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ATTN: ATF 2020R-10.

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## **GUN OWNERS OF AMERICA COMMENTS TO ATF RE PISTOL BRACES**

On December 18, 2020, ATF published a “Notice” in the Federal Register, seeking public comment, during an absurdly-brief 14-day period, in response to the agency’s publishing purported “Objective Factors for Classifying Weapons with ‘Stabilizing Braces.’” Docket No. 2020R-10, 85 *Fed Reg.* 82516 (“Notice”).<sup>1</sup> This ATF “Notice” claims that it is not a “rulemaking” under the Administrative Procedures Act (“APA”), nor does it purport to comply with APA requirements for notice and comment. *See* 5 U.S.C. Section 553 *et seq.* Rather, ATF claims that its Notice is merely a “guidance document” issued pursuant to 28 C.F.R. Section 50.26 — yet that regulation requires neither publication in the Federal Register nor a comment period, as ATF has provided here.

In other words, the Notice is Kabuki theater, designed to clothe another lawless ATF action with an air of legitimacy, while in reality completely reversing prior agency policy as

pertains to popular pistol braces owned by millions of Americans, and undermining their reliance on prior ATF assurances that their firearms are lawful to own with pistol braces attached.

First, ATF claims that its Notice does “not have the force and effect of law,” yet effectively rescinds all prior ATF classification letters that have been issued approving of pistol stabilizing braces. Next, ATF claims that its Notice is “not meant to bind the public in any way,” yet suggests that the only way to lawfully possess a pistol with a stabilizing brace is to (1) submit it to ATF for classification, (2) register it under the NFA, (3) remove the brace, (4) extend the barrel, (5) surrender the firearm, or (6) destroy the firearm. Notice at 82520. Finally, ATF audaciously claims that its Notice does not alter the agency’s current understanding or classification of pistol stabilizing braces, but rather clears up a simple “*misunderstanding* by some that a pistol assembled with any item purported to be a stabilizing brace still would be considered a ‘pistol’ regardless of other characteristics.” Notice at 82519 (emphasis added).

*Au contraire.* There has been no “misunderstanding” about pistol stabilizing braces being permissible accessories without changing a firearm’s classification. On the contrary, ATF has *expressly stated as much*, opining in its very first pistol brace classification letter 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).

ATF’s Notice then, is a complete and total reversal of agency policy, and represents the adoption of an entirely new set of vague and ambiguous standards by which the classification of pistols equipped with stabilizing braces will now occur.

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<sup>1</sup> <https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27857.pdf>.

**1. ATF’s “Objective Factors” Consist of a 17-Part Balancing Test, Replete with Numerous Sliding Scales and Even Secret Criteria — Each Applied Subjectively and Considered “Holistically.”**

ATF’s “Notice” states that the agency “is publishing the objective factors it considers<sup>2</sup> when evaluating firearms with an attached stabilizing brace....” Notice at 82516. If only that were so. Indeed, only a few pages later, ATF backtracks on its claim, stating it is only publishing *some* of the “objective design feature ATF considers,” which “include, *but are not limited to*” nine listed considerations. Notice at 82518 (emphasis added). ATF again warns that this list is “not exhaustive,” that “other factors *may be* relevant,” and that “other factors *may become* relevant....” Notice at 82519 (emphasis added).

Then, after listing its nine criteria, ATF concedes that there are numerous other considerations “*in addition to* the nine objective design features.” Notice at 82519 (emphasis added). ATF reports that the agency “also considers the marketing of both [10] the item and [11] the firearm to which it is attached,” along with “[12] the manufacturer’s stated intent when submitting an item.”<sup>3</sup> *Id.* Next, ATF claims that it might look to “[13] the actual use by members of the firearms industry, firearm writers, and the general public” to determine “the design and intent” of an item. *Id.* Finally, ATF warns that it may at any time revisit a classification it has made: “[14] if FATD classified a firearm ... that classification would be subject to FATD’s review if the manufacturer sold the product” different than it was originally submitted. *Id.*

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<sup>2</sup> On the one hand, ATF says that these so-called “objective factors” are merely being “proposed,” but on the other hand reports that the factors are already *in use* by “Firearms Enforcement Officers” within FATD. *Cf.* Notice at 82519 with Notice at 82519.

<sup>3</sup> Presumably, ATF means “when submitting the item” for classification by FATD. If that is the case, industry submissions and ATF classifications are not made public, so the end user would have no idea as to “the manufacturer’s stated intent when submitting an item.”

Next, in addition to the agency's **nine** "objective design features" and its **five** additional intent/marketing/use considerations, ATF claims that it may also consider **three** more factors: "[15] overall configuration, [16] physical characteristics ... and [17] *any other information* that directly affects the classification."<sup>4</sup> Notice at 82517 (emphasis added).

Finally, in its *coup de grâce*, ATF forewarns that, "[u]pon issuance of final guidance, ATF will provide *additional information* to aid persons and companies in complying with Federal laws and regulations." Notice at 82516 (emphasis added). ATF has thus sought public comment on "information" that will not be released until the comment period is closed. In other words, ATF's Notice is like Obamacare — "[w]e have to pass the bill so that you can find out what is in it."<sup>5</sup>

Apparently in order to clear up any lingering confusion about what level of impact each of these 17 factors will have on FATD's ultimate classification, ATF reassures 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. Moreover, ATF warns that "an ATF classification pertains only to the particular sample submitted ... [e]ven though firearms may appear to have similar features," which "make[s] the general applicability of any particular classification exceedingly rare." Notice at 82517.

## **2. ATF's "Objective Design Features" Are Not Objective if Kept a Secret.**

As explained above, ATF purports to provide nine "objective design features ATF considers in determining whether a weapon with an attached 'stabilizing brace'" is a short-barreled rifle. Notice at 82518. But while providing a list of general types of features that many

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<sup>4</sup> It is hard to imagine a more circular standard for a FATD classification than being based on "any [] information that directly affects the classification."

if not all firearms possess, ATF does not provide any specifics. Thus, ATF's list is anything but "objective." When describing a "test," the word "objective" means "limited to choices of fixed alternatives." But since ATF has not actually provided any fixed alternatives, but rather free-floating concepts, the Notice provides no concrete rules or principles that can be followed.

For example, ATF states that it might consider "[t]he type and caliber of a firearm," but does not state what types or what calibers. Notice at 82518. ATF hints that calibers which are too "large" and "impractical to fire with one hand" might not cut it, but does not draw any lines. *Id.* Similarly, ATF states that it considers "[t]he weight and length of the firearm used," and that firearms which are "so long" or "so heavy" are not acceptable as pistols.<sup>6</sup> But ATF provides no fixed measurements which could provide objective standards. *Id.* Again, the public and the industry are left to speculate.

Next, ATF claims that it will consider the "length of pull" of a firearm, meaning "the distance from the trigger to the point at which a stock meets the shoulder." Notice at 82518. But ATF does not specify any "length of pull" that is presumptively acceptable. Indeed, that appears to be because ATF has no fixed standard. In past classification letters, ATF has claimed that "FTISB considers any firearm with a 'length of pull' over 13-1/2 inches to be an indicator that the firearm is designed to be fired from the shoulder." ATF classification letter 310768 dated June 25, 2019, p. 6. Yet only five months later, ATF walked back that statement, claiming that "[w]hile 13-1/2 inches is an extreme limit indicator, it does not serve as a demarcation line;

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<sup>5</sup> <https://www.youtube.com/watch?v=9uC4bXmcUvw>.

<sup>6</sup> This "too long" and "too heavy" non-standard is similar to ATF's recent attack on the importability of pistols that ATF may arbitrarily deem not "suitable for sporting purposes." See J. Crump, "Is ATF Going To Make Pistols, Based On Rifles, NFA Items Because of Weight?," Oct. 27, 2020, <https://www.ammoland.com/2020/10/atf-to-make-pistols-based-on-rifles-nfa-items/#axzz6hNyAvFLT>.

shoulder fired weapons may possess a ‘length of pull’ as little as 7 inches.” ATF classification letter 311601 dated November 27, 2019, p. 6 (emphasis original). It is no wonder that ATF has failed to provide any clear guidance, since the agency itself operates by no fixed standards.

Next, ATF claims that it considers the “objective design features” of a brace, such as “[t]he amount of rear contact surface area,” the “material used to make” it, and “any other feature of the brace” that makes it easy to fire from the shoulder. Notice at 82518. But again, ATF does not state what “amount” of surface area is permissible, or what “materials” are permissible or impermissible. Finally, ATF states that certain “peripheral accessories” may convert a pistol into a short-barreled rifle, such as a magazine “that accepts *so many* cartridges that it increases the overall weight of the firearm....” Notice at 82518 (emphasis added). Of course, ATF does not say how many is “so many.”

At bottom, ATF’s “objective factors” are in reality entirely subjective, providing no fixed standards but instead vague concepts like too “large,” too “impractical,” “so long,” “so heavy,” and “so many.” With such clear and “objective factors” as that, who could possibly object?<sup>7</sup>

Indeed, no reasonable person could possibly attempt to understand and apply ATF’s Notice to any particular firearm, or to weigh and balance ATF’s 17 “non determinative” factors “holistically,” in order to come to an “objective” decision about a particular firearm. Of course, any determination could change at any time, and for any reason, subject only to “FATD’s review,” based on “other information” and “other factors” that “may become relevant.”

Consider, for example, the following:

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<sup>7</sup> ATF includes in its list other “objective factors” such as “attachment method,” “aim point,” “secondary grip,” “sights and scopes” with certain “eye relief,” *etc.* Notice at 82518-82519. Like the examples provided above, none provides any clear guidance or fixed standards, but rather *maximum ambiguity*.

- a. If a person purchased from a manufacturer a firearm which ATF had classified as a pistol, but then added an optic to that pistol, might ATF then deem the pistol to have been converted to a rifle? *See* Notice at 82518.
- b. What if a person swaps out the handguard or rail on an AR-15 pistol for a shorter or longer, lighter or heavier rail? Would the classification change to go from a 10 inch rail to a 12 inch rail?
- c. What if a shooter forgets which particular rail slot on which his quick-detach optic was placed — replacing it in a different position might change the eye relief — would that suddenly make a pistol into a rifle?
- d. What if a pistol equipped with a brace is sold by its manufacturer with a 20-round magazine, but a gun owner uses a 30-round magazine at the range? Does that make the pistol “so long” or “so heavy” or to hold “so many” rounds that it becomes a rifle?
- e. How about merely switching from shooting 55-grain ammo to 62-grain ammo, thereby increasing the weight of a 30-round magazine by 0.5 ounces — could that throw an otherwise legal pistol over ATF’s secret weight limit to being considered a short-barreled rifle? Could that additional weight be offset by using a polymer magazine instead of a steel magazine?
- f. Would using a sling affect the classification of a pistol? Does where the sling is mounted, or how many points of attachments it has affect the classification?
- g. A pistol with a flash hider may be acceptable, but what if a lawfully owned suppressor is added, thereby temporarily increasing the weight and length?

The above list provides just a few examples, but the list is endless. Modern firearms, such as AR-15 pistols, are infinitely customizable and can be tailored to a specific shooter, with dozens of types of parts and accessories, for each of which there are dozens if not hundreds of variations from numerous manufacturers.

The possible permutations of how a single AR-15 pistol could be configured would quickly run into the quadrillions. Yet according to ATF, each permutation might receive a different classification, based on a unique balancing of 17 vague factors (and perhaps more) that only ATF is qualified to provide.

### 3. ATF's Notice Is "Designed and Intended to Convert" Law Abiding Americans into Felons.

Disingenuously, ATF claims that its "Notice" is "intended only *to provide clarity* to the public," and "*to aid* persons and companies in complying with Federal laws and regulations." Notice at 82516, 82520 (emphasis added). ATF claims that its Notice "allows industry members to plan, develop, and distribute products in compliance with the law." Notice at 82517. ATF repeats these absurd claims no fewer than six times. Notice at 82516-82520.

In reality, ATF's Notice is — intentionally — clear as mud. Indeed, the only thing that is clear is that ATF has deliberately crafted its Notice to be this way. Under the ambiguity created by ATF's Notice, no law-abiding person would ever risk owning a pistol equipped with a brace, without first sending his entire, fully outfitted firearm to FATD for classification.<sup>8</sup> But even then, any determination received would apply only to firearms from the same manufacturer that are sold in identical configuration. Should a gun owner ever desire to add even a *single* new or different accessory, magazine, or even change ammunition used in the firearm, he would risk changing his pistol's classification. Therefore, he would need to resubmit his firearm for a new classification when literally *any one of dozens of variables* was altered. And, at the end of the day, any classification obtained from FATD would not be worth the paper it was printed on,

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<sup>8</sup> Moreover, ATF at SHOT Show in January of 2020 reported triumphantly that its FATD classification process was taking only a little over 12 months. Thus, a year would appear to be *the minimum amount of time* during which a law-abiding gun owner would be deprived of his Second Amendment rights while he waits for ATF's high priests to sanctify his firearm. But, of course, there are numerous submission samples that ATF has held in limbo *for years* — and, not coincidentally, many of these involve pistol braces. No doubt, ATF's years-long backlog will only continue to grow exponentially from the agency's open invitation to receive submissions from countless law-abiding gun owners eager to know if their *particular* firearm will be considered by ATF to be a pistol or a rifle.



since ATF could simply revisit and reclassify his firearm at any time and for any reason because of new “factors” or “information.”

Someone once said that “The essence of tyranny is not iron law. It is capricious law.” That quotation captures the essence of ATF’s pistol brace Notice. Operating in a Gestapo-esque fashion, the agency has assumed unto itself complete and total authority to declare any pistol with a brace to be an illegal short-barreled rifle, a decision to be made at the total and unbridled discretion of faceless, nameless bureaucrats within ATF.

Fortunately, although tyrannical governments operate in such fashion, this is not the way the American legal system works. Neither the National Firearms Act nor the Gun Control Act provide ATF the authority to adopt a “we’ll know it when we see it” standard for short-barreled rifles, where law-abiding gun owners will not be able to find out if their firearms are considered illegal until ATF agents kick down the front door.

On the contrary, criminal laws must be clear, so that law-abiding people can understand what is lawful as opposed to what is unlawful. As the Supreme Court has explained:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters ... for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute ‘abut[s] upon [Second] Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the

forbidden areas were clearly marked.’ [Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)].<sup>9</sup>

ATF’s Notice falls far short of this standard, and violates each of the important principles that the requirement for clear criminal laws is designed to protect.

Regardless of whether ATF is correct that certain pistol braces may convert pistols into short-barreled rifles, the Notice ATF has provided explaining how the agency makes such determinations is beyond incomprehensible in its vagueness and arbitrariness. It is gibberish. It is nonsense. But such behavior is what Americans have come to expect from this rogue agency that treats the Second Amendment with contempt and disdain.

For the reasons above, ATF should withdraw its Notice and its so-called “Objective Factors for Classifying Weapons with ‘Stabilizing Braces.’”

In Liberty,

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<sup>9</sup> See also *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018) (“The prohibition of vagueness in criminal statutes,’... is an ‘essential’ of due process, required by both ‘ordinary notions of fair play and the settled rules of law.’ ... In that sense, the doctrine is a corollary of the separation of powers — requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.”).