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December 5, 2013

Ms. Brenda Raffath Friend
Mailstop 6N-602
Office of Regulatory Affairs, Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives
U.S. Department of Justice
99 New York Avenue NE.
Washington, DC 20226
*ATTN: ATF 41P*

Re: Comment on Proposed Federal Rule Amendment for Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Legal Entity With Respect to the Making or Transferring of a Firearm – **Agency Docket No. ATF 41P; AG Order No. 3398-2013**

Dear Ms. Friend,

Thank you for the opportunity to comment on the Proposed Federal Rule Amendment regarding background checks for responsible persons of a corporation, trust or legal entity with respect to the making or transferring of certain firearms.

The undersigned author of these comments is an attorney licensed to practice in Ohio, Kentucky and Washington, is admitted to practice before the United States Supreme Court, and is registered to practice before the U.S. Patent and Trademark Office. In my law practice, I provide legal representation to clients who are manufacturers, distributors and instructors in the firearms industry. I hold a federal firearms license (FFL, Type 7) and am a Special Occupational Taxpayer (SOT, Class 2), which I use in the course of consulting with and providing legal representation to clients. As such, I have particular knowledge, experience and interest in the promulgation of proper ATF regulations.

I am joined in these comments by four other practicing attorneys, each of whom has a professional connection to the firearms industry. Each of us is also knowledgeable of federal

firearms laws and regulations, as well as laws affecting ownership, transfer, and use of personal property by corporate entities.

On September 9, 2013, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or "the Agency") published a Notice of Proposed Rulemaking ("NPR") in the Federal Register at Volume 78, pages 55014 through 55029, to institute this rulemaking proceeding with respect to firearms regulated under the National Firearms Act ("NFA"), 26 U.S.C. §§ 5801-5872. ATF's current regulations under the NFA are codified at 27 C.F.R., Part 479. Reference to the NPR will be made by citation to page number(s) in Vol. 78 of the Federal Register (i.e., "78 Fed. Reg. at __").

The proposed rule amendments make some important and useful clarifications with respect to the handling of transfers of firearms from decedents' estates under 27 C.F.R. § 479.90. Likewise, the proposal to incorporate the information currently required on ATF Form 5330.20 (Certification of Compliance with 18 U.S.C. 922(g)(5)(B)) into the requirements of 27 C.F.R. §§ 479.63 and 479.85 and into the corresponding transfer and making forms, ATF Forms 1, 4 and 5 is beneficial, reduces unnecessary paperwork, and increases efficiency. The undersigned heartily endorse these specific proposed amendments.

The remainder of the ATF's proposals, however, takes several backward steps, which increase costs to both ATF and entity applicants, provide no discernable benefit to public safety, and, in the case of firearm noise suppressors ("silencers"), arbitrarily impedes access to important hearing protection equipment. These comments will specifically address:

(1) ways in which the proposed regulations fail to actually address the statute's objectives;

(2) how the proposed regulations exceed the ATF's statutory authority and might be vulnerable to attack;

(3) how the proposed regulations increase expense to and burden on both the ATF and applicant's to make/transfer an NFA firearm without also furthering the Agency's statutory regulatory objectives; and

(4) alternate ways in which the ATF might, without such failings, more effectively and more efficiently fulfill its statutory mission.

As set forth in detail below, these proposed rule amendments would impose unnecessary, inefficient, inappropriate, ineffective and unworkable new burdens on the ATF and entity applicants to make or transfer a registered firearm.

## SUMMARY OF ISSUES, ARGUMENTS AND RECOMMENDATIONS

**Issue 1:** The requirement of a local CLEO certification is not statutory in origin and exceeds the ATF's statutory authority, making the proposed regulations vulnerable to attack.

**Argument:** Congress set a policy by statute that the ATF is expected to carry out, established non-discretionary criteria upon which the ATF is to approve an application to make or transfer a firearm, and specified the grounds on which an application may be denied. The ATF cannot delegate to itself (or to a third party) discretionary authority by issuing regulations, particularly if Congress has enacted statutory criteria contrary to what the Agency proposes to do.

**Recommendation:** The regulatory requirement of a local CLEO certification should be eliminated rather than expanded.

**Issue 2:** The regulatory requirement of a local CLEO certification imposes a discretionary third party approval that exceeds the statutory authority.

**Argument:** Although the statute does not contemplate denial of an application by an individual to make or transfer a firearm to be discretionary, the regulations adopted to carry out the process have given absolute and unchecked discretion to local CLEOs. The CLEO certification requirement does not stem from any statutory authority or legitimate statutory objective. Even if this discriminatory effect was an unintended consequence when the regulations were written, the effect is now well known and undeniable. The proposal to expand, rather than eliminate, the CLEO certification greatly increases the opportunity and likelihood of arbitrary or discriminatory impediments to the implementation of what is a nondiscretionary statutory scheme.

**Recommendation:** By eliminating the CLEO certification requirement, the statutory process can be administered objectively and effectively.

**Issue 3:** The proposal fails to address many easily anticipated circumstances.

**Argument:** The composition of persons having an ownership, equitable or beneficial interest in the property of an entity may change without necessarily affecting what individuals are "responsible persons" under the proposed definition. Making legal evaluation of entity documents formed under the laws of many different States will be burdensome and risky for the Agency. ATF's proposal does not address the foreseeable situation in which an individual is given temporary legal authority to possess or use an entity-owned firearm or where a legal entity revokes the possessory authority of a designated responsible person. There is no provision for notification to a responsible person whose status has been revoked.

**Recommendation:** Narrow the proposed definition of "responsible person" and use a process for corporate delegation similar to that used for licensees who manufacture or sell NFA firearms.

**Issue 4:** The proposal fails to consider regulatory alternatives that would be more cost effective, serve legitimate statutory objectives, and avoid legal vulnerabilities.

**Argument:** ATF repeatedly published an abstract in the Unified Regulatory Agenda proposing to "require that a copy of all applications to make or transfer a firearm be forwarded to the chief law enforcement officer (CLEO) of the locality in which the maker or transferee is located" and "eliminate the requirement for a certification signed by the CLEO." Because the ATF appears to have considered an alternative for several years, that alternative warrants evaluation and ATF must provide at least some reasoned explanation for the change in course.

**Recommendation:** Eliminating the CLEO certification and instead adopting a process of providing notification to the local CLEO when a Form 1, 4, or 5 is submitted would more effectively and efficiently serve legitimate interests for complying with the statutory requirements of §§ 5812 and 5822. By identifying a responsible person for an entity applicant, defined similarly to that used for licensees who manufacture or sell NFA firearms, a background check can be done to confirm that the entity's responsible individual is not otherwise prohibited or disqualified from possessing an NFA firearm under federal State or local law.

**Issue 5:** The proposed rules do not address how Form 1, 4, and 5 entity applications pending at the time such a rule amendment is implemented would be affected.

**Argument:** There is a current backlog of tens of thousands of applications that were submitted in compliance with existing rules. It has been estimated that Form 1, 4, or 5 applications submitted today may not be completed for fifteen months.

**Recommendation:** ATF should expressly state the date on which any new or different requirements will go into effect and clarify that the new regulations will not apply to applications submitted or approved before that effective date.

## DISCUSSION

Firearms subject to regulation under the NFA (machine guns, short barreled rifles, short barreled shotguns, silencers and "any other weapon") are commonly referred to as "Title II firearms" or "NFA firearms." "Title II" refers to the 18 U.S.C., Chapter 44, and is distinguished from Title I, the Gun Control Act of 1968, which separately regulates the sale of firearms other than destructive devices ("Title I firearms"). Unless otherwise indicated, references herein to a "firearm" are intended to mean a "Title II firearm" or "NFA firearm."

As reflected in ATF's *Firearms Commerce in the US, Annual Statistical Update*[1], there has been a surge in popularity of Title II firearms in recent years, especially for silencers, which offer hearing protection and facilitate training/instruction of new shooters. It is well known and undisputed that there has been a concurrent surge in the number of applications to acquire NFA firearms via a corporation, limited liability company, trust, or other legal entity.[2] The ATF acknowledges it is aware that officials in many jurisdictions refuse to sign the CLEO certificate required for individual applicants/transferees. 78 Fed. Reg. at 55017. While there may be differences in opinion regarding the reasoning behind the CLEOs' refusals, there is no question that avoiding the CLEO certification obstacle has been a significant motivation for individual applicants/transferees to opt for forming a legal entity, particularly a trust, to acquire NFA firearms.

Although no genuine problem or harmful results stemming from this use of legal entities has been identified in the NPR, the ATF proposes to extend the CLEO certificate requirement to the broadly defined "responsible persons" of a legal entity. The misguided nature of this

[1] Published reports for 2011, 2013, and 2013 are attached hereto as Exhibit A.
[2] "ATF has researched the issue and has determined that the number of Forms 1, 4, and 5 involving legal entities that are not Federal firearms licensees increased from approximately 840 in 2000 to 12,600 in 2009 and to 40,700 in 2012." 78 Fed. Reg. at 55016.

proposal becomes apparent when considered in the context of the statutory requirements and objectives from which the existing and proposed regulatory systems stem.

**Statutory Requirements and Objectives**

Title 26 U.S.C. §§ 5812 and 5822[3] specify that the Secretary [now Director] may prescribe by regulations the manner in which the applicant/transferee is to be identified and specifies that, for an individual, the identification include his fingerprints and photograph. In addition, the statute specifies that applications shall be denied if the making, transfer, receipt or possession of the firearm would place the maker or transferee in violation of law.

ATF approval of an application to make or transfer a firearm is not discretionary under the statute, which sets out specific requirements and the specific basis for denial. In § 5812, Congress specified that "[a] firearm shall not be transferred unless . . .," followed by six specific criteria: (1) the transferor filed an application form, (2) the transfer tax is paid, (3) the transferee is identified "in such manner as the Secretary may by regulations prescribe" and that, "if such person is an individual, the identification must include his fingerprints and his photograph;" (4)

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[3] **26 USC § 5812 - Transfers**

(a) Application - A firearm shall not be transferred unless

(1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary;

(2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form;

(3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph;

(4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe;

(5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and

(6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession - The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

**26 USC § 5822 - Making**

No person shall make a firearm unless he has

(a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary;

(b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form;

(c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe;

(d) identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and

(e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

the transferor is identified; (5) the firearm is identified; and (6) the form bears an indication of approval. Section 5812 further states the specific basis for denial of an application to transfer, i.e., "if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."

Likewise, 26 U.S.C. § 5822 specifies that "[N]o person shall make a firearm unless he has . . .," followed by five specific criteria: (1) filed an application form, (2) paid the making tax, (3) identified the firearms to be made; (4) identified himself "in such manner as the Secretary may by regulations prescribe" and that, "if such person is an individual, the identification must include his fingerprints and his photograph;" and (5) the form shows that it has been approved. Section 5822 further states the specific basis for denial of an application to make a firearm, i.e., "if the making or possession of the firearm would place the person making the firearm in violation of law."

Accordingly, the statutory requirements support certain *legitimate* legislative objectives. These legitimate objectives include (1) that the applicant/transferee is properly identified and (2) that the making, transfer, receipt or possession of the firearm would not violation a federal, State or local law. By identifying the applicant/transferee, a background check can be done to confirm that the entity or individual is not otherwise prohibited or disqualified from possessing a firearm under federal law, such as because of a prior felony conviction, or due to State or local laws that may be more restrictive than federal law. Any other objective, such as arbitrarily or discriminatorily impeding or prohibiting ownership or transfer of a firearm, which imposes a discretionary hurdle is *illegitimate*.

Regulations can serve legitimate purposes of ensuring compliance with federal laws, but cannot impose procedural burdens or discretionary approvals that curtail or prohibit firearm transactions, or that promote *de facto* discrimination for arbitrary, politically motivated, or any other illegitimate reasons. A proposed regulation may be invalid if it exceeds the legitimate objectives of the statute it is intended to implement.

**The CLEO Certification Requirement is Not Statutory in Origin**

As noted above, ATF approval of an application to make or transfer a firearm is not discretionary under the statute. Likewise, neither section of the statute provides for the

*delegation* of discretionary approval. The current and proposed CLEO certification requirement is regulatory, not statutory, in origin. Nothing in the statute suggests that discretionary approval of the local CLEO is a required or appropriate condition for approval of an application to make or transfer a firearm. Nowhere in either section does the statute provide authority for (nor permit) the affirmative discretionary approval of a third party to be a requirement, or the lack thereof to be an appropriate basis for denial, of the application to make or transfer an NFA firearm.

The ATF explains in the Notice that, originally, 27 CFR §§ 479.63 and 479.85 were written to assist ATF in the statutory requirements of confirming (1) the identity of the applicant/transferee, (2) that the applicant/transferee had no criminal record that would bar possession, and (3) that possession would not violate state or local law. The Agency states:

> When the law enforcement certificate requirement was implemented in 1934, local law enforcement officials were generally better situated than federal officials to determine whether the transfer, making, receipt, or possession of the firearm would place the applicant or transferee in violation of state or local law. There were not at that time any readily accessible national automated databases, such as the National Crime Information Center (NCIC), that could facilitate instantaneous comprehensive nationwide criminal background checks. Although federal officials would consult available criminal history and criminal identification records, the assessment of whether an applicant or transferee would use the firearm for other than lawful purposes often was based on information in the possession of local police. The CLEO certificate requirement thus was intended in part to ensure that an individual's authority to make, receive, or possess an NFA firearm was consistent with state and local law, and that the background of the individual was assessed by those in the best position to evaluate it.

(78 Fed. Reg. at 55017).

In the NPR, the ATF expressly acknowledges that it no longer relies on CLEO certificates and "independently verifies whether receipt or possession of a NFA firearm would place the applicant or transferee in violation of state or local law" and "whether a particular applicant or transferee has a record that would warrant denying the application." *See* 78 Fed. Reg. at 55017. Thus, these functions also are neither effectively nor efficiently served by requiring certification from the CLEO. The ATF nevertheless asserts:

> Although access to these databases provides ATF with a fuller picture of any individual than was possible in 1934, the available information is not comprehensive in all cases. For a variety of reasons, it is still the case that local law enforcement ***may*** have access to more complete records.

*Id.* (emphasis added). No factual basis or explanation for this assertion is cited. No example of the "variety of reasons" is given. Nowhere is there an acknowledgement that, without knowledge of *any* information indicating that the person is either legally disqualified or that a State or local law would be violated, a local CLEO has unchecked discretion to refuse to make the certification or even simply to ignore the applicant/transferee's request. Myriad other comments filed in response to the proposed rule amendments document that this is a widespread problem and underlying cause of the exponential surge in use of a legal entity over individual applicant/transferee status. Many other comments have explained and presented examples of CLEOs who refuse to sign the certification, not because the applicant/transferee has a criminal record or because the possession would violate state or local law, but because the certification is discretionary.

Although the statute does not contemplate denial of an application by an individual to make or transfer a firearm to be discretionary, the regulations adopted to carry out the process have given absolute and unchecked discretion to CLEOs. Even if this discriminatory effect was an unintended consequence when the regulations were written, the effect is now well known and undeniable. The National Firearms Act Trade and Collectors Association (NFATCA) submitted a petition for rulemaking, dated December 3, 2009. The NFATCA petition requested amendments to §§ 479.63 and 479.85, as well as to corresponding ATF Forms 1 and 4. Central to the petition was the elimination of the CLEO certification requirement. Until recently, ATF had indicated that eliminating the CLEO certification requirement was part of the proposal it would present. The ATF repeatedly published an abstract in the Unified Regulatory Agenda stating:

> The proposed regulations would (1) add a definition for the term "responsible person"; (2) require each responsible person of a corporation, trust or legal entity to complete a specified form, and to submit photographs and fingerprints; (3) ***require that a copy*** of all applications to make or transfer a firearm ***be forwarded to the chief law enforcement officer (CLEO)*** of the locality in which the maker or transferee is located; and (4) ***eliminate the requirement for a certification signed by the CLEO***. (emphasis added)

As recently as October 2012, ATF published that description (RIN: 1140-AA43) and indicated that it contemplated publishing a NPR in July 2013. As the abstract indicates, consistent with the NFATCA's 2009 petition, ATF contemplated that its proposed rule would "eliminate the requirement for a certification signed by the CLEO" and "require that a copy of all applications to make or transfer a firearm be forwarded to the chief law enforcement officer (CLEO) of the locality in which the maker or transferee is located." While ATF is permitted to change course before publishing a proposed rule, certainly where it considered an alternative, internally and in discussion with NFATCA, for several years, that alternative warrants analysis and the Agency must provide at least some reasoned explanation for the change in course.

In existing form, §§ 479.63 and 479.85 require, for an individual applicant, that the local CLEO certify he or she "is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that possession of the firearm by the [maker/transferee] would be in violation of State or local law or that the [maker/transferee] will use the firearm for other than lawful purposes." The ATF notes (78 Fed. Reg. at 55018) that the current ATF Forms 1 and 4 do not even include in the CLEO certification the language that he or she "is satisfied that the fingerprints and photograph accompanying the application are those of the applicant." This language is likewise absent in the current ATF Form 5. Presumably, the forms have never included this language. Thus, ATF has not relied on or found certification of these facts important or necessary.

**The Proposal to Extend the CLEO Certification Requirement is Misguided and Flawed**

No actual harm stemming from the current lack of CLEO certification for an entity applicant/transferee has been identified. In its NPR, the ATF failed to identify a single example where a prohibited person gained actual possession of a NFA firearm by virtue of his relationship to a legal entity, let alone where a person gained possession of a NFA firearm due to his relationship to a legal entity and then used that firearm in the commission of any crime. Instead, ATF described three situations, none of which on their face illustrate the problem that ATF speculates may exist.

In fact, those examples may serve to illustrate that there are even more safeguards under current law than ATF considered. Without access to the details of the three situations, however, one must view with suspicion the carefully-phrased descriptions and the questions left unanswered. It is entirely likely that existing prohibitions and safeguards applied (or would have applied) in each of the three situations, but without details allowing scrutiny of ATF's characterizations, the "examples" cited should be given no weight. Likewise, other "examples" recited by ATF in its proposal are suspect for reasons set out in comments submitted separately on behalf of David M. Goldman (Comment ID: ATF-2013-0001-1899).

It serves no legitimate interest to address this perceived shortcoming, acknowledged to be rare and lacking any significant impact, with such a burdensome, inefficient, and known to be discriminatory regulation when a simple, effective, and neutral alternative is available. The proposal to extend the CLEO certification requirement to virtually all persons in a legal entity is the equivalent of swatting a hypothetical gnat with a very real sledge hammer. The action is not appropriate for the perceived danger and collateral damage is certain.

Part of the misguidance in the Agency's proposal might be attributable to a fundamental misunderstanding of ATF's mission under the NFA. According to ATF's Website, the NFA's "underlying purpose was to curtail, if not prohibit, transactions in NFA firearms." http://www.atf.gov/content/firearms/firearms-industry/national-firearms-act. It describes the $200 tax imposed by the NFA as having been designed "to discourage or eliminate transactions in these firearms." *Id.* But Congress has never "prohibited" NFA firearms or "eliminated" the ability to make or transfer them, provided the tax is paid and registration procedures are followed. It would seem whatever doubt ATF may once have had on the subject should have been answered by the bipartisan *Report of the Subcommittee on the Constitution of the Committee on the Judiciary*[4] and with the enactment of the Firearms Owners' Protection Act, Pub. L. 99-308, 100 Stat. 449 (1986).

ATF approval of a Form 1, 4 or 5 does not make the otherwise illegal possession by or delivery to a disqualified person legal. The prohibitions of 18 U.S.C. § 922(d), (g) and (n) and prescribed punishments remain in effect, as well as any state or local restrictions on possession

[4] *Report of the Subcommittee on the Constitution of the Committee on the Judiciary,* United States Senate, 97th Congress, Second Session (February 1982), copy attached as Exhibit B.

of NFA firearms. ATF approval of a Form 1, 4, or 5 does not give a disqualified person access to a firearm without them breaking several other federal, State and local laws in the process. Because a Form 4473 is completed and NICS check done on the individual who takes possession on behalf of the entity, for a disqualified person to obtain access to a firearm through the current process would require cooperation of at least one other person, who would be violating several other laws in the process,.

The ATF specifically asks for comments regarding whether it is feasible to ask CLEOs to certify that they are satisfied that the photographs and fingerprints match those of the responsible person. 78 Fed. Reg. at 55019. It acknowledged, for example, that some responsible persons may bring their fingerprint cards to the CLEO office already stamped, and some legal entities may have the paperwork, fingerprint cards, and photographs for each of their responsible persons couriered to the CLEO office. ATF asks whether, in such instances, CLEOs will have enough information to certify that they are satisfied that the photographs and fingerprints match those of the responsible persons, or whether changes are needed to this proposal. The simple answer is "no." Interestingly, 27 CFR § 479.64 requires that "[t]he application to make a firearm, Form 1 (Firearms), *must be forwarded directly,* in duplicate, *by the maker of the firearm to the Director* in accordance with the instructions on the form" (emphasis added). Additionally, 27 CFR § 479.84 specifies that the Form 4 application "shall be filed by the *transferor* . . ." (emphasis added). These regulations make it rather impossible for the CLEO to certify exactly what was placed in the envelope by an applicant/transferor (much less by the transferee). In practice, the CLEO is unlikely to have personally fingerprinted the applicant and relies on the signature on the fingerprint card (FBI Form FD-258) of the official who actually took the fingerprints. At most, the CLEO may make a visual comparison of the photograph with the person. This assumes that he or she examines the card and photographs or even personally meets with the applicant/ transferee at all.

This identification verification function is neither effectively nor efficiently served by requiring such a certification from a local CLEO. The same verification could be performed as effectively—and far more efficiently—by any witness competent to testify under oath, by the signature on the fingerprint card of the person who took the prints, or by simply making it an express part of the attestation made under penalty of perjury by the applicant/transferee himself.

The latter option would be most appropriate, since it is that person who furnishes and submits the completed fingerprint cards and photographs to ATF with the application who should be subjected to penalty for falsification.

Nowhere in either section does the statute require certification that the local CLEO "has no information indicating . . . that the maker will use the firearm for other than lawful purposes." Such vague "information," with no defined standards, no requirement for identifying such "information," no opportunity for review, and no due process is a type of prior restraint and runs afoul of federal court decisions making evident an emerging distaste for unrestricted discretion in the federal agencies charged with administering laws. *Cf. Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229 (9th Cir. 2001); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001); *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001); and *Marshall v. Horn Seed Co., Inc.*, 647 F.2d 96, 104 (10th Cir. 1981) (removing from a federal agency "the unbridled discretion the Constitution condemns"); *see also Brown v. Texas*, 443 U.S. 47 (1979) ("an individual's reasonable expectation of privacy is not subject to arbitrary invasion solely at the unfettered discretion of officers in the field"); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) ("The line between a discretionary and a ministerial act is not always easy to mark"); *Saia v. New York*, 334 U.S. 558 (1948); and *City of Las Cruces v. Betancourt*, 105 N.M. 655, 659 (N.M. Ct. Appl. 1987) ("Unrestricted discretion . . . leads to the evil we seek to avoid."). But the ATF's proposal to eliminate this phrase from the CLEO certification statement does not cure the requirement's illegitimate objective.

The ATF acknowledges (78 Fed. Reg. at 55017) that there has already been litigation challenging CLEO certification requirement, citing *Lamont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002) and *Westfall v. Miller*, 77 F.3d 868 (5th Cir. 1996). The current proposal to extend the extra-statutory requirement of CLEO certification to entities would likely spark considerably more litigation. The ATF asserts that "courts have upheld the CLEO certification requirement," without citing to any examples. 78 Fed. Reg. at 55017. Notably, the *Lomont* and *Westfall* cases do not confirm the validity of arbitrary and unfettered discretion of a local CLEO to refuse approval or to simply ignore an otherwise qualified application.

In *Lomont*, the D.C. Circuit held that the CLEO certification requirement did not violate the Administrative Procedure Act on its face, but "express[ed] no views on the merits of a

complaint, brought by a proper plaintiff, claiming that the certification regulations were arbitrary and capricious as applied to him." Lomont, 285 F.3d at 18. The court noted:

> We have not decided whether, in a particular application, the regulations would be arbitrary and capricious — for instance, when every qualified local and state official has decided not to issue certifications for anyone within their jurisdiction, or when unlawful conditions are attached to the issuance of a certification. The complaint alleged only that the regulations were invalid on their face . . ..

*Id.* (citation and reference omitted). The court observed that one of the plaintiffs may have had a valid basis to challenge the regulation as applied, but that only a facial attack had been made. *Id.* at fn. 11.

In *Westfall*, the Fifth Circuit found lack of standing, also because the plaintiff had not exhausted all possible CLEOs eligible to make the certification, without addressing the merits of his Constitutional claim. In another case, *Steele v. National Firearms Act Branch*, 755 F.2d 1410 (11th Circuit 1985), the court again found lack of standing, remanding the case to determine whether a federal firearms licensee alleging injury to his business has standing to challenge the CLEO certification requirement without an allegation he has a buyer who met all the statutory qualifications to be a transferee and that *all* eligible to make the certification had refused. All of these cases are pre-*Heller*[5] and did not address the merits of a Constitutional claim.

The reason that federal agencies exist, as a matter of constitutional law, is that Congress is delegating power to them. But there are limits on both Congress and the agency's delegation authority. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Congress sets a policy that the agency is expected to further, establishes standards and practices for that agency, and tells the agency what it may and may not prohibit. An agency cannot delegate to itself (or to a third party) authority to regulate by passing new regulations, particularly if Congress has enacted statutes that go against what the agency wants to do. In one notable case, the Food and Drug Administration (FDA) tried to regulate tobacco products as "drugs" and cigarettes as a "device" within the meaning of the statute that created the FDA, the Food, Drug, and Cosmetic Act (FDCA). The Supreme Court refused to allow this:

[5] *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

> The FDCA's misbranding and device classification provisions therefore make evident that were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them. In fact, based on these provisions, the FDA itself has previously taken the position that if tobacco products were within its jurisdiction, "they would have to be removed from the market because it would be impossible to prove they were safe for their intended use . . .." Congress, however, has foreclosed the removal of tobacco products from the market . . .. More importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. When Congress enacted these statutes, the adverse health consequences of tobacco use were well known . . .. ***Nonetheless, Congress stopped well short of ordering a ban.*** Instead, it has generally regulated the labeling and advertisement of tobacco products . . .. Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting commerce and the national economy . . . reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. ***A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.***

*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137–39 (2000) (citations omitted and emphasis added). As it turns out, Congress would later give the FDA explicit power to regulate tobacco products in the Family Smoking Prevention and Tobacco Control Act of 2009, enacted with President Obama's signature.

In determining the power of agencies to regulate an area, courts will look at an agency's authorizing statute. If the two conflict, courts will always apply Congress's laws over the agency's rules. When an agency makes a rule implementing a law, the agency is expected to have a defined system of rules in place for agency employees to rely on that is consistent with what Congress would have wanted. If the standards are undefined or applied differently to people in the same kind of situation, or if the standards the agency uses lead to results Congress would not have intended, courts may declare the rule invalid.

While courts give federal agencies a substantial amount of latitude in what rules they make and what evidence they rely on in making those rules, there are limits to how far courts will allow agencies to go without a solid reason for their decisions. *Motor Vehicle Manufacturers Association of the United States Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). This standard is known in administrative law as a "hard look" review.

Section 706(2)(A) of the Administrative Procedures Act[6] allows courts to review agency rules and actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A court giving a rule a "hard look" will ask if the agency based its decision on the relevant factors that Congress told it to consider by law, and if the agency did not, why it did not. And if the agency considered those relevant factors, the court will also ask if the agency made some error in judgment or if the logic behind its rule was flawed. This is especially important in cases where, as here, an agency is proposing to amend an important rule.

Likewise, an agency may not impose a provision requiring the consent of a third party as a condition for a process Congress made nondiscretionary by statute, particularly when the process involves the exercise of a constitutionally protected right. Just as with the requirement of parental or spousal consent for an abortion was found to violate constitutional protections, so here, the ATF does not have the constitutional authority to delegate a third party an absolute, and possibly arbitrary, veto over the nondiscretionary approval of an application to make or transfer a firearm in the absence of a statutorily-authorized basis for denying the application. *See Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

As hundreds of examples already submitted as comments in this docket make clear, the consequence of retaining CLEO certifications for individuals is that individuals will continue to turn to legal entities as a way to exercise their rights to make, acquire, and possess firearms that both Congress and the respective State legislature have determined are appropriate for private ownership. The result of *extending* the CLEO certification requirement to apply to each of the broadly defined "responsible persons" associated with legal entities closes that alternative and perfects the ability of one obstinate officer to set his own policy in disregard of Congress and his

[6] **5 USC § 706 - Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

State legislature. A *de facto* ban of NFA firearms is the expected, foreseeable – and untenable – result.

ATF asserts it is aware "that officials in a number of jurisdictions refuse to sign the certificate because of concern about potential liability for an individual's intentional or accidental misuse." 78 Fed. Reg. at 55017. No specific examples are given, nor is there any evidence that "concern about potential liability" is the reason—or even *a* reason—for CLEO refusal. There may be many motivations for a CLEO to refuse or to simply ignore a request for certification. Some CLEOs are elected, making them susceptible to political motivations to arbitrarily refuse the certification or to sign/refuse based on favoritism. Other CLEOs, such as city chiefs of police, are appointed or hired by a counsel who can order them not to sign any NFA applications.

Although needlessly involving CLEOs in the process already imposes burdens upon them, ATF asserts that its proposal creates no unfunded mandate, presumably because ATF maintains the certification is "voluntary" and CLEOs have discretion to not act at all. Some comments suggest that ATF should adopt a regulation that – if the CLEO certification is retained and/or expanded – would require local CLEOs to sign forms unless there was a valid reason to deny the application of a particular person. Affirmatively requiring CLEOs to act, whether by federal statute or regulation, is not an option for curing the defect created by the regulatory CLEO certification requirement. Such a federal requirement would clearly violate the anti-commandeering principle articulated in *Printz v. United States,* 521 U.S. 898 (1997).

But avoiding *Printz* by claiming CLEOs have discretion to determine the level of resources to devote to requests for certification or to ignore them altogether only solves one Constitutional problem by creating another. To the extent ATF relies on any such rationale, it only underscores that the Agency is attempting to delegate a discretionary power to a third party that would be found to be an impermissible discretionary condition under the statute if exercised by ATF directly. It further interferes with the ability of States to make state-wide policy regarding NFA firearms by empowering local officials to act in defiance of state law. And ATF, by regulation, effectively denies a right and process that Congress confirmed by statute.

**Other Flaws in the Proposal**

In its proposal, ATF recognizes (78 Fed. Reg. at 55020) that the composition of the responsible persons associated with an entity may change, and is "considering" a requirement that new responsible persons submit a Form 5320.23 within 30 days of the change. ATF expressly asked for comments on this option and recommendations for other approaches.

Review of a new Form 5320.23, amending the list of "responsible persons" for an entity, would entail nearly as much time and resources on the part of the ATF as the Agency's initial review of the original Form 1, 4, or 5, even though it would be done at a later time and without collecting a fee or tax. The NPR ignores this significant cost on both the entity and the agency. There is no statutory authority for collecting any additional tax or fee for examination of a Form 5320.23 when a "responsible person" is added separate from an initial Form 1, 4, or 5 application. The statute (26 U.S.C. §§ 5811(a) and 5821(a)) provides only for "transfer" and "making" taxes, and the addition of a responsible person to a legal entity could not be considered a "transfer."

Presumably, though not adequately addressed by the proposed regulatory amendments, the composition of persons having an ownership, equitable or beneficial interest in the property of a trust (any interest other than a possessory interest) may change without necessarily affecting what individuals are "responsible persons" under the proposed definition. This distinction becomes even more complicated in other forms of legal entity, where officers or directors, for example, may have the authority or duty to use or dispose of the entity's property without having any ownership interest at all. However, unless the corporate resolutions, operating agreement of the limited liability company, or terms of the trust specifically address which individuals have a possessory interest or duty in the entity, an individual may easily (and unknowingly) run afoul of the NFA and violate the law. In each case, the ATF would be placed in the position of evaluating the propriety of corporate documentation under the laws of the various states.

As proposed, the definition of a "responsible person" in § 479.11 would be essentially any individual who has the power or authority "to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of," the entity. Importantly, the definition specifies "a firearm," not "the firearm." Presumably, because 27 C.F.R. Part 479 relates only to NFA (Title II) firearms, the definition would not include a person who has access

only to Title I firearms also owned by the entity. Also presumably, ATF would interpret its rule broadly such that it would mean access to any NFA firearms owned by the entity, not just the firearm that is the subject of a particular Form 1, 4, or 5 application. It is not unusual for the terms of a trust instrument, corporate bylaws, or company ownership agreement to segregate or distinguish the powers and authority of different individuals with respect to different property owned by the entity. The proposed language of the definition of "responsible person" would preempt, or at least greatly confuse and complicate, the legal force and interpretation of the terms of various instruments. The ATF specifically requested "comments on the clarity of the proposed rule and how it may be made easier to understand." 78 Fed. Reg. at 55025. Although the rule, to the extent proposed may seem to be clear on its face, there are several gaps that render it flawed and unworkable. The following are several examples.

ATF's proposal does not address the foreseeable situation in which a legal entity revokes the possessory authority of a designated responsible person. Again, because ownership and possession by the entity would not have changed, the revocation of one person's status as a responsible person could not be considered a "transfer" under § 5812 of the statute. Likewise, there is no definition of who (corporate officer, member, partner, grantor, settler, etc.) on behalf of the entity has legal authority to make such a revocation or how notice of such a change would be submitted, reviewed or recorded. A legal determination (of legal authority to revoke) would have to be made by ATF in each case at a cost not anticipated by the proposal. Again, charging a fee for processing such a change is not statutorily authorized.

There is no provision for notification to a responsible person whose status has been revoked. Depending on the type of legal entity, the person whose possessory interest or authority is terminated by the revocation may (or may not) continue to have an ownership or beneficial interest in the property.

The requirement being "considered" to address changes in an entity's designated responsible persons, though not part of the present proposal, does not contemplate several other foreseeable, if not likely, scenarios. For example, what if a change in responsible persons lasts for less than 30 days? Would a Form 5320.23 have to be filed (after the fact) for a person who temporarily had, but no longer has, authority to possess an entity's firearm? If a new responsible person is designated and a Form 5320.23 filed within 30 days thereafter (with NFA Branch

review times running from a minimum of three months to the current estimate of 15 months), what would the legal status of that person's possession of a firearm be in the interim?

The proposed rule amendments also do not address how a Form 1, 4, or 5 application will be treated if one of multiple designated responsible persons is found to be unqualified (whether by being a prohibited person or because of a state or local law). It is unclear whether the entity would be given an opportunity to amend its supporting entity instrument and/or application. Likewise, if there is a change in responsible persons that includes an unqualified person, what would become of the status of the previously approved Form 1, 4 or 5?

Accordingly, the proposed definition of "responsible person" is unnecessarily over-broad, making the proposed rule unworkable in practical application and will place the ATF in the untenable position of interpreting legal documents according to laws of the various States.

The proposed rules do not address how Form 1, 4, and 5 entity applications pending at the time such a rule amendment is implemented would be affected. There is a current backlog of tens of thousands of applications that were submitted in compliance with existing rules. It has been estimated that Form 1, 4, or 5 applications submitted today will not be completed for fifteen months. Presumably, though not expressly stated, the proposed rules would affect only those applications filed after the date the rules go into effect. The proposed rules, expanding rather than eliminating the CLEO certification requirement, would greatly increase the amount of time required to examine each entity application. The examination time would increase not only due to the addition of full FBI background checks to be performed, but also because the legal structure of each entity would have to be reviewed to determine which named individuals qualified as a "responsible person" under the proposed definition. Additionally, proposed Form 5320.23 changes to an entity's list of responsible persons would be a new administrative burden not previously carried by the NFA Examiner corps.

These easily anticipated, but unanswered, questions and problems render the proposed process – which expands, rather than eliminates, the CLEO certification requirement – unworkably flawed.

**The Proposal to Expand the CLEO Certification Is Unjustifiably Burdensome**

The ATF specifically requested comments on the costs or benefits of the proposed rule and on the appropriate methodology and data for calculating those costs and benefits. 78 Fed. Reg. at 55025. Along with its proposed regulatory amendments, ATF is submitting a request to revise currently OMB-approved ATF Forms 1, 4, and 5, and to obtain OMB authorization for a new ATF Form 5320.23 (the text of which has yet to be disclosed) in accordance with 5 C.F.R. § 1320.11. ATF specifically requested public comments on all aspects of these proposed collections of information, including to:

> Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
> evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
> enhance the quality, utility, and clarity of the information to be collected; and
> minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

78 Fed. Reg. at 55024. For the reasons set forth in more detail above, the proposed collections of information does not further, but rather frustrates, the statutory objectives of the Paperwork Reduction Act and should not be approved by OMB.

The collection of certain information, in particular the CLEO certification, is not necessary for the proper performance of the statutory functions of the ATF to fulfill legitimate statutory objectives. Because the ATF "independently verifies whether receipt or possession of a NFA firearm would place the applicant or transferee in violation of state or local law," the proposed CLEO certification is both unnecessary and will have no practical utility. Likewise, the proposed expansion (rather than elimination) of the CLEO certification will do nothing to enhance the quality or utility of the information collected.

The ATF has estimated the cost *increase* per entity to be $293.93. 78 Fed. Reg, at 55024. This cost, for which no benefit has been identified, is to collect a $200 tax levied on the making or transfer on an item typically costing in the range of $250 to $2,000 (silencer, short barreled

rifle or short barreled shotgun). Since May 19, 1986, the effective date of the Hughes Amendment[7], the number of transferable machine guns is now finite (and shrinking), so transactions relating to these firearms, whose prices have been artificially inflated by thousands of dollars, constitute a very small percentage of NFA transfers made each year.

The Agency's estimate of the burden of the proposed collection of information is inaccurate, as it applies both to the applicant and the Agency. These burdens cannot be evaluated solely on the basis of time and expenses. The interjection of unfettered discretion, even if delegated to a third party, to disapprove or simply refuse to act on the form cannot be countenanced. Moreover, the validity of the methodology and assumptions used by the ATF in estimating the costs and burdens are faulty. As explained in the comments submitted by others (*see, e.g.*, David M. Goldman, Comment ID: ATF-2013-0001-1899), the assumption of an average of two responsible persons per application by a legal entity is not based on a reliable or verifiable method.

The ATF estimated its annual cost for processing a Form 5320.23 to be $0, because "[a]ll the estimated costs are associated with the submission package for Forms 1, 4, and 5." 78 Fed. Reg. at 55025. No allowance is made for the submission of a Form 5320.23 submitted separately pursuant to the addition of a responsible person for an entity and the assumption that a Form 5320.23 would always be submitted concurrent with a Form 1, 4, or 5 is also inherently faulty. As the ATF acknowledges, the composition of individuals in an entity is dynamic and the information on this form would likely be collected and evaluated independently of the submission of an application to make or transfer a firearms, perhaps multiple times during the term that the entity owns the firearm. The stated estimate of $0 for the cost to the ATF is an inherently invalid assumption and grossly underestimated.

Other than the proposal to incorporate the information currently required on ATF Form 5330.20 (Certification of Compliance with 18 U.S.C. 922(g)(5)(B)) into the requirements of 27 C.F.R. 479.63 and 479.85 and into the corresponding ATF Forms 1, 4 and 5, the proposed changes, particularly expansion of the CLEO certification requirement, would greatly increase, rather than minimize, the burden of the collection of information on the applicants. While the

[7] 18 U.S.C. § 922(o).

Agency recently launched a process for electronic submission of certain forms (ATF eForms initiative), the inability to upload photographs and electronically recorded fingerprints greatly limits the ability of this program to minimize the burden of the collection of information on applicants.

**ATF Is Aware Of, But Has Ignored, Less-Intrusive Alternatives**

Although ATF has not demonstrated any genuine problem to be addressed by its proposed rule, whatever concerns ATF may reasonably assert could be addressed by alternatives that impose less cost and involve less intrusion into the affairs of law-abiding citizens. For example, the ATF repeatedly (and as recently as October 2012) published an abstract in the Unified Regulatory Agenda proposing to "require that a copy of all applications to make or transfer a firearm be forwarded to the chief law enforcement officer (CLEO) of the locality in which the maker or transferee is located" and "***eliminate*** the requirement for a certification signed by the CLEO" (emphasis added). As this abstract indicates, ATF contemplated that its proposed rule would eliminate the CLEO certification requirement. Certainly where ATF appears to have considered an alternative, internally and in discussion with NFATCA, for several years, that alternative warrants evaluation and ATF must provide at least some reasoned explanation for the change in course. But none has been offered.

**CLEO Notification Process Would Be a Superior Alternative**

Adopting a process of providing notification to the local CLEO when a Form 1, 4, or 5 is submitted would more effectively and efficiently serve legitimate interests for complying with the statutory requirements of §§ 5812 and 5822. A limited time period could be set (such as 15 days) in which information of why the making, transfer, receipt or possession of the firearm by the applicant/transferee would be in violation of State or local law could be brought to the attention of ATF. A similar process is already used, for example, when a person submits an application (ATF Form 7) to become a licensed dealer or manufacturer. The estate planning and property succession benefits of trusts would remain, as would the separate benefits of a corporation or LLC. Replacing the CLEO certification requirement with a notice and response

period would remove the most common reasons for using an entity for acquiring NFA firearms instead of doing so as an individual.

Action by the CLEO would remain voluntary, as ATF notes with approval in its proposal to expand the CLEO certification, but the opportunity for arbitrary or politically motivated refusal, as documented and described in numerous comments submitted by others, would be eliminated. Although use of a legal entity to acquire NFA firearms provides other benefits, by eliminating, rather than expanding, the CLEO certification requirement, the single greatest motivation for using an entity would be eliminated and its popularity is likely to wane significantly.

Sections 479.63 and 479.85 of the ATF Rules could be amended to require a certification by the applicant/transferee that the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose notification may in a particular case be acceptable to the Director has received a copy of the application. Likewise, this language would be added to the declaration of ATF Forms 1, 4, and 5 (similar to that currently used in the ATF Form 7). The Forms could also include a notice to the CLEO recipient instructing how information regarding the applicant/transferee is to be submitted and what facts would constitute grounds for denial of the application by ATF. Alternatively, the Rules and Forms could be amended to require provision of the name and address of the local CLEO, who may then be notified directly by the ATF.

Additionally, the ATF should also consider adopting a system for designating one or more "responsible person" or "Primary" who would then have the authority to designate other "agents" having limited powers and authorities for the entity. This could be similar to that in place for FFL dealers and manufacturers (and as proposed in the NFATCA Petition). In such a system, the Primary would be subject to a NICS check or even the full regimen of fingerprinting, photographs and FBI background check required for an individual. That person would be responsible for the actions of any designees and would remain subject to 18 U.S.C. § 922(d), which prohibits providing any firearm to a prohibited person. Alternatively, a procedure for performing a NICS check on designees (including collecting information and requiring a statement of eligibility similar to that of an ATF Form 4473) would provide additional safeguards, protecting both liability of the Primary and safety of the public at large, without unduly burdening the applicant/transferee or the ATF.

Just as every employee of an FFL dealer or manufacturer is not required to be a responsible person on the license despite handling NFA firearms, so too there is no reason to require everyone associated with a trust or other legal entity to be designated a responsible person. And just as the responsible person of a FFL is required to take precautions to prevent a prohibited person from gaining access to NFA (or other) firearms, so too the designated responsible person with respect to a legal entity be required to take precautions to prevent a prohibited person from gaining access to NFA firearms.

ATF's proposed rule is premised on a false dichotomy, suggesting that there is no check at all on an entity's responsible persons if there is not a check based on the technology of the 1930s. As many comments already filed in this proceeding have observed and expressed, the availability of NICS has rendered CLEO certification obsolete. Without providing any reasoned explanation, ATF concluded otherwise in the NPR. 78 Fed. Reg. at 55017. ATF acknowledges that, even in the absence of a CLEO certification, it already has "a fuller picture of any individual than was possible in 1934." *Id.* However, rather than rely on a superior system, ATF speculated – as one may do with any system of background checks – that the results "may" be more complete by requiring additional layers of certification. A reasoned consideration, however, requires discussion of the likelihood that CLEO certification would identify any proper basis for denying an application other than the information available through a NICS check. Moreover, the analysis must weigh the likelihood that maintaining the CLEO certification requirement will illegitimately bar an applicant/transferee on arbitrary, political, or discriminatory grounds. As ATF does not specify any minimum level of investigation that a CLEO must conduct, it is difficult to understand why ATF assumes it would divulge any additional information in an age when few CLEOs personally know an appreciable percentage of individuals within the jurisdiction. Likewise, as ATF does not specify what "information" would constitute a legal basis for deeming an applicant/transferee a prohibited person, there is no objective standard by which an otherwise nondiscretionary approval may be denied. Indeed, even in the context of FFLs, those who make and sell the very items at issue here, ATF does not require CLEO certification. What is the possible justification for imposing burdens on the end-user of a firearm that ATF does not impose on the dealers or manufacturers of those firearms?

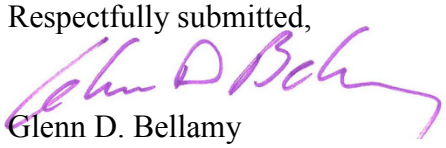
In the event that ATF concludes that, at least in some circumstances, an entity's responsible persons must submit fingerprints, it is not clear why the continued use of physical

cards is necessary. Other federal agencies rely upon digital fingerprint technology. Stuart Fleming [Comment ID: ATF-2013-0001-0993], for example, described systems used by the Securities & Exchange Commission and the Transportation Security Agency. Together with the use of digital photography, such a step could allow full use of the existing eForms system, greatly improving efficiency and reducing errors.

**Public Hearing Requested**

The undersigned hereby respectfully requests an opportunity to comment orally at a public hearing on the proposed rule amendments.

Respectfully submitted,



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