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Office of Regulatory Affairs  
Enforcement Programs and Services  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
99 New York Ave. NE, Mail Stop 6N-518  
Washington, DC 20226  
ATTN: ATF 2021R-08

**RE: Docket No. ATF 2021R-08**  
**RIN 1140-AA55**

To Whom It May Concern:

The Second Amendment Foundation (“SAF”) makes this public comment to the Notice of Proposed Rulemaking titled, “Factoring Criteria for Firearms With Attached ‘Stabilizing Braces,’” Docket Number ATF 2021R-08, as published by the Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) at 86 Fed. Reg. 30826 (June 10, 2021) (the “proposed rule”).

SAF ([www.saf.org](http://www.saf.org)) is a tax-exempt Washington-state non-profit corporation, organized under § 501(c)(3) of the IRS code. It supports education, research, publications, and legal action about the Constitution’s right to privately own and possess firearms and the consequences of gun control.

SAF has over 650,000 members, to include disabled firearms enthusiasts, and has worked to promote Second Amendment rights throughout the United States since 1974. SAF members are affected by ATF’s proposed expansion of gun controls under the National Firearms Act of 1934 (“NFA”) to pistols equipped with stabilizing braces.<sup>1</sup>

**SAF General Comments**

Stabilizing arm braces were created to provide shooting support to disabled combat veterans. ATF initially acknowledged that pistols equipped with stabilizing braces are not subject to the NFA in 2012.<sup>2</sup> Since that time, millions of stabilizing braces and stabilizing

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<sup>1</sup> 26 U.S.C. § 5801 et seq.

<sup>2</sup> ATF Letter to Redacted Recipient, Nov. 26, 2012.

brace-equipped pistols have been sold.

As reflected in the proposed rule, ATF has changed its mind about stabilizing braces and now seeks to reclassify millions of stabilizing brace-equipped pistols as subject to the NFA, triggering NFA paperwork requirements, taxes, long wait times, and transfer restrictions.

The ATF's proposed expansion of NFA control will not only impact how new pistols and shotguns are equipped with stabilizing braces, but would also affect millions of existing pistols, lawfully in private hands, that are equipped with stabilizing braces.

ATF does not have the authority to impose NFA control on stabilizing braces and its proposed rule will threaten millions of citizens with prison, harsh fines, forfeiture of firearms, and the loss of the right to own or possess firearms should they fail to comply with ATF's policy change. The NFA was not amended for these changes. No new laws were passed. Instead, ATF decided to change the scope of the NFA on its own, imposing significant burdens on core constitutional rights of over a million law-abiding citizens.

The proposed rule will stretch already limited agency resources beyond their capabilities. No doubt, ATF will face a daunting task administering and enforcing the new and highly controversial prohibitions against millions of citizens. These affected persons are unlikely to agree with ATF's latest interpretations and, as explained below, the proposed rule is open to constitutional and other legal challenges.

## **I. ATF Treatment of Stabilizing Braces**

Congress carefully described the physical features subject to NFA control. Both a "rifle" and "shotgun" mean "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder..."<sup>3</sup>

Short-barreled rifles ("SBRs") and short-barreled shotguns mean rifles "having a barrel or barrels of less than 16 inches in length" and shotguns "having a barrel or barrels of less than 18 inches in length".<sup>4</sup> The definitions of SBRs and short-barreled shotguns also include "any weapon made from a [rifle or shotgun] (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches."<sup>5</sup>

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<sup>3</sup> 18 U.S.C. §§ 921(a)(5) and (a)(7); 26 U.S.C. §§ 5845(c) and (d).

<sup>4</sup> 18 U.S.C. §§ 921(a)(6) and (a)(8); 26 U.S.C. §5845(a).

<sup>5</sup> *Id.*

A “handgun” means, in part, “a firearm which has a short stock and is designed to be held and fired by the use of a single hand...”<sup>6</sup> The term includes pistols. At present, ATF regulations define a “pistol” to mean:

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).<sup>7</sup>

Under current law, pistols and other rifled bore handguns are regulated solely under the Gun Control Act of 1968 (“GCA”)<sup>8</sup> and there are no restrictions on the barrel or overall length of such handguns.

The statutes and regulations do not define “stabilizing braces.” Stabilizing braces are common accessories installed on pistols and shotguns that allow users to stabilize these firearms against their forearms, resulting in more accurate shooting without compromising safety or comfort, and reducing the risk of bruising and other injuries when shooting from one hand.

Stabilizing braces generally consist of two flaps, a strap, and shroud attached to the end of a firearm.<sup>9</sup> Originally developed for use by disabled persons, both disabled and non-disabled persons now use stabilizing braces as an additional point of support to ensure firearm safety and accuracy in operation of pistols and shotguns.

According to ATF, “[a]necdotal evidence from the manufacturers of the affected ‘stabilizing braces’ indicates that the manufacturers have sold between 3 million and 7 million ‘stabilizing braces’ between the years 2013 to 2020 or over the course of eight years.”<sup>10</sup> However, the Congressional Research Service reported a much higher estimate of affected owners: “that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands, either purchased as accessories or already attached to firearms made at home or at the factory.”<sup>11</sup>

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<sup>6</sup> 18 U.S.C. § 921(a)(29).

<sup>7</sup> 27 C.F.R. § 479.11 (emphasis added).

<sup>8</sup> Pub. L. No. 90-618, 82 Stat. 1213.

<sup>9</sup> See e.g., [www.sb-tactical.com](http://www.sb-tactical.com) (last assessed July 6, 2021).

<sup>10</sup> 86 Fed. Reg. at 30845 and 30846.

<sup>11</sup> William J. Krouse, *Handguns, Stabilizing Braces, and Related Components*, Congressional Research Service, April 19, 2021, p. 2 (the “CRS Report”) (emphasis added), available at <https://crsreports.congress.gov/product/pdf/IF/IF11763> (last assessed July 6, 2021).

### A. ATF Treatment of Stabilizing Braces

In 2012, ATF determined that a pistol equipped with a stabilizing brace does not make it an SBR subject to NFA control.<sup>12</sup> In March 2014, ATF then determined that shouldering a pistol with a stabilizing brace does not change the classification of the pistol under federal law because “[u]sing such an accessory improperly would not change the classification of the weapon per Federal law.”<sup>13</sup>

Thereafter, ATF apparently became increasingly concerned with the use of stabilizing braces as shoulder stocks. Apparently, it believed that its regulation of 37mm flare guns provided legal support for subjecting stabilizing braces to the NFA based on mere use of a brace against the shoulder as a “redesign”, even where there were no accompanying physical changes made by the user. ATF also apparently believed the expansion of NFA control to stabilizing brace-equipped pistols was analogous to its application of the NFA to any other weapons (“AOWs”), such as nails guns, when used as weapons.

ATF was mistaken in its analysis because, among other things, the definition of “redesign”<sup>14</sup> and “remake”<sup>15</sup> involve manufacturing, modification of appearance or function, or other physical changes. Misuse of a stabilizing brace, without more, cannot meet these commonly accepted definitions. Use of a stabilizing brace does not cause some other physical change to a pistol to which it is attached. Nothing is added other than the brace and the pistol’s function remains the same. Regardless of whether fired with the brace attached to the forearm, fired from the cheek, or fired from the shoulder, it still functions as designed, and will shoot the same ammunition regardless of how held.

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<sup>12</sup> ATF Letter to Redacted Recipient, Nov. 26, 2012 (“FTB finds 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.”).

<sup>13</sup> ATF Letter to Sergeant Joe Bradley of the Greenwood Police Department, Mar. 5, 2014 (“firing a pistol from the shoulder would not cause the pistol to be reclassified as an SBR... we do not classify weapons based on how an individual uses a weapon.”) (emphasis in original).

<sup>14</sup> See [www.merriam-webster.com/dictionary/redesign](http://www.merriam-webster.com/dictionary/redesign), defining “redesign” as “to revise in appearance, function, or content”; see also 2015 ATF “OPEN LETTER ON THE REDESIGN OF ‘STABILIZING BRACES’” (“The GCA does not define the term “redesign” and therefore ATF applies the common meaning. ‘Redesign’ is defined as ‘to alter the appearance or function of.’”).

<sup>15</sup> NFA expressly provides that “the term ‘make’, and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.” 26 U.S.C. § 5845(i).

Nevertheless, ATF made an abrupt change in policy, issuing two private classification letters<sup>16</sup> and its “Open Letter on the Redesign of ‘Stabilizing Braces’” on January 16, 2015 (the “2015 Open Letter”) completely reversing the position taken in its 2014 Letter. In the 2015 Open Letter, ATF stated that the use of stabilizing braces, as designed, would not create a short-barreled rifle when attached to a firearm; and stabilizing braces are perfectly legal accessories for large pistols.<sup>17</sup> However, the 2015 Open Letter also advised that, because the stabilizing brace was not designed as a shoulder stock, “use” of the device as a shoulder stock would constitute a “redesign” of the firearm to which it was attached, resulting in the classification of the firearm as a short-barreled rifle subject to the NFA.

In a 2017 classification letter to SB Tactical, ATF acknowledged “that the *Open Letter* may have generated some confusion concerning the analytical framework by which those conclusions were reached”, and it advised that “incidental, sporadic, or situational ‘use’” of an arm-brace on firearms that do not have certain modifications” alone would not subject a stabilizing brace-equipped pistol to the NFA.<sup>18</sup>

Also relevant to the proposed rule, the 2017 ATF letter to SB Tactical provided:

If, however, the shooter/possessor takes affirmative steps to configure the device for use as a shoulder-stock—for example, configuring the brace so as to permanently affix it to the end of a buffer tube, (thereby creating a length that has no other purpose than to facilitate its use as a stock), removing the arm-strap, or otherwise undermining its ability to be used as a brace—and then in fact shoots the firearm from the shoulder using the accessory as a shoulder stock, that person has objectively “redesigned” the firearm for purposes of the NFA. This conclusion is not based upon the mere fact that the firearm was fired from the shoulder at some point.<sup>19</sup>

With the vagueness provided in public and private guidance, the twists and turns in ATF’s interpretations, and with various private ATF letter classifications posted online by recipients, it has been, and continues to be difficult to determine what ATF’s current position is on a given day.

ATF never before took the position that the NFA applies to pistols merely because of attachment or use of a stabilizing brace and, in or around August 2020, ATF reportedly

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<sup>16</sup> See ATF Letter to Eric Lemoine, Oct. 28, 2014 (stating pistol with stabilizing brace is subject to NFA when the brace is used as a shoulder stock); ATF Letter to Redacted Recipient, Nov. 10, 2014 (same).

<sup>17</sup> *Id.*

<sup>18</sup> ATF Letter to SB Tactical, Mar. 21, 2017.

<sup>19</sup> *Id.*

advised industry that it is not imposing any restrictions on stabilizing braces.<sup>20</sup> Just a few months later, on December 18, 2020, ATF published a notice in the Federal Register seeking to impose NFA controls on braces meeting certain “Objective Factors for Classifying Weapons with ‘Stabilizing Braces’” (the “2020 Notice”).<sup>21</sup>

ATF provided an extremely short 17-day time period for public comments to the 2020 Notice that began on the last day of Chanukah and ran over Christmas Eve and New Year’s Eve. This action violated Congressionally-mandated rulemaking requirements, threatening rights protected by the Second Amendment. SAF and others therefore filed a lawsuit in a federal court to require ATF to comply with applicable NFA and Administrative Procedures Act public comment requirements.<sup>22</sup>

After receiving letters signed by over 100 members of Congress that objected to the arbitrary and subjective nature of the 2020 Notice, and after receipt of over 70,000 public comments,<sup>23</sup> ATF withdrew the 2020 Notice.<sup>24</sup>

## **B. ATF Treatment under the Proposed Rule**

Under its proposed rule, ATF now seeks to amend the definition of “rifle” in definitional sections of the regulations implementing the GCA and the NFA at 27 C.F.R. sections 478.11 and 479.11, respectively, to expand NFA control to cover “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 a new proposed ATF Worksheet 4999.”<sup>25</sup>

Proposed ATF Worksheet 4999 will document ATF’s allocation of weighted values to various characteristics of a brace-equipped pistol submitted for classification. As proposed, this scoring scheme will apply to any pistol that weighs at least 4 pounds and is between 12 and 26 inches long. Its proposed point values range from 0 to 4 points based upon the degree of the indicator, explained by ATF as follows:

- 1 point: Minor Indicator (the weapon could be fired from the shoulder)

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<sup>20</sup> See e.g., “The ATF is Not Banning Pistol Braces: NSSF satisfied that braces are not being reviewed for restrictions” (Aug. 17, 2020), available at [www.range365.com/story/nssf-update/the-atf-is-not-banning-pistol-braces/](http://www.range365.com/story/nssf-update/the-atf-is-not-banning-pistol-braces/) (last assessed July 4, 2021).

<sup>21</sup> 85 Fed. Reg. 82516 (Dec. 18, 2020).

<sup>22</sup> See *SAF, et al. v. BATFE, et al.*, No. 21-cv-00116 (N.D. Tex).

<sup>23</sup> See <https://beta.regulations.gov/docket/ATF-2020-0001> (last assessed Jan. 14, 2021).

<sup>24</sup> See 85 Fed. Reg. 86948 (Dec. 31, 2020).

<sup>25</sup> 86 Fed. Reg. at 30851.

- 2 points: Moderate Indicator (the weapon may be designed and intended to be fired from the shoulder)
- 3 points: Strong Indicator (the weapon is likely designed and intended to be fired from the shoulder)
- 4 points: Decisive Indicator (the weapon is designed and intended to be fired from the shoulder)

Features are assigned points and organized under two sections. A firearm that accumulates 4 points or more in either section will be classified as an NFA SBR. A pistol that accumulates less than 4 points in Section II (Accessory Characteristics), and less than 4 points in Section III (Configuration of Weapon), will generally be determined not to be designed to be fired from the shoulder. However, ATF reserves the discretion to impose NFA control on any pistol not caught by the scoring scheme where “there is evidence that the manufacturer or maker expressly intended to design the weapon to be fired from the shoulder.”<sup>26</sup> In other words, as stated in the proposed ATF Worksheet 4999, the scheme would allow ATF to impose NFA control over pistols that do not exceed the stated threshold.<sup>27</sup>

Under the proposed rule, affected persons (i.e., persons who possess stabilizing brace-equipped pistols caught by ATF’s expanded NFA controls) would need to take one of the following actions before the effective date of a final rule:

- 1) Permanently remove or alter the stabilizing brace such that it cannot be reattached, converting the firearm back to its original pistol configuration;
- 2) Remove the short barrel and attach a 16-inch or longer barrel to the pistol;
- 3) Destroy the firearm;
- 4) Turn the firearm into a local ATF office; or
- 5) Complete and submit an Application to Make and Register a Firearm, ATF Form 1 and pay the \$200 tax.

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<sup>26</sup> *Id.* at 30829.

<sup>27</sup> *Id.* at 30830 (“The Bureau of Alcohol, Tobacco, Firearms and Explosives reserves the right to preclude classification as a pistol with a ‘stabilizing braces’ 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.”) and 30834 (“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.”).

Federal firearms licensees not having paid special (occupational) tax as a Class 2 manufacturer under the NFA must also take an action under one of options above. Manufacturers qualified under the NFA and licensed under the GCA must also take an action under options 1 to 4 above or complete and submit an ATF Form 2, Notice of Firearms Manufactured or Imported.

## **II. The Proposed Design Features are Vague and Overboard**

The proposed point scoring scheme uses a non-exhaustive list that relies on vaguely defined features and bias thresholds that would subject nearly every stabilizing brace-equipped firearm configuration to the NFA.

Under the proposed scheme, a pistol must not be too long or too short. It must not be too light or too heavy. A configuration can be penalized for having sights and for not having sights. And while ATF provided three examples in the proposed rule to illustrate its proposed scoring methodology, the examples instead illustrate how seemingly identical firearms can be subject to vastly different government controls. All this, and the deficiencies identified below, show how ATF's proposed point scoring scheme overcomplicates what is already an overly complicated matter, setting the stage for more confusion.

### **A. Unlimited ATF Discretion**

As explained above, the proposed rule would allow ATF to classify a stabilizing brace-equipped pistol as an NFA-regulated SBR regardless of its point score. This does not sufficiently limit ATF discretion.

ATF must stop interpreting the law one way for one person or company and differently for others. Stabilizing braces and pistols are simple items in common use. To the extent ATF knows all the design features it intends to control, it must not disclose some features and keep others secret, locked away in the desk draw of some unidentified government official until an enforcement action.

To the extent ATF does not yet know all the design features it may decide to consider in imposing NFA control, it must provide notice and follow the APA process when it knows the additional features it wants to control. It may not (as it appears to do in the proposed rule) attempt to sidestep the APA process to proliferate more private rules that leave persons to guess at what features beyond published agency rules can subject them to NFA penalties.

### **B. Bias Scoring Allocations**

ATF's proposed scoring scheme relies on vague and highly subjective indicators that will allow ATF to arbitrarily weight points in favor of NFA control. For example, the scheme assigns 1 point for features considered a "Minor Indicator", which merely requires that "the

weapon could be fired from the shoulder”. This scope is overbroad because almost any large frame pistol can be fired from the shoulder.

ATF’s proposed scoring methodology would also assign 1 point for many simple and common features, such as a +1 for “Minimized Rear Surface lacking features to discourage shouldering,” and allocate +1 to +3 for lengths of pull that well below the reported 13.5 inch industry standard for rifles.<sup>28</sup>

In addition, the scope of many factors listed on ATF Worksheet 4999 overlap, which would allow ATF to unfairly stack points for a single factor. For example, the proposed rule would assign 2 points to a pistol with an extended AR-type pistol buffer tube, a folding adaptor, and that uses spacers because these modifications increase the length of pull. At the same time, ATF will apparently score additional points for the applicable length of pull.

### **C. Comments on Specific Factors**

#### **1. Length of Pull and Adjustability**

Neither the term “length of pull” or the concept of length of pull are in the NFA. Nevertheless, ATF presents length of pull as a measurement of the distance between the center of the trigger and the center of the shoulder stock recoil pad or butt plate. ATF’s stated reasoning for inclusion of this factor is that “a shooter merely requires a device that reaches from the back of the firearm to the forearm.”<sup>29</sup>

In scoring length of pull, ATF will assign 1 to 4 points based on the farther a stabilizing brace can be positioned rearward, with assigned ranges of 10.5 to under 11.5 inches (+1); 11.5 but under 12.5 inches (+2); 12.5 but under 13.5 inches [+3]; and 13.5 inches or more [+4]. The proposed rule would also apply 2 points for stabilizing brace designs that are adjustable. ATF apparently bases these point ranges on the industry standard for stock sizes, but it does not consider how lengths of user forearms vary and ATF does not present any anthropometric data to justify the ranges penalized under its scoring scheme.

Brace straps can be secured to the mid to rear forearm. This is especially the case in use of fin-type braces, which are often positioned to the rearmost of a forearm to provide a larger circumference for support. It is also true in use by smaller persons, who need the brace situated higher up to wrap around the largest part of the forearm for a secure fit. This variance is acknowledged but not properly addressed by ATF in the proposed rule.<sup>30</sup>

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<sup>28</sup> See e.g., Dow, Todd, “Rifle Fit: Length of Pull”, Art of the Rifle, available at <https://artoftherifle.com/rifle-fit-length-of-pull/2012/02/rifle-fit-length-of-pull.html> (last visited July 6, 2021).

<sup>29</sup> 86 Fed. Reg. at 30833.

<sup>30</sup> *Id.* (“taller shooters require a longer length of pull and shorter shooters require a shorter length of pull.”).

Average forearm sizes range from between 10.98 inches and 15.55 inches,<sup>31</sup> indicating that assessing points for length of pull of 10.5 inches or more, or for adjustable brace designs with such length of pull, would capture and unfairly penalize braces properly sized for the purpose of one-handed shooting.

In addition to the above, and although not addressed in the proposed rule, ATF has in the past measured length of pull diagonally between the center of the trigger and the top of the shoulder stock in classifying a pistol equipped with a Maxim Defense cheek rest.<sup>32</sup> This practice is inconsistent with other ATF classifications<sup>33</sup> and would unfairly skew measurements higher. As such, ATF must provide notice of whether it will measure length of pull diagonally for any pistol configurations.

## 2. Weight and Length

As noted above, the proposed rule arbitrarily excludes pistols that weigh under 4 pounds and/or that are under 12 inches from the purview of pistols eligible for use with a stabilizing brace.

Using weight and length as determinative factors will create a subjective and overbroad control because the ability to handle any firearm varies among users. For example, on weight, a household may have a 6 foot 280 pound man who can hold and shoot a full size rifle in one hand like a pistol without any problem; whereas his 5 and a half foot 120 pound wife may not be able to shoot a large frame pistol with one hand. Similarly, it is reasonable to assume that some smaller and disabled persons may find that a Desert Eagle and other large caliber pistols under 12 inches in length much too difficult to shoot without a stabilizing brace.

ATF does not offer any studies or anthropometric data on users to justify its weight and length thresholds. Instead, the proposed rule states that ATF bases its proposed weight threshold on 1911-type and Glock 17 pistols and arbitrarily concludes: “4 pounds (weighed with unloaded magazine and accessories removed) are not considered weapons suitable for use with a ‘stabilizing brace’ accessory because they are more easily held and fired with one hand without the need for a ‘stabilizing brace.’”<sup>34</sup>

On length, ATF arbitrarily concludes: “[f]irearms with an overall length of less than 12

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<sup>31</sup> See Gordon, Claire C. et. al 2012 Anthropometric Survey of U.S. Army Personnel: Methods and Summary Statistics, Dec. 2014, p. 117 (reporting adult forearm sizes ranging between 10.98 and 15.55 inches), available at: [www.hsdl.org/?abstract&did=762624](http://www.hsdl.org/?abstract&did=762624)

<sup>32</sup> *United States v. Kelland Jamieson Wright*, No. 3:18-cr-00162 (ND Ohio) (2018), Dkt. 24 (at Exhibit 1, pictures 11 to 13).

<sup>33</sup> See e.g., ATF Letter to Shockwave, Oct. 31, 2017, p. 6. (ATF measuring length of pull parallel with the pistol buffer tube and barrel).

<sup>34</sup> 86 Fed. Reg. at 30831.

inches are considered too short to indicate any need for a ‘stabilizing brace.’”<sup>35</sup> ATF does not provide any basis for its determination that disabled persons do not need a brace for firearms under 12 inches. Nor can it because there is no clear dividing line between the needs of disabled and other individuals based on length of a pistol.

Any true determination of whether a stabilizing brace-equipped pistol is impractical to fire with one hand because of weight or length comes down to the physical characteristics of the individual user. ATF’s proposed arbitrary weight and length restrictions, to include those on length of pull, will therefore impose NFA control on stabilizing-brace pistols used by persons who need braces for support in one-handed shooting.

ATF’s proposed weight and length restrictions will also result in unequal treatment of female gun owners and owners with physical disabilities, who will be disproportionately impacted by ATF’s proposed scoring scheme because of their physical limitations.

### **3. Rear Surface Area**

The proposed rule lists rear surface area as a feature, but it does not provide any specific measure for rear surface area in inches or otherwise. Instead of simply providing an objective measure for rear surface area, ATF proposes vague evaluation criteria under four highly subjective categories (e.g., “clearly makes it difficult to use as a shouldering device”, “designed with rear surface area sufficient to shoulder the firearm”, “features material clearly designed to increase rear surface area to facilitate shoulder firing”).<sup>36</sup> It is unclear how reasonable persons would understand the differences between and consistently apply these vague and ambiguous categories.

### **4. Accessory Design**

The proposed scoring scheme would allocate +1 where a stabilizing brace design “[i]ncorporates shoulder stock design feature(s)” and allocate +2 for designs “[b]ased on a known shoulder stock design.”<sup>37</sup> These are vague factors that can result in control for features with functions that do not relate to use against the shoulder.

### **5. Stabilizing Support, Modification, and Configuration**

ATF lacks authority to subject stabilizing brace-equipped pistols to NFA control and SAF may challenge any ATF attempt to do so. With that said, if ATF is intent on expanding NFA controls, and to reduce the adverse impact on the public, ATF should limit any new controls to pistols equipped with stabilizing brace that do not incorporate an arm strap; or that incorporate an arm strap that is too short to wrap around the shooter’s arm or that is manufactured from elastic material that eliminates the strap as a stabilizing support. This

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<sup>35</sup> 86 Fed. Reg. at 30832-30833.

<sup>36</sup> 86 Fed. Reg. at 30832.

<sup>37</sup> 86 Fed. Reg. at 30830.

more limited control is consistent with “Alternative 2—Simple Criteria” of the proposed rule.

### **III. ATF Failure to Waive Tax**

Adding insult to injury, ATF also changed its proposed policy for payment of the NFA tax. Less than a year ago, in its December 2020 Notice, ATF proposed to waive the NFA tax and expedite application processing for affected gun owners:

ATF plans to expedite processing of these applications, and ATF has been informed that the Attorney General plans retroactively to exempt such firearms from the collection of NFA taxes if they were made or acquired, prior to the publication of this notice, in good faith.<sup>38</sup>

Unlike its 2020 Notice, ATF’s proposed rule does not include any provisions for an NFA tax waiver or expedited processing for affected gun owners. Its change now threatens to extract over \$100 million dollars from lawful firearm possessors, and the lack of expedited processing will further aggravate the burden on possessors of otherwise lawful firearms in common use.

ATF should not tax or otherwise penalize gun owners for ATF’s sudden policy reversal, especially a reversal so likely to be enjoined. ATF’s stated explanation in the proposed rule for not waiving the tax (i.e., fear that persons can register multiple firearms at once for free) is pure speculation and is premised on the highly illogical assumption that persons have a strong desire to register with ATF. Given the circumstances, all registrations of existing firearms caught by the rule should be free, at least until a court determines the constitutionality of ATF’s attempt to expand NFA control.

### **IV. Other Substantive Concerns**

Other substantive concerns with the proposed rule include the following:

- ATF does not provide any exemption for disabled and smaller-sized persons who have clear and legitimate needs for use of stabilizing braces.
- ATF does not clearly state whether those in possession of brace-equipped pistols are required to obtain ATF classifications or if they can rely on their own self-classifications or self-classifications by others.
- ATF does not clearly explain the differences in ATF treatment of stabilizing brace-equipped GCA-regulated shotguns and firearms with a smooth bore that use shotgun ammunition.

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<sup>38</sup> 85 Fed. Reg. at 82519.

## V. Unlawful Burdens on Second Amendment Rights

ATF's proposed changes will impose NFA application, fingerprinting, photographing, chief law enforcement certification, registration, taxes, and transfer restrictions on firearms owned by millions of citizens. The NFA registration requirement involves wait times of several months to half a year or more.<sup>39</sup> In addition, ATF's Preliminary Regulatory Analysis, which accompanies the proposed rule, acknowledges that ATF's policy change will put multiple manufacturers out of business and impose significant financial burdens on the firearms industry generally. These burdens will unlawfully infringe on the Second Amendment rights of millions of citizens to keep and bear arms in common use. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). No substantial public safety concern will be served by these burdens.

ATF claims 2 prospective benefits of the proposed rule:

- To prevent manufacturers and individuals from circumventing the requirements of the NFA.
- To enhance public safety by reducing the criminal use of such firearms, which are easily concealable from the public and first responders.

The first alleged benefit is circular in logic because ATF is creating the problem at issue—i.e., the only reason the activity in question would violate the NFA is because of ATF's policy change. The second alleged benefit is conclusory and presented without any data or analysis.

## VI. Procedural Concerns

### A. **ATF's Continuing Failure to Consider 70,000 Public Comments**

In its proposed rule, ATF states that it will not consider the over 70,000 public comments submitted in response to its 2020 Notice. However, the proposed rule expands upon the 2020 Notice. ATF should therefore reconsider its continuing refusal to consider and respond the comments. At a minimum, ATF must address significant comments submitted to the 2020 Notice.<sup>40</sup>

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<sup>39</sup> See *Transfer Tracking*, NFA TRACKER, available at <https://www.nfatracker.com/nfa-transfer-time-tracking/> (last assessed July 6, 2021).

<sup>40</sup> *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002) (“Comments and responses made during the promulgation of the interim rule address the same issues as were raised with respect to the final rule.”).

## B. **Conflicting Information on Affected Persons**

ATF's Regulatory Impact Statement, which accompanies the proposed rule, provides conflicting information on the number of affected persons. This is highly material information necessary to assessing the scope, impact, and costs of the proposed rule.

As noted above, ATF estimates stabilizing brace sales at "between 3 million and 7 million" for the last 7 years.<sup>41</sup> Based on that estimate, ATF's Regulatory Impact Statement represents the affected population at "1.4 million firearm owners who have purchased pistols with 'stabilizing braces' attached and those who intend to purchase them in the future."<sup>42</sup> Of note, ATF does not base its estimate of future sales on existing market conditions. Instead, it estimates future sales on the market impacted by its change in policy.

The estimated 3 to 7 million sales upon which ATF bases its estimate of affected persons is inconsistent with, and vastly lower than, the 10 to 40 million "in civilian hands" estimate reported by the Congressional Research Service in April 2021. Unlike the ATF estimate, the Congressional Research Service estimate does not include estimated future sales, which indicates the actual number of affected persons is even higher than the estimate reported by the Congressional Research Service.<sup>43</sup> Further unlike the ATF, the Congressional Research Service found that "[a]ltering the classification of firearms equipped with stabilizing braces would likely affect millions of owners."<sup>44</sup>

## VII. **Conclusion**

ATF's authority under the NFA is limited. It must focus on clear rules that conform to the law and that do not violate constitutional rights.<sup>45</sup> ATF must not, as it proposes, open the Pandora's box of unjustified burdens and legal infirmities presented by its proposed rule. Because of this, and based on the above, SAF urges ATF to reconsider its position.

Sincerely,

THE SECOND AMENDMENT FOUNDATION



Alan Gottlieb  
Executive Vice President

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<sup>41</sup> 86 Fed. Reg. 30826, 30845, and 30846 (June 10, 2021).

<sup>42</sup> ATF Regulatory Impact Analysis for Docket No. 2021R-08, p. 8.

<sup>43</sup> CRS Report at p. 2.

<sup>44</sup> *Id.*

<sup>45</sup> Nothing in this public comment should in any way be construed to imply that SAF agrees with legislative or agency restrictions that impinge on the right to bear arms preserved by the Second Amendment.