

**WRN** WOODHOUSE RODEN  
NETHERCOTT, LLC  
— Attorneys At Law

**James O. Bardwell**  
1912 Capitol Avenue, Suite 500  
P.O. Box 1888  
Cheyenne, WY 82001  
T: 307-432-9399  
F: 307-432-7522  
Email: [james@wrnlawfirm.com](mailto:james@wrnlawfirm.com)  
Paralegal: [nichole@wrnlawfirm.com](mailto:nichole@wrnlawfirm.com)  
Website: [www.wrnlawfirm.com](http://www.wrnlawfirm.com)

September 1, 2021

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

RE: ATF 2021R-08

Greetings:

I am writing on behalf of the National Association for Gun Rights (NAGR), a not for profit organization of 4.5 million supporters of the right to keep and bear arms. NAGR opposes the changes in the Notice of Proposed Rule Making 2021R-08 (NPRM) outlined below.

The proposed rulemaking purports to explain how ATF will decide whether or not some pistols equipped with braces are in fact meant to be fired from the shoulder, and if the gun otherwise fits within the length parameters to be a short barreled rifle (overall length under 26 inches, or a barrel under 16 inches) is also a short barreled rifle.

**History.** Regulation of short barreled rifles was included in the National Firearms Act as part of a proposal to also regulate handguns under the Act. Specifically, “handguns” that were just made from long guns by altering the shoulder stock and/or barrel length were to be included as short barreled rifles. Regulation of short barreled rifles under the Act also helped deter persons from seeking to evade State level regulation of handguns (essentially New York’s Sullivan Law) by altering rifles to be more concealable. In the end the proposal from President Roosevelt’s administration to regulate ordinary handguns in the same way as was proposed to apply to machineguns lacked sufficient political support, but regulating short barreled rifles under the Act was left in the bill that became the law. The 1934 version of the NFA included within its coverage any rifle with a barrel under 18 inches in length.

Even so, the regulation of short barreled rifles was amended several times, as its inclusion of any rifle with a barrel length under 18” included a large number of inoffensive single shot .22 caliber rimfire guns meant for children, and also included a large quantity of other rifles commercially manufactured before the NFA was enacted. The applicable barrel length for .22 caliber rifles was lowered to 16” almost immediately, and eventually the NFA was amended again in 1960, (Public Law 86-478) such that the 16 inch barrel length exception was applied to all rifles. When the NFA was rewritten in 1968 to allow ATF to except NFA firearms from the purview of the Act because they were unlikely to be used as a weapon, virtually all of the excepted guns are short barreled rifles, either pistols with a detachable shoulder stock, or rifles with a barrel under 16 inches in length as originally manufactured before 1934.

The point of this history is that as compared to the main stated reason for enacting the NFA- regulation of fully automatic guns - short barreled rifles have lawful uses and have been made for sporting and other lawful purposes since firearms were first developed. Even today, handguns are by far the criminal’s choice of firearm, and firearms made from a rifle, or rifles with a short barrel are very infrequently used. ATF’s concern with braces that actually make the handgun larger and less concealable seems far removed from crime prevention and much more concerned with making life more difficult for people who enjoy firearms, especially firearms that have a visual resemblance to machineguns.

**Current Law and Regulation.** What, legally speaking, is a rifle, or a pistol? Under the National Firearms Act and Gun Control Act, a rifle is a firearm with a rifled bore, which can only fire one shot with each trigger pull, which is designed and intended to be fired from the shoulder, and which has a barrel at least 16 inches in length and an overall length of at least 26 inches.

Under Federal law, a short barreled rifle is, generally speaking, a firearm with a rifled bore, meant to be fired from the shoulder, which can only fire one shot with each trigger pull, that has a barrel less than 16” or an overall length of less than 26” or a firearm made from a rifle that has a barrel less than 16” or an overall length less than 26.” So a pistol with a shoulder stock is a short barreled rifle. A pistol sized gun made from a rifle (by cutting the stock or barrel or both, generally speaking) is also a short barreled rifle.

On the other hand what constitutes a pistol is not defined in the NFA or GCA. Instead it is defined by ATF regulation. The definition dates from before the enactment of any federal gun control law. It was part of implementing the Federal excise tax on firearms, which applied a different tax rate to long guns as compared to pistols and revolvers. A pistol is “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).” This definition by regulation is really what ATF should be modifying, if anything is to be modified. Pistol shooting is rarely done one handed, whether for fun or for self-defense. All credible instructors recommend shooting pistols with two hands, if circumstances allow for it. Only the very smallest handguns should ever be shot one handed, no matter the circumstances of the shooter. Pistol target shooting may have been done one handed in the 1920’s when the definition currently in use was first created, but in the last hundred years what is considered good shooting form with a handgun has evolved. The reference to one handed shooting in the pistol definition should be removed; pistols may be shot one handed, but most should be shot two handed. Much of the NPRM hangs on physical limits on one handed shooting, and is no basis for further regulation.

However, under current law, a rifle is, by definition, meant to be fired from the shoulder. A pistol on the other hand, is meant to be held in only one hand by a short stock that extends at an angle to and below the bore. A pistol can have any barrel length or overall length, but is supposed to be concealable. A rifle, to avoid NFA regulation, must be at least 26” in length and have a barrel of at least 16” in length.

Commercially made pistols that utilize the action or mechanism more typically seen on a rifle have existed for many years. Remington made a single shot bolt action pistol, the XP100, for a number of years in various chamberings that were typically seen in rifles. Companies making copies of the WWII era rifle called the M-1 carbine in the 1960’s and 1970’s, Universal, Plainfield Machine and Iver Johnson, also made pistol versions of the M-1 carbine often referred to as “Enforcer” models. While perhaps outside the mainstream of pistol design and of what most shooters think of as a handgun, handguns based on rifle design are not new.

In this era of interest in semi-automatic rifles that resemble machine guns cosmetically, there is an interest in semi-automatic pistols that more faithfully resemble the short barreled versions of their respective machine guns. Some are machine guns that are really only offered with a barrel under 16”, like the H&K MP5. Some are machine guns, like the numerous variants of the U.S. M16, which come in a variety of barrel lengths. I think this interest is also driven by the fact that since 1986 Federal law now prohibits ordinary persons from obtaining any machine gun, excepting some of those both made and registered before the 1986 ban. This ban has created a scarcity of actual machineguns which can be owned by ordinary persons, resulting in greatly increased price for them. A machinegun, like a short barreled rifle, was and is also still subject to the transfer and registration requirements of the NFA. Machineguns are out of reach financially for ordinary persons. Short barreled rifles, while not subject to a total ban on new production for ordinary persons the way machineguns are, still require significant expense and delay for a lawful purchase. Pistols that cosmetically bear a resemblance to those much harder to obtain firearms have developed a niche market, although a very active one.

A pistol version of an MP5 or an M16, offered in semi-automatic firing mode only, resembles its more regulated counterpart, while also being available on the market for over the counter purchase. However they also result in a cumbersome and heavy pistol.

In 2012 a resourceful inventor brought to market a device to attach to a pistol based on the AR-15 action type. The gadget allowed a shooter to clamp the pistol to his forearm with a plastic cuff and strap. The cuff and strap were also attached to the buffer tube (aka the receiver extension) of the AR-15 type action. This provided a second point of contact for shooting the AR-15 style pistol with one hand (the other point of contact being the shooters hand around the pistol grip). The idea was that this was an accessory for persons who, because of disability or just lack of physical strength, could not hold the pistol securely with one hand alone. ATF agreed that a pistol with such an accessory was not a rifle.

However the brace could also be used, if the shooter elected to do so, as a crude sort of shoulder stock. As first approved by ATF, the result of the brace was an imperfect shoulder stock with a very short length of pull. However the idea of the brace was built upon to create braces for guns that did not have a rear buffer tube. Braces that provided for a hinge that folded the brace to one side, similar to a side folding shoulder stock and for braces that could have their length changed, similar to a collapsing shoulder stock were also brought to market in the years after 2012. The shape and design of the plastic cuff also evolved to become more like a shoulder stock in shape and position.

In 2015 ATF issued an open letter which claimed that persons who shouldered a pistol brace equipped pistol to shoot it were “redesigning” their brace equipped pistol into a rifle, and that such a use magically made a brace equipped pistol that otherwise met the length parameters of a short barreled rifle, into a short barreled rifle. Based on existing law such an opinion lacked credibility. Changing how the shooter held the gun, with no physical change to the firearm, did not redesign it at all, if the words design or redesign are to have any meaning at all.

In 2017 ATF substantially backed off on the 2015 letter, and agreed that the mere fact of how someone uses a brace equipped pistol does not alone constitute a design or redesign of that pistol. At the same time ATF started coming up with ideas for what was a legitimate aid for the disabled, versus what was really meant to be fired from the shoulder, and thus could constitute a rifle, and perhaps also a short barreled rifle.

On March 22, 2021, an adult Islamic terrorist from Syria, admitted to the U.S. as a child refugee, randomly murdered ten persons in a Boulder, Colorado grocery store supposedly using a Ruger AR-556 pistol. This pistol is an AR-15 style semi-auto firearm action with a barrel length of either 9.5 inches or 10.5 inches, depending on the exact model the buyer selects. It comes with

a pistol brace made for Ruger by a commercial supplier of pistol braces to a number of firearms manufacturers. <https://www.nytimes.com/2021/03/24/us/ruger-ar-556-boulder-shooting.html> It is hard to see how the pistol brace or the killer's ability or inability to use it to shoulder the pistol makes any difference in the crime he committed, but the announcement from the present administration mentions this crime as a reason to clarify when a pistol brace equipped pistol will be considered a short barreled rifle, subject to the NFA.

Due to the modularity of the AR-15 design (which is one of the reasons for its popularity), the killer could have swapped the receiver extension assembly on the Ruger pistol with one meant for an AR-15 rifle using ordinary hand tools with no alteration to any part by filing, sanding or machining, and attached an ordinary shoulder stock had he so desired. The receiver extension, whether for a pistol or a rifle, merely threads into the rear of the AR-15 receiver. If he had no problem murdering random people working or grocery shopping simply for being non-Muslim residents of the nation that gave him shelter when he needed it as a child, what would stop him from swapping the rear parts of the Ruger pistol with those making it into a short barreled rifle?

**The Proposed Rule.** First, the rule arbitrarily decides that if a pistol weighs under 64 ounces then disabled persons need no brace to shoot it, and so any brace for such a light weight pistol is automatically only meant for firing from the shoulder, and therefore likely makes the pistol into a short barreled rifle. Further, if the pistol weighs more than 120 ounces with the brace then no disabled person could ever shoot it one handed even with a brace, and so a brace on such a pistol is a short barreled rifle. Further the pistol must have an overall length of between 12 and 26 inches. Pistols under 12 inches do not need a brace, according to ATF, and pistols over 26 inches are too unwieldy to be shot from only one hand regardless of the presence or absence of a brace, according to ATF.

None of these proposals have any foundation in fact, at least none the NPRM mentions. There should be science or evidence behind the contentions about the weight of a firearm that a disabled person can handle or not handle. It is basic that a person's ability or disability runs on a scale, from very physically fit adults with great ability to handle weighty firearms, to weaker persons who can handle some firearms but not all, to persons with physical injury or malformation and finally perhaps, to children or adults with little to no physical strength. ATF is in no position to judge how much or how little assistance a particular person requires to successfully aim and fire a particular firearm. Nor is NAGR. NAGR has members with a great deal of physical ability all the way to persons with extremely limited physical ability. All should be able to use whatever assistive device they find helps them. The NPRM is really "arbitrary" in the most lay use of the term, in deciding that no one can shoot pistols over 26" in length one handed, no one needs assistance in shooting a pistol under 12 inches in length with one hand, or that pistols must be between 64 and 120 ounces in weight or they are either impossible to shoot

one handed or such that no one needs help to shoot them one handed. In the most basic sense of the term, ATF is just making these statistics up. If there is any evidence based rationale, it is absent from the NPRM.

There is no question that shoulder stocks, or braces, in themselves, are unregulated under Federal law (except perhaps as to their exportation). Regardless of the result of this NPRM, anyone can make metal and plastic accessories for firearms and market them as they see fit. ATF can only regulate them once they are attached to a firearm, by regulating the firearm with the accessory attached. So everything currently on the market and perhaps more, can continue to be marketed regardless of what happens with the NPRM. The problem is that the NPRM gives a prospective buyer or owner of a firearm no way to tell whether or not a pistol equipped with a device is lawful or not. Much of the criteria is either subjective or requires expertise that no one can be expected to have.

The rule then lists a number of criteria and assigns a point value to each. If a pistol equipped with a brace scores 4 or more points on either of two different tests, ATF will contend the brace is in fact designed to be fired from the shoulder, and thus is a shoulder stock. The list of criteria is varied and subjective. One is whether or not the brace is based on a shoulder stock design. A person looking at a gun and trying to decide if it is a short barreled rifle or not will have no familiarity with every shoulder stock design ever made. While this may help ATF “get” someone, it doesn’t help a gun owner evaluate whether a gun is considered by ATF to be a short barreled rifle or not. In the *U.S. v. Staples* case the U.S. Supreme Court said that in the context of a prosecution for possessing an unregistered machinegun, the government must prove the defendant knew the gun had the characteristics that made it subject to the NFA. In that case, the government had to prove the defendant knew the gun was capable of firing more than one shot with a single trigger pull, it was not enough for the government to prove the gun could fire more than one shot with a single trigger pull. How can ATF show someone knew a brace equipped pistol was really a short barreled rifle, if the criteria are things such as the design history of the brace?

While the criteria worksheet proposed in the NPRM may assist ATF and licensed manufacturers in evaluating a product the manufacturer proposes to market, much of the criteria are too subjective for a gun owner to decide if a firearm he is considering buying is legal or not. The buyer knows it has a brace. But how can he know if it was installed by the manufacturer or not? How can he know if it was derived from a shoulder stock design?

Another criteria is whether or not there is “minimal” or “material added to the” rear surface area on the brace. These are subjective evaluations and do not assist anyone in evaluating a shoulder stock design. It relies on ATF’s opinion about whether or not the brace has excess material at the rear, versus what would be needed to make a brace. Other criteria appear to be

based on prejudice. A brace that moves to collapse or fold for compactness will be considered to be more likely to be a shoulder stock, even though nothing about that feature makes it easier or more useful for shouldering (or at least ATF does not point to anything there). Instead ATF contends that these are features of a stock, even though a collapsed stock is no more meant to be used in that position than a collapsed brace is meant to be used in the collapsed position. Either is just for compactness in storage or transport.

Certain features will automatically make a brace into a stock under the scoring system. A “length of pull” over 13.5 inches or more is automatically a shoulder stock. In this case length of pull is the distance between the end of the brace in its fully extended position, if it moves, and the trigger, not necessarily measured on a line parallel to the bore.

A second pistol grip indicates the gun is no longer meant to be fired with only one hand, and thus a brace on it is considered a shoulder stock. A “brace” that is (presumably homemade) made from a shoulder stock is also a shoulder stock regardless of the amount of modification. A pistol with a (presumably user installed) sight or scope that is not usable unless the brace is shouldered makes that brace a shoulder stock, automatically. A “cuff” style brace that came with a strap but no longer has a strap will be considered a shoulder stock. A brace that has been otherwise user modified to be a shoulder stock (no additional clarification on this is offered in the rule) is a shoulder stock. How is the secondary user supposed to know if it came with a part, like a cuff or a loop for a cuff, which is now absent?

Finally, under the NPRM if someone has a pistol equipped with features and a brace that makes ATF consider it a short barreled rifle the owner needs to either register it under the NFA, or remove the brace and get rid of it. Alternatively if feasible the person can replace the barrel that is under 16 inches with one that it is over 16 inches, or permanently attach an extension that also gets it to the required length to not be considered short barreled. This proposal plainly violates prior ATF guidance on registering existing, unregistered NFA firearms. ATF has always (correctly) contended that making an NFA firearm before permission is given under 26 U.S.C. § 5822 is a crime. Possession of such a firearm is a crime. Such a firearm is contraband. The only party able to register such an NFA firearm and then lawfully possess it is a law enforcement entity under the procedure found in 27 C.F.R. § 479.104.

It is true that ATF has ignored this in the past when it has unilaterally changed its mind, such as with permitting registration of existing Striker12, Streetsweeper and USAS12 shotguns. Past instances of ATF ignoring the provisions of the NFA to soften the blow of its unilateral reversals do not excuse future instances of the same extra-legal conduct. Here ATF proposes to soften the impact of its arbitrary reclassification of most brace equipped pistols as short barreled rifles by telling owners they can apply to register the short barreled rifle via 26 U.S.C. § 5822,

even though that section bars making the NFA firearm before applying for, and receiving approval from ATF for the making of the firearm.

ATF could declare an amnesty and permit existing unregistered NFA firearms to be registered, under the uncodified provisions of the 1968 revisions of the NFA. Section 207(d) of Public Law 90-618, authorizes an amnesty under certain circumstances. NAGR is well aware that ATF believes that an amnesty would not further the goals of the NFA and therefore has never had one (beyond the one called for at the time the law was enacted in 1968) and does not wish to declare one. However the part of the NPRM that calls for the registration of existing NFA firearms is plainly outside of the provisions of the NFA. If ATF insists on considering brace equipped pistols to be short barreled rifles it must either live with the political fallout of making literally millions of firearms owners felons overnight, or permit them to register their unregistered NFA firearms via the only lawful mechanism, an amnesty. Or of course, ATF could also choose not to make brace equipped pistols short barreled rifles.

NAGR demands that ATF drop the idea of enacting the changes outlined in the NPRM, and instead leave the regulations ATF proposes to amend as they now exist.

Sincerely,

*/S/ James O. Bardwell*  
JAMES O. BARDWELL