol." *Id.* at 30829. In other words, according to ATF's contradictory statements, rear surface area is ***both useful and useless*** to a

[5] In fact, the only type of brace that ATF likely would *not* penalize under this category is one that which "incorporates features to prevent use as a shouldering device." *Id.* at 30841. Presumably, protruding rusty nails would qualify to "prevent ... shouldering," but such a stabilizing brace does not exist. Worksheet thus begins with a baseline that ***penalizes all existing stabilizing braces***, further showing that the NPRM's proposed test is designed and intended to eliminate stabilizing braces entirely. In fact, even a KAK Shockwave — a "fin-type" brace with perhaps the least rear surface area of any brace available on the market — gets 1 point under ATF's test. *See* NPRM at 30832.

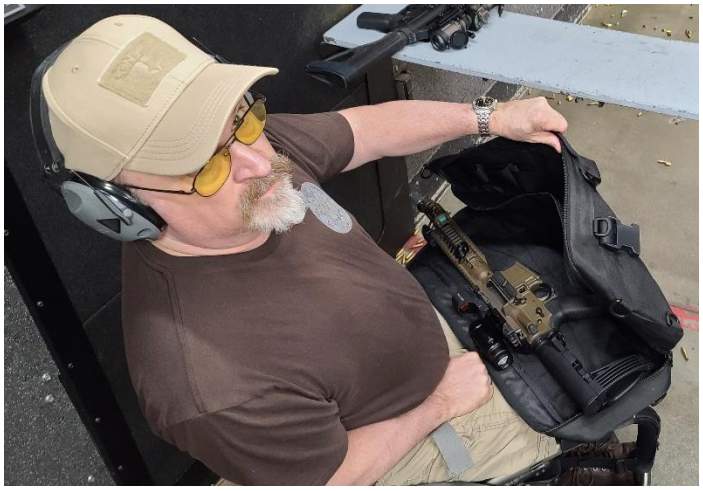
stabilizing brace. Of course, if the same characteristic can be useful for *both* a stock *and* a brace, it makes little sense to penalize a feature that ATF itself admits is particularly *useful* for a good stabilizing brace.

Nonsensically, when discussing the "stabilizing support" category, ATF **approves** of "[o]riginal 'stabilizing brace' designs used a substantial amount of hardened material intended to contact a significant portion of the shooter's forearm" (*id*. at 30832), even though that results in "added ... rear surface area," a feature of which ATF **disapproves**. On the other hand, ATF **disapproves** of "[l]ater iterations [which] substantially reduced these design features" with "low-profile ... slim design[s]," even though this results in "minimized rear surface" area, a feature of which ATF **approves**.

In other words, ATF's test ensures that a brace designed to avoid penalties in one category receives penalties in another category, and vice versa, setting up a system designed to invalidate use of every brace.

Likewise, ATF points to "adjustability" as a common feature of rifle stocks and penalizes two points for stabilizing braces that incorporate adjustable features. *Id.* at 30841. Of course, while "adjustability" might make a brace more useful for shouldering as a stock, it likewise might be advantageous for adjustment to different size and length of forearms for a wider range of shooters. The NPRM acknowledges that, when it comes to rifle stocks, "[g]enerally, taller shooters require a longer length of pull and shorter shooters require a shorter length of pull," but fails to make a similar recognition when it comes to users of stabilizing braces, claiming that "[f]ar less variation exists between shooters ... when a pistol is involved because a shooter merely requires a device that reaches from the back of the firearm to the forearm." *Id.* at 30833.

Finally, ATF claims that "counterbalance designs" such as the Gear Head Works Tailhook, which "fold[] closed" when not in use, "may create rear surface area ... that ... may be suitable only as a shoulder stock when closed," and thus "stands in contrast to the purported intent of the device." *Id.* at 30832. ATF ignores the possibility that such a device may "fold closed" simply to be more consolidated when carried by a shooter, transported in a bag, or stored in a safe. Likewise, a coat rack with folding hooks may not be particularly useful to for hanging items when the hooks are closed, but that does not make it a baseball bat.



2. The NPRM's "Accessory Characteristics" Are Vague and Ambiguous.

In December 2018, ATF issued a "Notice" entitled "Discontinuance of Accessory Classifications," claiming that ATF only "classifies firearms," and that "[e]ffective immediately, any requests for a determination on how an accessory affects the classification of a firearm under the GCA or NFA must include a firearm with the accessory already installed," and "FTISB will not issue a determination on an accessory...." *See also* NPRM at 30828 ("ATF does not classify unregulated components or accessories…."). Interestingly enough, however, the NPRM does exactly what ATF claims it does not do, with Section II of Worksheet 4999 looking at "Accessory Characteristics" of a stabilizing brace itself, looking only at "Configuration of Weapon" in Section III. Under Worksheet 4999, a brace can fail Section II ***without even being***

attached to a firearm. ATF's Worksheet 4999 thus violates the agency's own rules, performing precisely the task that ATF claims it does not and will not perform.

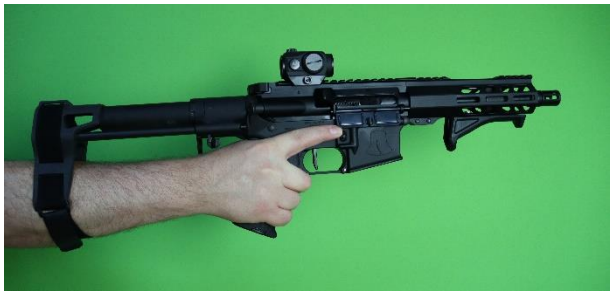
In ATF's now-repudiated December 2020 Notice providing new brace rules, the agency claimed to be "publishing the objective factors it considers when evaluating firearms with an attached stabilizing brace." Notice at 82516. In reality, the Notice provided an arbitrary 17-part balancing test, replete with numerous sliding scales and even secret criteria — each applied subjectively and considered "holistically." In reality, no gun owner (or even lawyer) would have had any idea how to apply ATF's vague criteria to an actual firearm or stabilizing brace.

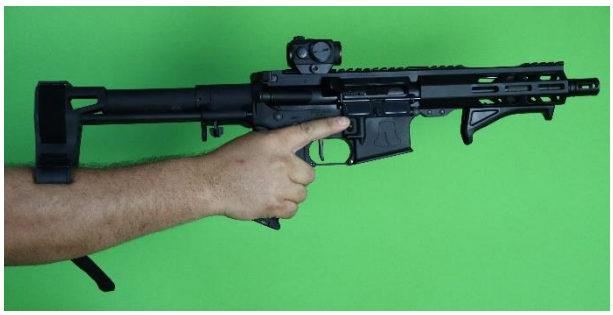
The recent NPRM, to be sure, provides more detailed and specific criteria of stabilizing braces that the agency allegedly considers, including actual numerical figures. But the NPRM still provides numerous unclear and ambiguous standards which inevitably will lead to confusion on the part of the industry and gun owners, and to arbitrary and capricious enforcement by ATF.

For example, ATF's categories of "surface area" consist of the following descriptions: "**minimal**" surface area, "**useful**" surface area, and "**added**" surface area. *Id.* at 30830. Of course, no one (including ATF) has any idea what any of that means. Is 4 square inches of surface area considered "minimal," or is 40?

Likewise, a stabilizing brace obtains either 1 or 2 points depending on whether it merely "incorporates ... features" from shoulder stocks or is "based on known shoulder stock design." *Id.* at 30830. Theoretically, a stabilizing brace could cross some line from merely "incorporating" features of a stock design, to being considered too closely related to a stock design and therefore "based on" that design. But that imaginary line in the sand is entirely open to ATF's discretion.

Likewise, ATF claims that various "cuff-type" braces that either "fully" or "partially" or "fails" to wrap around the arm are penalized between 0 and 2 points. *Id.* at 30830. But this is a completely arbitrary standard, and depends entirely on both the length and circumference of any individual person's arm. For example, a brace that may wrap "fully" around the arm of a petite woman... might wrap only "partially" around a man's arm... or even "fail" to wrap around the arm of a burly man.





Likewise, a non-adjustable brace used by a person with shorter arms might mean that the brace wraps around the meatier part of the forearm near the elbow, while the same brace used by a person with longer arms might fit closer to the wrist on a narrower part of the forearm (especially since ATF penalizes adjustability, calling it "length of pull").[6]

Finally, the "point value" system adopted by the NPRM is completely arbitrary. It would appear that ATF simply picked arbitrary numbers out of thin air, deciding to penalize braces between 0 and 3 points depending on the severity

[6] Not to mention, ATF never explains *why it matters* if a brace wraps around a person's arm "fully" or only "partially." The alleged purpose behind this category is to provide "sufficient and stable contact with the shooter's forearm" (*id*. at 30832), which does not necessarily depend on the "cuff-type" alone, but also on rigidity of material, presence of a velcro strap, positioning on the forearm, *etc*. The fullness of the "wrap" around a person's arm is only one aspect of the "stab[ility]" a brace provides.

of the alleged violation. Moreover, some categories penalize between 0 and 1 point, some between 0 and 2 points, and some between 0 and 3 points. ATF claims that "the point values associated with particular features or designs are based upon their relative importance in classifying the firearm," but that is a circular statement, and ATF does not explain why some categories and/or violations are more important and thus weighted more heavily than others. Likewise, ATF fails to explain why the magic number to fail each Section is 4 points, as opposed to 3, or 5, points in order to fail.

B. ATF Proposed Form 4999 Section III — Configuration of Weapon.

According to the NPRM, *only if* a particular firearm makes it past the "prerequisites" in Section I, *and only if* a particular stabilizing brace makes it past the "characteristics" prohibitions in Section II, can the brace and the firearm be considered together in a "configur[ed]" state in Section III. Like Sections I and II before it, Section III is designed to eliminate virtually any combinations of firearms and braces that sneak past the prior sections.

1. Issues with Length of Pull.

In perhaps its most absurd criterion yet, the NPRM proposes to measure the so-called "length of pull" of a pistol (with a brace), a concept similar to the "length of pull" of a rifle (with a stock).[7] *Id.* at 30831. The NPRM then adopts a graduated scale of point penalties, starting at 0

[7] This "length of pull" concept does not appear in any statute or regulation, but is entirely a creation of ATF bureaucrats. ATF does not explain why this measurement applicable to *rifles* has any application to the assessment of a brace on a *pistol*, much less why this measurement should be a "decisive indicator." *See* NPRM at 30833.

points for a 10.5" or less length of pull[8] ("LOP"), and ending with 4 points for a greater than 13.5" LOP. *Id.*

ATF's hypocrisy on measuring firearms is well known. For example, when it comes to rifles, ATF claims that the overall length ("OAL") should be measured with the stock **fully extended** "to its extreme length." But when it comes to pistols equipped with braces, ATF claims that "overall length is measured with the brace in the folded position," or **fully collapsed** if "telescoping." Now, even though ATF measures pistol OAL with a brace fully collapsed, the NPRM proposes to measure LOP with the brace **fully extended**, "in rear most 'locked position.'" *See, e.g.*, NPRM analysis of KAK Shockwave Blade, at 30841-43. It seems that ATF simply chooses whatever measurement standard will be the most restrictive and most harmful to the firearms community. [9]

Further compounding ATF's hypocrisy on this issue, the length of pull measurement appears in Section III of Worksheet, the "configuration of weapon" section, which ATF describes as "the entire weapon including how the 'stabilizing brace' is mounted to the firearm...." *Id.* at 30833. But if that were the case, then the LOP should be measured **how it is actually configured** — how it *is* mounted — not how it theoretically *could be* mounted or configured in its "rear most 'locked position.'" Confusingly, the NPRM appears to admit as much, claiming that a brace "will accrue more points the further it is positioned rearward,"

[8] As noted above, ATF already has made gross errors in weighing a Glock 17 and in measuring the length of common AR15s. Additionally, in the past ATF has had difficulty measuring a firearm's length of pull, *even according to its own rules*, in one federal criminal case having measured LOP diagonally instead of parallel with the buffer tube, leading to a mistake of over an inch, leading to acquittal of the criminal defendant. The NPRM certainly does not help ATF regain any credibility in its skill with a tape measure.

[9] If a person puts a brace on a firearm with a 16-inch barrel, is the OAL measured with the brace "fully extended" or "fully collapsed"?

indicating that it should be measured the way it is actually configured. But that is not what Worksheet 4999 actually says, instead requiring that the brace be considered *not as configured*, but rather artificially "positioned" in the "rear most locked position."[10]

Of course, even if ATF examined a brace the way it was *actually* mounted to a pistol, the NPRM still would make little sense, because the Worksheet penalizes LOPs *shorter than* 13.5 inches, in graduated penalties from 1 to 3 points.[11] Yet taller persons almost invariably have longer arms, necessitating a longer LOP in terms of the positioning of their stabilizing brace, so that it reach the most stable spot on their forearm. *See, e.g.*, NPRM at 30833 (acknowledging that "[l]ength of pull ... is a measurement that may be used to fit a firearm to a particular shooter. Generally, taller shooters require a longer length of pull and shorter shooters require a shorter length of pull."). Capriciously, then, the NPRM's graduated penalty for LOP over 10.5 inches but under 13.5 inches ***discriminates against larger shooters***, penalizing their firearms' so-called LOP which is based on nothing more than the length of their arms.[12]

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[10] ATF does not indicate how to measure braces that do not have "adjustable" or "telescoping" or "locked positions." For example, the original SB15 brace merely slides onto the buffer tube and, depending on its positioning, could be measured at 14.25 inches LOP or even greater. Likewise, a KAK Shockwave 1.0 brace that does not use a "tube with adjustment notches" could be adjusted to achieve a LOP of over 13.8 inches.

[11] The NPRM claims that "length of pull measurements are far less relevant when a pistol is involved" on the theory that "far less variation exists between shooters in this way." *Id.* at 30833. But by conceding that "less variation" exists, ATF thereby *admits that some variation exists*.

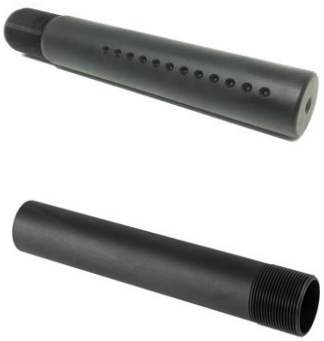
[12] The NPRM *might* make more intuitive (but not legal) sense had it adopted a system whereby *any* LOP *under* 13.5 inches garners 0 points, while *any* LOP *over* 13.5 inches garners 4 points, on the theory that no one needs a LOP greater than 13.5 inches. This would at least accord with prior ATF conclusions that 13.5 inches is "***presumptively***" (the NPRM now turns a *presumption* into a *conclusive* determination) "the maximum length a brace may extend behind the trigger face without being considered a shoulder stock," a standard which "lacks description in any Federal statute, regulation or published letter [but] [i]nstead ... comes from the NRA Firearms Sourcebook which states, 'Most standard factory rifles and shotguns have pull lengths of from 13.5 inches to 14.5 inches.'"

2. Issues with Attachment Method.

Next, ATF creates a category based on the "attachment method" used to mate a stabilizing brace to a pistol. *Id.* at 30830. However, this section is largely redundant to other considerations which have already occurred. For example, the second through fourth factors relating to "adjustab[ility]"[13] overlap with Section II's "adjustability" section, while the fifth through seventh factors relating to "extending length of pull" relate to Section III's "length of pull" section. ATF thus attempts to double penalize, based on the same criteria.

a) NPRM Arbitrarily Assigns 0 Points for "Standard AR-Type Pistol Buffer Tube" But 1 Point for an Identical Tube with "Adjustment Notches."

ATF penalizes 0 points for a "standard AR-type pistol buffer tube," but penalizes 1 point for the same tube with "adjustment notches" — small indentations designed to allow semi-permanent mounting of a brace such as a KAK Shockwave Blade in a more rigid and properly aligned position.[14]



[13] The NPRM fails to recognize that adjustability, while certainly a feature of many rifle stocks, is also a useful feature of many braces, allowing fine tuning for different size and shapes of shooters to hold a pistol with one hand.

[14] ATF appears to consider these sorts of indented tubes "adjustable," even though they are a semi-permanent mounting solution that requires loosening and re-tightening of a set screw (sometimes with use of an Allen wrench), rather than merely the push of a lever on normal "adjustable" stocks. *See* NPRM at 30833 ("indicates the ability to adjust the 'stabilizing brace'"); *see also* at 30843 ("KAK-type tube [] incorporates adjustment notches for adjustability."). By that definition, just about any brace could be considered "adjustable," even the original SB15.

b) Arbitrary Penalty for "Adjustable Rifle Buffer Tube."

ATF similarly penalizes 1 point for an "adjustable rifle buffer tube." This distinction makes no sense. While a standard M4-style buffer tube certainly allows for either stocks or braces that are *quickly adjustable* with a lever, both the "KAK-type" tube and the traditional pistol buffer tube require that a brace (such as the Shockwave 1.0) be set in a *semi-permanent* (*i.e.*, not adjustable) fixed location by tightening either of a knurled knob or an Allen wrench.

Likewise, either of the types of smooth tubes allows installation of friction fitting braces such as the original SB15, and neither would allow that brace to be easily "adjustable."

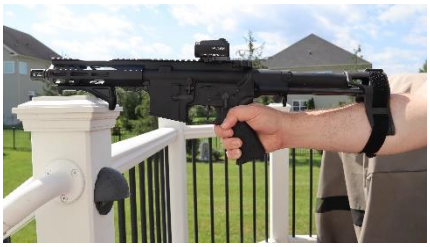
c) Arbitrary Stabilizing Brace "Attachment Method[]" Penalty.

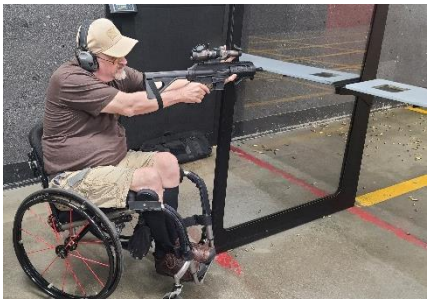
Next, ATF points to three types of "attachment methods" ("extended" tubes, "folding adapter[s]," and "spacers") that are each penalized two points, on the theory that each "increases the 'length of pull'...." *Id.* at 30831, 30833. As noted, this category basically creates a double penalty for both the "attachment method" that increases the length of pull, along with the resulting longer length of pull itself.

3. Issues with Modifications/Configuration.

Next, the NPRM lists various design features of certain braces or "modifications" thereof which will accrue either 2 or 4 points. First, ATF creates what is basically a regulatory requirement that stabilizing braces must have a Velcro strap, penalizing both "cuff-type" braces "with strap removed" and "fin-type" braces "lacking an arm strap." Also by fiat, ATF requires these Velcro straps to be of a certain *indeterminate* length that is not "too short to function" and

out of a certain material that is not too "elastic." *Id.* at 30833. Of course, ATF does not explain how short is "too short" or how "elastic" is too stretchy. Finally, ATF penalizes what it terms a "modified shoulder stock" defined as a brace that was "originally a shoulder stock," adopting a new bureaucratic theory of "once a stock, always a stock." Each of these classifications is entirely arbitrary, and none makes much sense.





4. Issues with Peripheral Accessories.

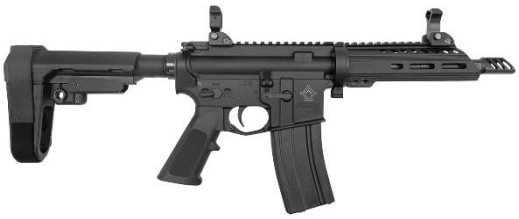
As part of the final analysis under Section III of Worksheet 4999, ATF points to certain so-called "peripheral accessories" that can result in assessment of penalty points against a firearm configured by the end user. Bizarrely, the NPRM creates a system where a particular firearm and stabilizing brace can be marketed and sold as a legal pistol, but then magically transformed into a short-barreled rifle by a gun owner simply through the addition of "peripheral accessories" such as optics and grips.

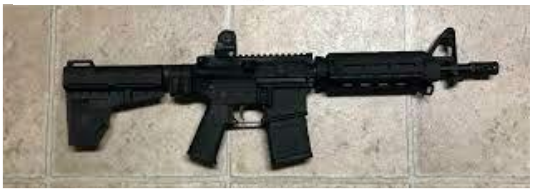
a) Misguided "Hand Stop" and "Secondary Grip" Penalty.

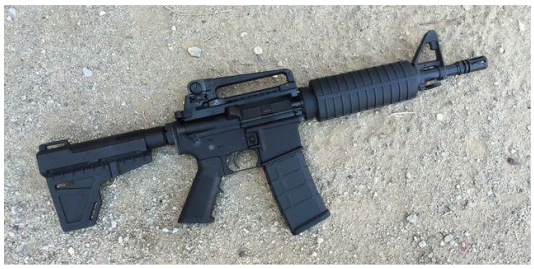
First, ATF assesses a 2-point penalty for use of a "hand stop," and a 4-point penalty for use of what ATF terms a "secondary grip,"[15] claiming that these accessories "indicat[e] two-handed fire."[16] *Id.* at 30831. Previously, ATF has approved of pistols that have used hand stops, without

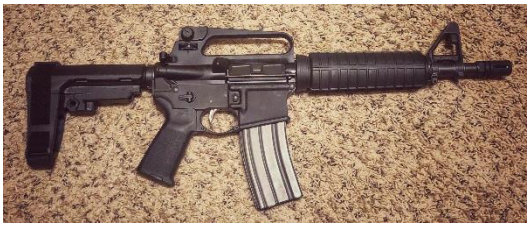
[15] This appears to represent a change on the part of the ATF, which previously has concluded that an "*angled* fore-grip" may be installed on an AR-15 type pistol, while a "*vertical* fore-grip" may not. Now, the NPRM would make any "secondary grip" a 4 point penalty, immediately disqualifying the weapon. What about the hand guard/rail on the front of an AR15? Does this count as a "grip", and if so, how many points does this accrue?

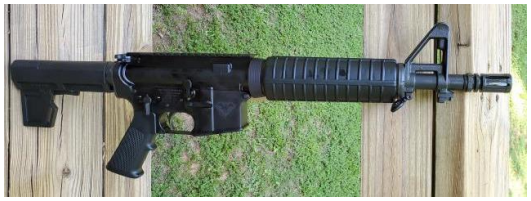
[16] What is to say that a foregrip is not designed and intended to be used as a monopod?

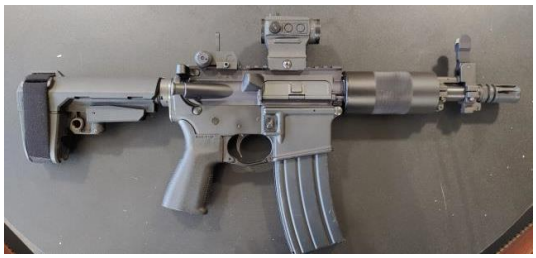












even mentioning them as problematic. Of course, while many shooters use these accessories as "grips," others use them to brace the firearm, such as over the top or around the corner of a wall — a tactic made all the more useful when firing a pistol with a single hand.

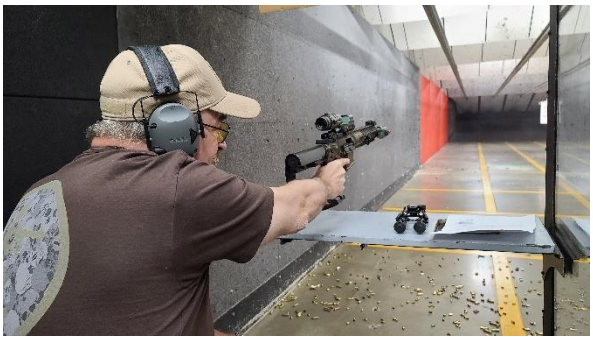
b) Misguided "Back-Up," "Flip-Up," and "No" Sight Penalties.

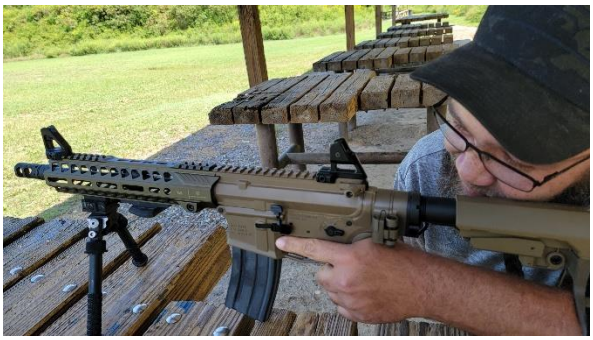
Next, ATF assesses a 1-point penalty for a firearm that has "back-up" sights, "flip-up sights," or "no sights." It is unclear what ATF means by "back up" sights, to be distinguished from "flip up" sights. If a pistol includes iron sights (but not the type that "flip up") as its primary and only sighting option, presumably they would not be considered "back up" sights?

And if a pistol barrel includes a semi-permanent, built-in A2 front sight, but incorporates no rear iron sight, would that still be considered a prohibited "back-up" sight? And is a pistol utilizing an upper receiver with a built in or detachable "carry handle" sight acceptable?

Finally, some gas blocks include built-in and non-detachable "flip up" sights. Must a gun owner choose between installing a gas block, which is necessary for a firearm's semiautomatic function, or not having sights, for which his firearm will be penalized?

c) Misguided "Magnifier" Optic Penalty.

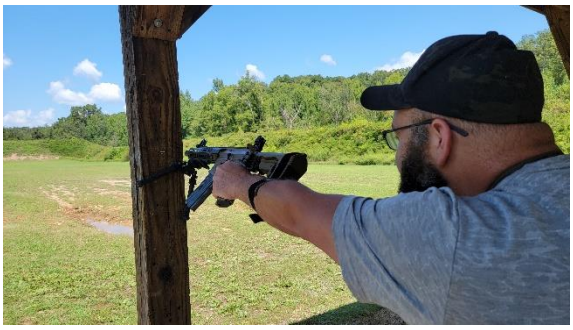




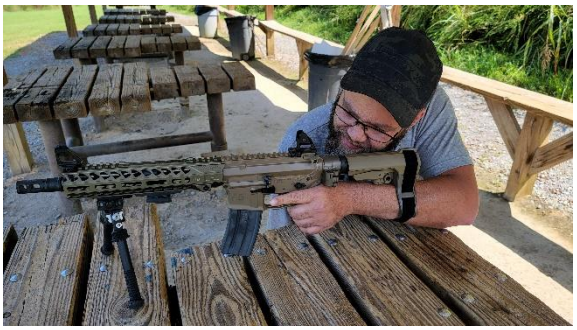
Similarly, ATF penalizes 2 points for an optic with a flip-to-side "magnifier with limited eye relief." Finally, ATF penalizes 4 points for a "scope with eye relief incompatible with one-handed fire." These types of aiming systems, the NPRM claims, are either "only partially usable when firing the weapon with one hand, or are "incompatible with one-handed firing" because such sights "cannot be seen clearly when held at arm's length...." *Id.* at 30834. But ATF mistakenly assumes that the only way a pistol can be used with a stabilizing brace is "when held at arm's length." ATF fails to recognize that a shooter may be able to bend the head and obtain a sight picture even while using a stabilizing brace attached to his wrist, thereby utilizing magnified optics or even iron sights.[17]

[17] In fact, permitting a longer so-called "length of pull" would make it easier to obtain a cheek weld using a brace, but Worksheet 4999 penalizes longer lengths of pull. Obtaining a cheek weld with a brace would also serve as another point of contact and way to stabilize a firearm, thereby increasing accuracy.

d) Misguided "Bipod/Monopod" Penalty.



Next, ATF penalizes 2 points for the "presence of a bipod/monopod,"[18] even though such a device — as with a forward grip or hand stop — clearly seems *uniquely suited* to help a shooter stabilize a pistol while shooting it one handed using a stabilizing brace, such as prone, on a bench, against structure, etc.



Bizarrely, ATF claims quite the opposite, that such an accessory is "counter-intuitive to an attached 'stabilizing brace.'" NPRM at 30834. And since foregrips are penalized 4 points while bipods are penalized only 2 points, what classification results from a "grip-pod" which incorporates both features?

e) Misguided Weight Criteria.

Next, ATF prohibits any pistol which, "as configured weigh[s] more than 120 ounces," or 7.5 pounds, "weighed with magazine unloaded." NPRM at 30831. But this makes little sense, because it would mean a person could become a felon by something as innocent as borrowing a 30-round magazine at the range, after his 20-round magazine runs out of ammunition, thus

[18] ATF does not give examples of such "monopods," nor are we aware of any commonly used monopod that is designed to be attached as a component onto the front of a rifle. Since ATF makes clear that manufacturer design and intent is not as important as eventual configuration, would a shooter's use of a vertical foregrip as a monopod decrease the penalty from 4 points to 2 points? And is use of a *tripod* on a pistol ok?

throwing his pistol just over ATF's arbitrary illegal weight limit. The use of a particular magazine thus would determine a firearm's classification as a pistol or rifle.

Likewise, a pistol configured to weigh just under 7.5 pounds with an empty 100-round magazine, but with ammo weighing over **10 pounds, would be legal**. Meanwhile, a pistol weighing just over 7.5 pounds with an empty 20-round magazine, but with ammo weighing about **8 pounds, would be illegal**. ATF for some reason has decided to consider a firearm as "unloaded," even though no one shoots *unloaded* firearms.

Finally, ATF's arbitrary weight limit does not take into account the size and strength of different shooters. Again, an older woman might struggle to use a six-pound (legal) pistol effectively, while a large, young man might have no trouble with an eight pound or greater (legal) pistol.

f) "Peripheral" Accessory Penalties are Arbitrary.

ATF's decision to penalize various impermissible "peripheral" accessories is completely arbitrary, because the NPRM fails to account for other such similar features that might better demonstrate whether a firearm was designed to be fired from the shoulder, versus with one hand. For example, a weapon mounted light or laser almost certainly would necessitate a second hand to engage, and thus would fit ATF's understanding of a feature showing the firearm was designed to be a rifle fired with two hands. Yet the NPRM targets other, more ambiguous features, while ignoring these much more obvious accessories, and fails to explain why that is so.

C. ATF's Catch-All Disqualifier Ensures Arbitrary and Capricious Enforcement.

Amazingly, even if a particular brace and particular firearm (as uniquely configured) manage to make it all the way through Worksheet 4999, ATF has another surprise up its sleeve.

ATF claims that, "[e]ven if a weapon accrues less than [sic] 4 points in each section, attempts by a manufacturer or maker[19] to circumvent Federal law by attaching purported 'stabilizing braces' in lieu of shoulder stocks may result in classification of those weapons as 'rifles' and 'shortbarreled rifles.'" NPRM at 30834; *see also* at 30829 ("less than [sic] 4 points in Section II … and less than [sic] 4 points in Section III … will generally be determined not to be designed to be fired from the shoulder."). ATF claims that it will make this determination "regardless of the points accrued on the ATF Worksheet 4999...." *Id.* ATF provides no examples of what such "attempts" to "circumvent[] Federal statutes" might look like, and provides no criteria by which it proposes to make such a determination to override Worksheet 4999. Worksheet 4999 contains a similar disclaimer, explaining that ATF "*reserves the right to preclude classification* as a pistol with a 'stabilizing braces' [sic] 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." NPRM at 30835 (emphasis added).

ATF thus purports to provide Worksheet 4999's allegedly "objective factors" that can be objectively applied to pistols equipped with stabilizing braces, yet reserves to itself unlimited and unbridled discretion to reject Form 4999 at any time, and determine that any particular firearm has been made in violation of the law. That is the very definition of an arbitrary and capricious rule. After providing numerous pages of detailed analysis, ATF then casts it all aside in favor of a "we'll know it when we see it" standard, with which neither gun owners nor the industry could ever hope to comply. Why even have the Form 4999 at all if the ATF's "objective factors" are not sufficient to qualify as a classification when applied?

[19] Presumably, this would include a gun owner who "makes" his own firearm by piecing together components.

D. ATF Proposed Framework Violates the Plain Text of the Statute.

At bottom, the NPRM is designed with one obvious goal in mind — to completely eliminate the ability of every law-abiding gun owner to use any stabilizing brace on any firearm. In so doing, ATF proposes a regulatory framework that violates the plain text of the statute, which requires a rifle to be ***both*** "designed" ***and*** "intended" to be fired from the shoulder. 26 U.S.C. Section 5845(c). The NPRM, on the other hand, treats these factors as if they are disjunctive, assuming that **design alone can be determinative** without evidence of intent, and that purported objective **intent alone can be determinative** in spite of design. Whereas the statute requires **both** factors, ATF requires **either** in order to classify a pistol as a short-barreled rifle.

For example, as ATF explains, the agency will consider "objective **design** features" of a firearm and also the "manufacturer's purported **intent**" — but only so long as that "**intent**" conforms with the "**design** features" — otherwise ATF will classify a firearm "based on the objective design features" alone. *Id.* at 30828. In other words, if a firearm does not qualify under Worksheet 4999, ATF will reject it "regardless of the manufacturer's stated intent." *Id.* at 30829. And on the flip side, the NPRM explains that even if a firearm's **design** does qualify under Worksheet 4999, ATF could still reject it based on "**intent** ... attempts by a manufacturer or maker to circumvent Federal law." *Id.* at 30834.

Not only is this approach in conflict with the plain language of the statute, but also grafts into the NFA definition of a "rifle" language stolen from other portions of the statute. While Section 5845(c)[20] defines an NFA "rifle" as being "designed ... made ... **and** intended," Section

[20] *See also* Section 5845(b) and (d), similarly defining "machinegun" and "shotgun" using the conjunctive word "and."

5845(f) defines a "destructive device" as one that is "designed **or** intended." *See United States v. Johnson,* 152 F.3d 618 (7th Cir. 1998) (noting that "[t]he terms 'designed' and 'intended' as used in §5845(f)(3) are separated by the disjunctive word 'or.'"); *see also* Section 5845(e) (defining an AOW as "designed, made, **or** intended"). Congress was not simply careless in its selection of language. Various parts of the NFA use "and," while other parts use "or," and ATF is not free to rewrite Section 5845(c) from "and" to "or."

E. ATF Seeks to Make it Impossible to Rely on its Classifications.

Repeatedly, the NPRM indicates that an ATF classification only applies to a particular firearm as it is specifically and uniquely configured. This means that, even if a firearm is designed, made, and sold as a pistol, it could be inadvertently converted into a short-barreled rifle by the purchaser, by merely adding popular accessories to the firearm. Congress never intended such a freewheeling application of the GCA and NFA. Indeed, the NPRM is explicitly open-ended. For example, ATF claims that "FATD ... examines [not only] objective design features," but also "any other information that directly affects the classification of a particular firearm configuration as presented by that sample." *Id.* at 30827. This language is reminiscent of the failed December 2020 Notice, which referred to "any other information that directly affects the classification." Notice at 82517. Even though it abandoned the prior Notice, ATF still does not explain what "**any other information**" consists of.

Moreover, the NPRM states that an ATF classification will be "of a particular firearm configuration as presented *by that sample*." *Id.* at 30827 (emphasis added). ATF claims that "[e]ven though firearms may have a similar appearance (*i.e.,* shape, size, etc.), an ATF classification of a firearm pertains *only to the particular sample* submitted because of the vast variations in submissions...." *Id.* (emphasis added). This makes reliance on ATF rulings nearly

impossible, even for firearms configured nearly identically to one of which ATF has approved. It would thus appear that, if even the smallest detail is changed (such as adding different sights, or a different optic), *the entire firearm's classification could be inadvertently changed*. Indeed, under the NPRM, gun owners could not modify a single aspect of their firearm (even factors that do not appear on Worksheet 4999) without potentially exposing themselves to criminal liability, because ATF has disclaimed any binding effect of Worksheet 4999, stating that it may classify a firearm "regardless of the points accrued on the ATF Worksheet 4999," by circularly considering "any other information that directly affects the classification."

This creates an impossibility for law abiding gun owners to reasonably use their firearms, including AR-15 type pistols, which are infinitely modifiable with thousands of accessories, to suit a shooter's needs and situation. Under the NPRM, literally every gun owner would be required to submit his particular and unique firearm for ATF classification and, even if he obtained a favorable classification that it was a pistol, thereafter he would be entirely unable to change even the smallest detail, without running the risk that ATF might consider its classification to have been voided. This is not the statutory framework that Congress enacted and, if it is, then it is unconstitutionally vague.

IV. ATF's Regulatory Impact Analysis Is Bunk.

The NPRM disingenuously claims that "ATF wants to assist affected persons or companies...." NPRM at 30843. ATF insincerely alleges that "FATD's classifications … allow industry members to plan, develop, and distribute products in compliance with the law…." *Id.* at 30827. Yet the NPRM is designed to pull the rug out from under the entire stabilizing brace industry and the gun community, reversing and voiding prior "FATD classifications." As part of its purported "assistance" to the firearms community ATF demands that millions of "current

unlicensed possessors" should (1) remove the brace, (2) replace the barrel with one 16 inches or greater, (3) destroy the firearm, (4) turn the firearm over to ATF,[21] or (5) submit and receive an approved ATF Form 1, paying a $200 tax (per firearm) and registering the weapon on the NFRTR (and engraving it as such). *Id.*

A. ATF Alleges Brace Manufacturers Have Lied About Sales.

Yet although making these demands of millions of gun owners,[22] ATF admits that it has absolutely no idea how many stabilizing braces have been manufactured and sold since initially approved by ATF. ATF first claims that, "[b]ased on anecdotal evidence from the manufacturers of the affected 'stabilizing braces,' the manufacturers have sold between 3 million and 7 million stabilizing braces between the years 2013 and 2020." RIA at 16. However, ATF then attacks its own "anecdotal evidence," calling brace manufacturers liars, alleging that they have "likely inflated their sales estimates," and concluding arbitrarily "the number sold to be 3 million." *Id.* ATF claims that this estimate is from "subject matter experts," but does not say who these people are, does not reveal whether they even work for ATF, and does not explain the basis for their opinions.

B. The Congressional Research Service Estimates Up To 40 Million Braces Could Be Affected.

Interestingly enough, ATF is not the only government entity which has attempted to estimate the number of braces on the market. Earlier this year, the Congressional Research

[21] ATF later explains that it "does not anticipate anyone" will actually do this. *Id.* at 30846.

[22] ATF estimates that the NPRM will impose more than three million hours of work on the American public (NPRM at 30849), the equivalent of the entire working lives of 38 Americans. Under higher estimates, that could range as high as **the entire working lives of 500 able bodied Americans**.

Service estimated that "unofficial estimates suggest that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands...." Although CRS released this widely distributed number as early as February of 2021, the NPRM entirely fails to consider it. Nor does ATF ever explain why the CRS estimate is incorrect.

C. The NPRM's Estimates of Effects on Gun Owners, the Firearms Industry, and the Economy is Flawed.

Undaunted, and armed with its low estimate of 3 million stabilizing braces, ATF then arbitrarily estimates that 10% will be converted to a rifle through use of a longer barrel and hand guard,[23] that 27% will be registered with the NFA,[24] and that 63% will result in removal of the offending stabilizing brace, leaving the firearm a pistol with no stabilizing brace.[25] RIA at 32-33. It is worth noting that, if any of ATF's off-the-cuff percentages and cost estimates turn out to be inaccurate, the total cost of the NPRM would vary significantly.

[23] ATF estimates this will cost $410 to complete for each firearm.

[24] ATF estimates labor costs for completing the paperwork as averaging about $66 per firearm (ATF values Americans' "leisure" time at only $16.52 per hour). ATF claims that it is not necessary to consider the NFA $200 tax implications of the NPRM, claiming this is "considered a transfer payment from industry to the Federal government, and thus is not a net societal cost to the economy." RIA at 27, 36. Apparently, ATF believes that the Biden Administration's use of taxpayer dollars to arm the Taliban is equivalent to law-abiding gun owners using their hard-earned money to support the American firearm industry while exercising their Second Amendment rights. On the contrary, since the NPRM's imposition of a $200 NFA tax on braced firearms will be borne by law abiding gun owners, we include it in our estimates.

Additionally, ATF fails to consider that an NFA firearm "must be properly marked" (NPRM at 30843) with engraving, an additional cost (estimated to be about $50, not including travel time and cost) which is not included in ATF's estimate. Nor does the NPRM factor in the cost of an NFA applicant to have his fingerprints taken, another $10-15 (again, not including travel time and cost). These additional factors create a total average *minimum* cost of $326 per firearm registered under the NFA.

[25] ATF estimates the damage overall done to the value of the firearm only to be the purchase cost of the stabilizing brace, or $236.

ATF also includes various other estimates of more indirect costs of the NPRM, such as for damage to the firearms industry based on future braces and braced firearms that would have been sold. *See, e.g.*, RIA at 34-35. 36-40. Interestingly enough, ATF does not estimate future brace sales based on current trends, but circularly, based on the existence of the NPRM's ban on the use of braces. [26] It is thus obvious that the true damage of lost future stabilizing brace transactions is far higher than ATF estimates.

Even using ATF's artificially *low* estimates of the number of braces in circulation, the total cost of the NPRM is ***simply staggering***. Assuming a bare minimum of 3 million braces in circulation would lead to a minimum of $1.4 billion in damages by gun owners. An estimate of 7 million braces (ATF's high figure) results in a minimum of around $3.3 billion of damages. These numbers are far higher than ATF's estimates, because they take into account the $200 NFA transfer payments and other NFA costs. Moreover, using CRS estimates of 10 and 40 million results in minimum damages of $4.84 billion and an eye-popping $14.15 billion, respectively.

D. The NPRM Attempts to Seize, Waste, and Obliterate an *Unfathomable* Percentage of Total Annual U.S. Firearms Commerce.

No matter which estimate is used, the NPRM attempts to seize, waste, and obliterate, through a single regulatory action by ATF, an *unfathomable* percentage of the total annual

[26] In a thinly-veiled threat, ATF warns that it "will … use enforcement actions, to include criminal actions, against existing FFLs that manufacture firearms that do not comply with the intent of the law." NPRM at 30846. ATF claims that "these individual enforcement actions … would change the market perception … and may affect overall demand…." In other words, once ATF SWAT teams begin raiding manufacturers and dealers of firearms using stabilizing braces, gun owners may be intimidated and stop buying braces.

firearms commerce in the United States.[27] ATF's money grab demands law-abiding gun owners fork over NFA fees (based on ATF's numbers) ranging anywhere from $162 million to $2.2 billion — a number dwarfing ATF's entire annual budget, which was $1.4 billion in 2020. ATF proposes to have its NFA branch — which cannot keep up even with the current level of just over 500,000 forms per year — suddenly and immediately to handle an influx of between 810,000 and 11 million Form 1 and Form 2 firearms, swelling the size of the NFRTR between 27% and 367% — a registry which currently stands at about 3 million NFA items (and which is already plagued by a huge percentage of errors[28]). ATF thereby seeks to swallow up a large number of privately owned firearms, requiring through bureaucratic fiat that they be registered with the federal government in the NPRM's new national gun registry.

V. In Contrast with Its Devastating Effects, the NPRM Offers No Realistic Benefits.

The NPRM proposes to upend the firearms industry, causing untold billions of dollars of damage to the firearms community, yet offers no benefits in return. Several times throughout the NPRM and the RIA, ATF claims that pistols equipped with stabilizing braces are designed "to circumvent the requirements of the NFA," that without the NPRM, "these weapons can continue to proliferate and could pose an increased public safety problem given that they are easily concealable." NPRM at 30845, 30848. ATF claims that the NPRM "would prevent persons from circumventing the NFA by using arm braces as stocks on 'short-barreled rifles.'" *Id.* at 30848.

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[27] Estimates of annual firearms commerce in this country range from $13.5 billion to $28 billion.

[28] In June 2007, the Office of Inspector General released a report detailing various issues with the National Firearm Registration and Transfer Record ("NFRTR"). One Industry Operations Investigator ("IOI"), obviously frustrated with his own agency's system, stated on record for the ATF to "[u]pdate the computer program to a 21st century capability.... [ATF should] stop operating like a third world Department of Motor Vehicles office." *See* https://oig.justice.gov/reports/ATF/e0706/results.htm#IV.

ATF points to "at least two mass shootings, with the shooters in both instances reportedly shouldering the 'brace' as a stock...." *Id.* at 30828. ATF claims that the NPRM "would affect the criminal use of weapons with a purported 'stabilizing brace'...." *Id.* at 30847.

ATF's speculation misses the mark entirely. First, pistols will be legal to possess even with the NPRM, just without a stabilizing brace, the absence of which will make them even more "concealable." Second, as the NPRM acknowledges, nothing in the proposed regulation would make it illegal to continue to possess a stabilizing brace, or to use it as a rifle stock, so long as it is not attached to a pistol. Third, ATF assumes that criminals who engage in mass murders will obey the NFA, either removing their braces or registering their firearms. Fourth, there is no reason to believe that those who use firearms for nefarious purposes will be unable to register their pistols as NFA weapons — indeed, both of the mass murderers to which ATF points obtained their firearms legally, and would have passed an ATF NFA background check. Fifth, there is no reason to believe that NFA registration of firearms will lead to less crime with those firearms, as if an ATF Form 4 miraculously cures mass murderers of their murderous intent. Sixth, ATF fails to recognize that even if "stabilizing braces" are no longer manufactured and sold, a person could simply replace a stabilizing brace with an actual rifle stock on most affected pistols, circumventing the NFA in that way.

At bottom, there is not a shred of evidence that the NPRM's ban on the use of stabilizing braces will "enhance public safety and [] reduce the criminal use of such firearms" (RIA at 41), since all of the components at issue (rifles, pistols, braces, and stocks) continue to be perfectly legal to purchase and possess, and can be easily swapped or changed out by those intending to violate the law.

VI. Reversing Over a Decade of ATF Classifications, the NPRM Mistakenly Assumes that Stabilizing Braces Can Only Be Used on Pistols.

Reversing over a decade of ATF classifications, the NPRM mistakenly assumes that stabilizing braces can only be used on pistols. As is relevant here, an NFA "firearm" includes:

> (3) a **rifle** having a barrel or barrels of less than 16 inches in length; [or]
> (4) a weapon **made from a rifle** if such weapon as modified has an overall length of less than 26 inches **or** a barrel or barrels of less than 16 inches in length. [26 U.S.C. Section 5845(a) (emphasis added).].

The NFA, in turn, defines a "rifle" as:

> 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. Section 5845(c) (emphasis added).]

Next, the NFA defines an "any other weapon" (AOW) to include:

> any weapon or device **capable of being concealed on the person**[29] from which a shot can be discharged through the energy of an explosive [but] **shall not include a pistol** or a revolver having a rifled bore, or rifled bores, **or** weapons **designed**, made, or **intended to be fired from the shoulder** and not capable of firing fixed ammunition. [26 U.S.C. Section 5845(e) (emphasis added).]

The NFA does not define a "pistol" that is exempted from being an AOW, but ATF through regulation defines a "pistol" as:

> A weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels **when held in one hand**, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock **designed to be gripped by one hand** and at an angle to and extending below the line of the bore(s). [27 C.F.R. Section 478.11 (emphasis added).]

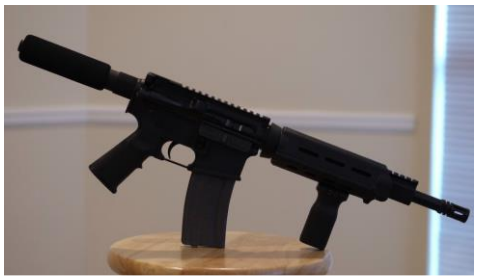
Similarly, the GCA defines a "handgun" as:

[29] ATF understands that firearms over 26 inches in overall length are not AOWs, the informal threshold for concealability.

> (A)a firearm which has a short stock and is **designed to be held and fired by the use of a single hand**.... [18 U.S.C. Section 921(a)(29) (emphasis added).]

A. ATF Has Approved Braces for Use on Non-Pistols and Non-AOWs.

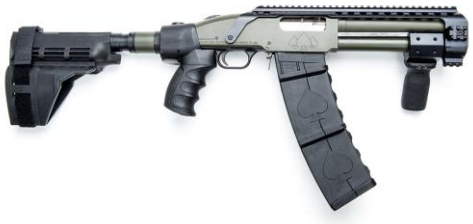
In the past, ATF has repeatedly approved of various weapons that are neither "rifles" (not designed to be fired from the shoulder) nor "AOWs" (over 26 inches) under the NFA, nor are they "pistols" or "handguns" (designed to be fired by one hand) under the GCA.



In 2011, for example, ATF classified the Franklin Armory XO-26 as merely a Title I "firearm" on the basis of this theory. Similarly, in 2017, ATF classified the Mossberg Shockwave as a

GCA "firearm," because it is not otherwise properly classified as a SBR, AOW, or a handgun/pistol.

With the advent of stabilizing braces, manufacturers began to add such braces to their "firearms," on the theory that this did not change the classification, as they were still designed to be fired with two hands, but not from the shoulder. In 2014, ATF classified a Black Aces Tactical 12 gauge weapon as a "firearm," even though it had a SB15 brace installed. Likewise, Franklin Armory now sells its XO-26 with a SBM4 brace attached.



B. Stabilizing Braces Can Be Used to Support Two Handed, Non-Shouldered Fire.

The NPRM would change all this. As ATF apparently now understands it, a stabilizing brace can be used ***only*** "to support single-handed firing." NPRM at 30827. Thus, ATF apparently believes that such a device can ***only*** be used on a "pistol" or

"handgun," a firearm "designed to be gripped by one hand." ATF apparently believes that a stabilizing brace can ***never*** be used on a "firearm" that is designed to be operated by two hands. Indeed, the NPRM states that stabilizing braces cannot be used on, and Worksheet 4999 does "not apply to[,] firearms" such as the "Mossberg Shockwave [and] Remington Tac-14" which "were never designed to be fired from one hand." NPRM at 30828. Yet as noted above, ATF *has explicitly approved of* a Black Aces Tactical smooth bore "firearm" that incorporates a stabilizing brace.

ATF now claims that "the addition of a 'stabilizing brace'" to such a "firearm" "does not assist with single-handed firing, but rather redesigns the firearm to provide surface area for firing from the shoulder." *Id.* Likewise, ATF now claims that "'stabilizing braces' were originally marketed as intended to assist persons with disabilities and others lacking sufficient grip strength to control heavier *pistols*." NPRM at 30829 (emphasis added). ATF alleges that braces have been "marketed to help a shooter 'stabilize' his or her arm to support *single-handed firing*." *Id.* at 30827 (emphasis added).

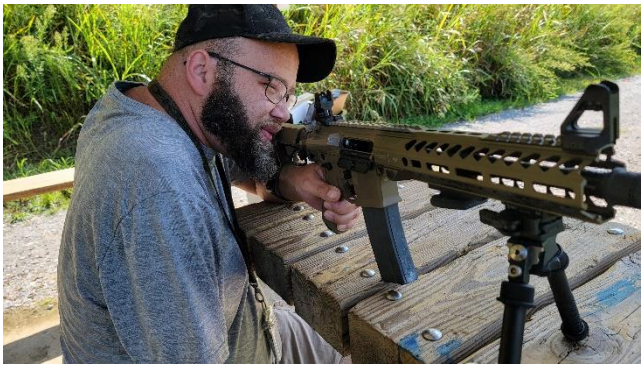
This demand that stabilizing braces be attached only to "pistols" has never been ATF's conclusion in the past. Quite the opposite. In fact, when classifying the first stabilizing brace in 2012, ATF stated quite differently that a "forearm brace, when attached to *a firearm*, does not convert that weapon to be fired from the shoulder and would not alter the classification of ***a pistol or other firearm***.[30] While *a firearm* so equipped would still be regulated by the [GCA], such *a firearm* would not be subject to NFA controls." Thus, nearly a decade ago, ATF explicitly

[30] ATF points to the fact that "the first individual to submit a forearm brace" stated that "'the AR15 pistol is very difficult to control with the one-handed precision stance,'" and that "the submitter explained that the intent of the brace was to facilitate one-handed firing of the AR-15 pistol…." NPRM at 30827.

acknowledged that a stabilizing brace could be used on a "firearm" that is not a "pistol." The NPRM would reverse even ATF's original stabilizing brace classification letter, and would also implicitly reverse subsequent classification letters, presumably including some of those discussed above.

C. Failure to Account for "Firearms" Equipped with Stabilizing Braces Undermines the Entire NPRM and Worksheet 4999.

Without the assumption that a stabilizing brace can ***only*** be used on a pistol, ATF's entire NPRM and Worksheet 4999 falls apart at the seams. For example, Worksheet 4999 automatically disqualifies all firearms over 26 inches in length, which is also the prerequisite length for a "firearm" to no longer be considered an AOW. Likewise, Section III's prohibitions of hand stops and foregrips also falls flat, because such items demonstrate that a weapon is a "firearm" instead of a "pistol." The same applies to ATF's prohibition of various types of sights, which ATF erroneously claims "must be fired from the shoulder in order to use the sight" (NPRM at 30843) but, in reality, which can be used when firing with two hands, yet not "at arm's length," but not from the shoulder. Finally, ATF's prohibition on weapons that are "too heavy" is bunk, because a "firearm" using a brace but held with two hands can be easily wielded, even if greater than ATF's 7.5 pound maximum.



The NPRM thus not only attempts to eliminate the market for stabilizing braces, but also to indirectly crack down on Title I "firearms." But it is simply not the case that a weapon must either be a "pistol," or else it is by default a short-barreled rifle. As ATF has routinely and

repeatedly acknowledge, a firearm over 26 inches in length (including one with a vertical foregrip)[31] can be considered a "firearm" under the GCA, and unregulated by the NFA. Such a firearm — fired with two hands, but not from the shoulder (like a Shockwave or Tac-14) — can easily utilize a stabilizing brace to help a shooter control length, weight, and recoil. The NPRM not only fails to recognize this reality but, in so doing, reverses nearly a decade of ATF findings to the contrary.

VII. CONCLUSION

For the reasons above, the NPRM should be withdrawn.

Respectfully submitted,

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[31] Interestingly enough, Worksheet 4999 would automatically disqualify a firearm based not on the presence of a stabilizing brace, but on the presence of a "secondary grip," meaning this category has nothing to do with stabilizing braces.