

Bureau of Alcohol, Tobacco, Firearms, and Explosives

Machine Guns, Destructive Devices)	
and Certain Other Firearms;)	Docket No. ATF 41P
Background Checks for Responsible)	
Persons of a Corporation, Trust or)	RIN 1140-AA43
Other Legal Entity With Respect to)	
Making or Transferring a Firearm)	

David M. Goldman
Comments in Opposition to Proposed Rule ATF 41P

David M. Goldman is a licensed attorney practicing in the State of Florida, associated with **GunTrustLawyer.com** and the **Apple Law Firm PLLC**, 3733 University Boulevard West, Suite 212B, Jacksonville, Florida 32217. Mr. Goldman is the founder and owner of **Gun Trust Lawyer®**, a nationwide network of more than 200 lawyers throughout the United States. Since 2007, **Gun Trust Lawyer®** has produced more than 5,000 trusts for its clients. Mr. Goldman is recognized as one of the leading lawyers nationally with respect to issues relating to gun trusts and is often quoted by the media in stories addressing such issues.

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.

With the exception of ATF's proposal to add new section 479.90 with respect to decedents' estates, **David M. Goldman** opposes the remainder of the proposed rulemaking for the reasons set forth below and in the Exhibits to these Comments incorporated herein by reference. Part I, below, demonstrates that ATF failed to identify any problem for its proposed

rule to correct. ATF neither quantified any benefits from its proposed rule (pages 2-5), likely because the proposal predominantly addresses conduct that is already criminalized, nor identified a single example that illustrates the problem that it speculates may exist (pages 5-13). Indeed, there is scant evidence of misuse of registered NFA firearms (pages 13-14). Part II illustrates that trusts serve many legitimate purposes (pages 14-21), establish distinct roles with very different powers with respect to trust assets (pages 21-26), and arise in varied contexts, some of which should ameliorate concerns regarding potential misuse (pages 26-29), but that ATF has not considered these distinctions in formulating its proposed rule. Some trusts specifically designed to hold NFA firearms have numerous safeguards against improper transfer of trust assets that may be more effective than anything ATF proposes yet ATF failed to acknowledge such provisions or explain why some combination of them would be inadequate (pages 29-32). Part III explains how the CLEO certification requirement renders the proposed rule unworkable and demonstrates the need to abandon the certification for individuals as well as legal entities (pages 33-41). Part IV documents ATF's underestimate of the cost of its proposed rule due to understated costs (pages 42-45) as well as omitting altogether lost tax revenue (pages 45-46) and the cost of hearing loss attributable to the greater unavailability of silencers (pages 46-48). Part V details the many less-intrusive alternatives that ATF failed to consider in formulating its proposed rule (pages 48-54), including a more-limited concept of responsible persons and use of modern methods of conducting background checks.

I. ATF FAILED TO DEMONSTRATE ANY NEED FOR ITS PROPOSED RULE

A. ATF Failed to Quantify Any Benefits from its Proposed Rule

ATF has rendered the entire process of cost/benefit analysis meaningless through its failure to quantify any benefits whatsoever. Simply speculating that there may be some marginal

benefit from its proposed rule without even troubling to estimate the size of that benefit or its value turns the entire process into a charade. With no quantified benefits, by definition, even the \$11,963,087 figure ATF compiles for annual cost to regulated parties is sufficient to illustrate the proposal should be abandoned. Factoring in the additional annual costs ATF assigns to State and local agencies of \$1,263,560 and the additional annual costs to ATF itself of \$1,807,894 only serve to reinforce that conclusion. In fact, as demonstrated below, the costs imposed by ATF's proposed rule would be much greater than it estimated.

There may be a good reason ATF did not attempt to measure any benefit from its proposed rule or to assign any economic value to any such benefit. ATF's proposed rule would add new precautions on top of existing precautions on top of existing criminal liability. The marginal increase in regulatory benefit in that environment would seem to be negligible.

- It is already a violation of federal criminal law for a prohibited person to possess a firearm, 18 U.S.C. § 922(g). ATF's proposed rule cannot properly claim any benefit associated with that existing prohibition.
- It is already a violation of federal criminal law for a person to make false statements on the federal forms that would permit him to take possession of a firearm, 18 U.S.C. § 1001. ATF's proposed rule cannot properly claim any benefit associated with that existing prohibition.
- To the extent the instruments establishing the legal entity already contain provisions that, by their own terms, disqualify any responsible person from possessing any of the NFA firearms owned by the legal entity if the responsible person becomes disqualified, an additional safeguard is in place. In that event, the prohibited person is already acting without any authority from the legal entity and, indeed, in violation of his fiduciary duty to the legal entity, its beneficial owners, or both.
- To the extent a responsible person swore under oath in connection with assuming a position as a responsible person that he was not a prohibited person, the prohibited person is already acting in violation of the applicable law regarding statements made under penalty of perjury. *E.g.*, 28 U.S.C. § 1746.

- To the extent a responsible person swore under oath in connection with assuming a position as a responsible person that, upon subsequently becoming a disqualified person, he would notify the other responsible persons, surrender possession of any NFA firearms owned by the legal entity, resign his position, or some combination of any or all of those provisions, the prohibited person is already acting in violation of (a) the applicable law regarding statements made under penalty of perjury and (b) his fiduciary duty to the legal entity, its beneficial owners, or both.

So, for ATF's proposed rule to have *any* marginal benefit at all, one must assume a scenario in which a prohibited person associated with a legal entity is, on the one hand, perfectly willing to violate all the foregoing prohibitions while, on the other hand, he remains scrupulous about obtaining a *registered* NFA firearm rather than simply making his own NFA firearm or turning to the black market. Even then, one must further discount the benefit to take account of other restrictions.

- It is already a violation of federal criminal law for a trustee (or any other "responsible person" associated with a legal entity) to permit a prohibited person to possess a firearm if he has even "reasonable cause" to believe the person is prohibited, 18 U.S.C. § 922(d), (h). ATF's proposed rule cannot properly claim any benefit associated with that existing prohibition and the actions by law-abiding possessors of *registered* NFA firearms.
- To the extent a responsible person made false statements on the federal forms that would permit him to take possession of a firearm with the intent to transfer it to a prohibited person associated with the same legal entity, he would already be acting in violation of federal criminal law, 18 U.S.C. § 1001.
- To the extent a responsible person swore under oath that, upon subsequently learning a different responsible person associated with the legal entity was or became a disqualified person, he would take possession of any NFA firearms held by the prohibited person and owned by the legal entity, that responsible person is already acting in violation of (a) the applicable law regarding statements made under penalty of perjury, *see, e.g.*, 18 U.S.C. § 1746, and (b) his fiduciary duty to the legal entity, its beneficial owners, or both.

So, for ATF's proposed rule to have any marginal benefit, one must also assume that one or more other responsible persons associated with the legal entity would be, on the one hand,

perfectly willing to violate all the foregoing prohibitions while, on the other hand, the responsible person remains insistent *both* on transferring a *registered* NFA firearm and on doing so only with respect to someone associated with the legal entity rather than someone who is not a responsible person with respect to the legal entity.

To state the rather unlikely combination of circumstances in which ATF's proposed rule would produce any benefit whatsoever goes far to explaining the apparent embarrassment in quantifying benefits. It would seem that ATF could not find a reputable economist willing to lend his name to the effort. In setting forth this proposed regulation, nonetheless, ATF demonstrates complete disregard for the Administration's directive. On March 4, 2009, the Office of Management and Budget clarified that Executive Order 13497, issued by President Obama on January 30, 2009, effectively revived review under the standards and procedures under Executive Order 12866. Executive Order 12866, in turn, purported to establish that "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits."

B. *ATF Failed to Describe a Single Situation Illustrating the Problem it Purports to Address; The Entire Rulemaking Seems to Rest on a False Premise*

In the NPR, ATF did not identify a single instance where a *registered* NFA firearm was used in the commission of a crime.¹ Indeed, such incidents are sufficiently rare that -- short of an outright ban -- proponents of gun control measures point to the NFA registration process as the

¹ ATF also failed to produce documents regarding any such instances in response to requests filed under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by counsel for Mr. Goldman. *See* FOIA Request of Thomas H. Odom, Aug. 27, 2013 (ATF reference 13-1532).

goal to which they aspire.² The current ATF proposal addresses a subset of the NFA universe: NFA firearms owned by a legal entity (*e.g.*, corporation, LLC, or trust). And again, 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 can only raise questions about the carefully-phrased descriptions and the questions they leave unanswered.

It is entirely likely that existing prohibitions and safeguards applied (or would have applied) in each of the three situations but the ability to demonstrate such a fact is frustrated by ATF's refusal to permit its characterizations to be subject to meaningful public scrutiny.³

1. *The Silencer Transaction*

ATF describes a situation in which a prohibited person sought to acquire a silencer from a FFL but had his application denied (presumably by ATF) "because the transferee was determined to be prohibited from possessing a NFA firearm." 78 Fed. Reg. at 55016. ATF does not explain the basis of the prohibition or whether that basis was grounded in fact. ATF does not

² See http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=10993387-5d4d-4680-a872-ac8ca4359119 (visited Oct. 6, 2013) (attached as Exhibit 1).

³ ATF has refused to place any documents relating to these examples in the rulemaking docket despite repeated requests to do so and has also failed to produce any such documents in response to FOIA requests. See Letter to Stephanie Boucher & Brenda Friend from Thomas H. Odom, Oct. 3, 2013 (attached as Exhibit 2).

explain whether it investigated potential violations of the laws prohibiting false statements and referred the matter for prosecution.

Thereafter, according to ATF's account, the same FFL "subsequently applied to transfer the same silencer to a trust whose name contained the same last name as the prior transferee" and upon review of the trust document ATF "found that the prohibited person was a settlor of the trust and, thus, would have access to the firearm." *Id.* ATF denied the transfer so the prohibited person, in fact, did not obtain access to the suppressor. *Id.* But ATF omits facts critical to examining the situation.

How much time had transpired between the two visits to the FFL? Did the same individual approach the FFL each time? If a different individual approached the FFL the second time, did the FFL recognize the name on the trust was that of the prohibited person? Did the FFL recognize a potential "straw purchase" and notify ATF? If the FFL played a role in alerting law enforcement, rather than demonstrate a flaw in the existing regulations, this example shows yet another safeguard: watchful FFLs.

ATF does not even address whether the settlor of the trust could have succeeded in obtaining the suppressor without going through additional checks. At least since the publication of the April 2009 edition of ATF's *National Firearms Handbook*, ATF has advised that despite its prior approval on a Form 4, an individual taking physical possession of a NFA firearm from a FFL must complete a Form 4473 and undergo a background check through the National Instant Check System ("NICS") at that time.

Subsequent to the approval of an application requesting to transfer an NFA firearm to, or on behalf of, a partnership, company, association, trust, estate, or corporation, the authorized person picking up the firearm on behalf of, a partnership, company, association, trust, estate, or corporation from the FFL

must complete the Form 4473 with his/her personal information and *undergo a NICS check*.

ATF, *National Firearms Act Handbook* § 9.12.1 (Apr. 2009) (emphasis added).⁴ As the public comments make clear, FFLs take seriously this instruction. *E.g.*, 0120, 0207, 0551, 0909, 1002.⁵ And many individuals taking physical possession of NFA firearms on behalf of legal entities report going through NICS checks. *E.g.*, 0117, 0135, 0145, 0181, 0188, 0226, 0260, 0486, 0577, 0731, 0744, 0775, 0911, 0914. Moreover, some States require, as a matter of State law, that a background check be completed before physical transfer of a firearm. *E.g.*, 0197, 0260. Because ATF failed to even disclose the jurisdiction in which this event supposedly took place, it impossible to evaluate whether such a law may have been applicable. Yet, if either of those obstacles would have precluded the settlor from taking physical possession of the suppressor, rather than demonstrate a flaw in the existing regulations, this example shows yet more safeguards: State laws regulating the sale and transfer of firearms as well as vigilant FFLs.

In addition, it does not follow that even a prohibited person who could not possess a NFA firearm could not serve as the settlor of a trust that could own a NFA firearm, as ATF's description of the situation seems to assume. Even a prohibited person can establish a trust as settlor thereby retaining his *ownership* interest in property while surrendering his right to the *possessory* interest to a trustee. *See United States v. Zaleski*, 686 F.3d 90 (1st Cir. 2012); *United*

⁴ This instruction would seem to be in tension with 27 C.F.R. § 478.102(d)(2), which does not require NICS checks where "[t]he firearm is subject to the provisions of the National Firearms Act and has been approved for transfer under 27 CFR part 479." To the extent, however, that the Handbook directive applies only to legal entities while the regulation applies to individuals, there is an added safeguard with respect to legal entities that is not present for individuals acquiring NFA firearms.

⁵ ATF assigned a unique identification number (distinct from the "tracking number") that begins with the prefix ATF-2013-0001- to each comment posted to the electronic docket. For ease of reference, throughout these comments other matters filed as public comments will be cited by the four digits that follow that prefix.

States v. Miller, 588 F.3d 418 (7th Cir.2009); *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990). It is not at all uncommon for trustees to hold assets that a beneficiary has no current legal ability to possess.⁶ In other regulatory contexts, the restrictions of such trusts have been accepted for decades as a means for a person prohibited from possessing property without advance regulatory approval to nonetheless maintain an ownership interest in the property. *E.g.*, *Water Transport Ass'n v. Interstate Commerce Comm'n*, 715 F.2d 581 (D.C. Cir. 1983) (citing *Illinois Cent. R.R. v. United States*, 263 F. Supp. 421, 424 (N.D. Ill.1966) (3-judge court), *aff'd mem.*, 385 U.S. 457 (1967)) (common carrier acquisition of interest in another common carrier pending regulatory approval).

2. *The Texas LLC Situation*

ATF describes a situation involving "an illegal alien, living in the United States under an assumed name" who also "had a felony warrant outstanding." 78 Fed. Reg. at 55023. At first blush, it does not sound as if such an individual would have qualms about seeking a NFA firearm from a black market source if he wanted one, in which case ATF's proposed rule would accomplish nothing in such a situation. But ATF's characterization may be misleading.

ATF asserts that the individual was a "member of an LLC" and that "the LLC had 19 firearms registered to it." *Id.* ATF's description raises more questions than it answers. To start with, ATF does not disclose how "ATF became aware" of the situation. Did another member of the LLC advise ATF? If so, once again, it would seem that responsible persons associated with

⁶ For example, if a minor were entitled to receive property under a deceased parent's Will, it is common that the Will would contain provisions for holding the property in trust for the benefit of the child until he attained age 18. Where the particular property is a firearm or other item subject to special regulations, it is even more common that the legal instrument will contain explicit provisions prohibiting distribution until the person is legally entitled to take possession. In the context of a decedent's estate, ATF's proposed rule seems to acknowledge such restrictions as completely adequate.

legal entities served as an added safeguard. Were any of the "19 firearms" registered to the LLC subject to the NFA or is the entire example inapposite?

Was the prohibited person "living in the United States" even in Texas or had he fled to avoid the felony warrant and was 1,000 miles from any firearms held by the LLC so that any access is entirely hypothetical? Had the prohibited person been deported the day after he joined the LLC? Did the LLC have procedures in place to ensure that anyone taking physical possession of any of its firearms had to undergo further screening so that the example illustrates yet another safeguard under current law? Did the prohibited person even know the LLC had firearms? Were they all kept secure in a safe that only a different member of the LLC could access?

The answers to these questions are crucial as ATF does not represent that the prohibited person ever had *actual* possession of any of the firearms.⁷ At most ATF suggests some form of *constructive* possession. "[C]onstructive possession is necessarily a fact-specific inquiry. *United States v. Fambro*, 526 F.3d 836, 839 (5th Cir.2008); see *United States v. Booker*, 436 F.3d 238, 242 (D.C. Cir. 2006). Factors that aid that inquiry include: the defendant's knowledge and access to the firearms; his proximity to the firearms; his occupancy or presence, exclusive or joint, at the place where firearms were found; the nexus between the defendant and the firearms; and his association with and exercise of control over the person in actual possession of the firearms. *United States v. Jones*, 484 F.3d 783, 788 n.11 (5th Cir.2007); *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir.1993); *United States v. Morris*, 576 F.3d 661, 666 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1313 (2010). Even when an individual is in close proximity to a firearm -- which ATF does not even suggest was the case here -- that fact alone is insufficient to

⁷ "Actual possession" means that "the defendant knowingly has direct physical control over a thing at a given time." *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir.1998).

establish constructive possession. "[M]ere proximity to a gun is insufficient to establish constructive possession, evidence of some other factor -- including connection with a gun, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise -- coupled with proximity may suffice." *Booker*, 436 F.3d at 242 (quoting *United States v. Alexander*, 331 F.3d 116, 127 (D.C. Cir. 2003)). Where a firearm is located someplace where the prohibited person is not the sole occupant (as would seem very likely to be the case with respect to properties of the LLC), courts impose a higher standard for finding constructive possession, requiring evidence that the prohibited person had knowledge of the firearm and access to it. See *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2013). ATF provides no information that suggests the prohibited person ever even established *constructive* possession.

ATF is also silent as to whether the felony warrant resulted in a conviction or if it even came to trial. Or, whether it involved a crime of violence or involved a technical violation of an obscure environmental regulation. Regardless of any involvement in the felony, however, the individual would still have been a prohibited person by virtue of his status as an alien "illegally or unlawfully in the United States." 18 U.S.C. § 922(g)(5)(A). While ATF does not disclose how long the individual may have been illegally in the United States, it may be that the example better illustrates the Administration's limited enforcement of immigration laws rather than anything about the access to NFA firearms.

3. *The Tennessee Trust Transaction*

ATF asserts that two applications were submitted to transfer NFA firearms to a trust in which one of the trustees was a convicted felon. 78 Fed. Reg. at 55023. The most ATF says about the potential harm presented by this situation is: "ATF would not have known of the need to conduct any background checks for the trust members to determine if they were prohibited

persons." *Id.* On its face, the NPR does not even make out a case that if the "convicted felon" had applied in his own name as an individual that a transfer would have been improper. Not all convicted felons are prohibited from owning NFA firearms. Congress excluded convictions relating to antitrust, unfair trade practices, restraints of trade, and similar matters. *See* 18 U.S.C. § 921(a)(20). ATF did not represent that upon conducting its investigation it determined that the individual was prohibited from owning a firearm.

ATF acknowledges, moreover, that it was the FFL that provided the information prompting it to investigate this matter. Here is positive confirmation that rather than display the need for yet additional regulations, there are safeguards already in place in addition to the criminal prohibitions and other measures discussed above.

* * *

If these three examples are the best ATF has to offer out of the entire period since 1934, when *Congress* authorized ownership of NFA firearms by "a partnership, company, association, or corporation, as well as a natural person" in the original NFA itself, *see* NFA § 1(c), 48 Stat. at 1236, there is simply *no evidence of any problem* that existing law does not address. Indeed, accepting for the sake of discussion ATF's absurdly low estimate of a \$14.9 million annual cost, for the proposed rule to have any *net* benefit one would expect news reports of about two deaths every three years from *registered* NFA firearms that the perpetrators acquired by virtue of their connection to legal entities.⁸ If the actual costs of the proposed rule were to be considered, one

⁸ In other rulemaking initiated by this Administration the figure of \$9.1 million has been used as the value of a statistical life. *E.g.*, Memorandum from Polly Trottenburg & Robert S. Rivkin to Secretarial Officers & Modal Administrators, "Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses" (Feb. 28, 2013) (attached as Exhibit 3).

would expect more than ten such deaths per year. But the record here is barren of any such examples, let alone a statistically significant number of such instances.

C. *There is Little Evidence of the Misuse of Registered NFA Firearms*

As noted above, ATF has not demonstrated a misuse of NFA firearms that its proposed rule would address. The false premise upon which ATF relies, however, is still broader. Regardless of whether NFA firearms are registered to an individual or a legal entity, there is little evidence of the misuse of such firearms in the almost-eighty-year history of the NFA.

Numerous public comments have made the point that criminals are not likely to go through the process of registering a highly-regulated firearm with ATF when there are black market sources, including the criminal's ability to make his own NFA firearm. In addition to such registration, the criminal would have to pay a premium to obtain a legal firearm, pay a \$200 transfer tax, and wait months for ATF approval. One can search the historical record for evidence of such a scrupulously honest criminal. Instead, the examples of misuse referenced in the public comments fall into two categories. *First*, there are examples of misuse of *unregistered* NFA firearms but those examples only underscore the futility of attacking such misuse by adding regulations to *registered* NFA firearms. *Second*, there are references to two examples where an individual who was *not a prohibited person* lawfully gained access to a NFA firearm only to subsequently use it in the commission of a crime. Because in both instances the individual was not prohibited when he acquired access to the firearm, no part of ATF's proposed rule would have produced a different result. Moreover, in both of those examples the individual who misused the NFA firearm was a law enforcement officer.

Recently proposed legislation confirms that even gun control proponents recognize the efficacy of regulation under the NFA. *See* Exhibit 1. ATF failed to explain, let alone demonstrate, the need for a change in regulations.

II. ATF FAILED TO CONSIDER THE MANY PURPOSES AND USES OF TRUSTS

Trusts (and other legal entities) have existed for centuries and serve a variety of legitimate purposes. Following the 1535 Statute of Uses enacted by Parliament, the crux of the modern trust is described by the simple conveyance:

O to A for the benefit of B

where *O* is the owner of property and settlor of the trust, *A* holds the legal title (as trustee) and *B* (as beneficiary) has the beneficial use of the property, enforceable against *A* in equity. Beyond that basic framework, the roles trusts create and powers they give to individuals associated with them are as varied as the purposes they are established to accomplish. There are different types of trusts and, as a creature of State law, they also vary from State to State. Some trusts include specific provisions designed to address ownership of NFA- or other firearms that may alleviate ATF's concerns. ATF failed to consider these important distinctions and, without explanation, proposed a one-size-fits-all mandate.

A. Trusts Serve Many Legitimate Purposes

Trusts (and other legal entities) are not some new, nefarious means created to circumvent regulation under the NFA. Individuals establish trusts for many different reasons, some of which should be sufficient to mitigate ATF's concerns. Often the trusts are established so that individuals may minimize taxes otherwise due, a perfectly legal objective. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits,

cannot be doubted."). In light of the fact that the NFA itself is a tax statute and Congress expressly provided for ownership of NFA firearms by trusts, ATF is obligated to consider the disruptive impact of its proposed regulation upon trusts.

1. *Estate Planning*

Trusts have long been a favored tool of estate planners. Millions of families have one or more trusts designed to manage the distribution of assets. It is absurd to think that an individual would establish a trust to hold all or a significant portion of his assets where a miniscule portion of its value consisted of a NFA-regulated firearm so as to grant a prohibited person access to the NFA firearm. Where NFA firearms do not constitute a substantial portion of the assets held by the trust, ATF should hesitate to become involved in personal estate planning decisions just as ATF wisely proposes to do with respect to decedents' estates.

Even where one or more NFA firearms constitute a substantial portion of the value held by a trust, there may be other strong indicia that should alleviate ATF's concern. For example, the NFA firearm may be a valuable family heirloom where the goal is to keep the heirloom in the family without necessarily imposing the associated tax burdens on one individual. Or, the trust that holds the NFA firearm may be structured to obtain certain tax benefits, such as maximizing the value of the estate and gift tax unified credit in conjunction with transfer to a surviving spouse through the use of QTIP and non-QTIP trusts. *See* 26 U.S.C. § 2056(b). Or, the trust could be designed to provide some income for a family member while providing for a gift of the NFA firearm to a charity via a charitable remainder trust. *See* 26 U.S.C. § 2055. Again, given the careful planning with such trusts and the fact that they only *incidentally* involve NFA firearms, ATF should carefully evaluate the need to disrupt such plans and impose additional regulatory burdens.

2. *Family Law*

Trusts are also used in the context of property division in divorce. Where a significant portion of the net worth includes one or more NFA firearms, a trust may provide the means for both parties to share in the appreciation of the value of those assets, even where shared *use* of the firearms is not contemplated. Or, a court may impose a constructive trust with respect to certain assets of the divorcing couple.⁹ Before limiting or complicating the already potentially-difficult negotiations between divorcing couples, ATF should pause to ask whether trusts in such a context are a likely means to improperly transfer a NFA firearm.

3. *Elder Law*

As many individuals age, they may contemplate the need to establish a trust so as to preserve assets while simultaneously qualifying for governmental benefits. After sections 6011 through 6016 of the Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat. 4 (2006), harmonized the look-back provisions between transfers involving trusts and non-trust transfers, there is no longer a disincentive to use a trust in such planning. Moreover, a trust may offer additional benefits in Medicaid planning. For example, an irrevocable trust may provide asset protection from future creditors of beneficiaries and preservation of the exclusion from capital gains on the sale of a principal residence, as well as the ability to render assets noncountable in regard to eligibility for means-based governmental benefits, such as Medicaid and Supplemental Security Income ("SSI"). Trusts designed to accomplish these purposes are established by individuals seeking protection of assets *within the law* and ATF has not demonstrated any consideration of whether such trusts are prone to abuse as a means of transferring NFA firearms.

⁹ For example, a court might impose a constructive trust in the absence of a qualified domestic-relations order ("QDRO") as a means to equitably divide retirement assets subject to the anti-alienation provision of ERISA.

4. *Sharing of Assets Among Family Members*

Certain trusts are clearly designed to permit the distribution of assets among family members in response to changing circumstances. It is not unusual for wealthy families to establish so-called "sprinkle trusts" that authorize, but do not require, the distribution of income, certain limited invasions of the trust corpus, or both, among a designated class of beneficiaries, typically descendants of the settlor. In that situation, there may be dozens of potential beneficiaries who could receive distributions.

Another common use of a trust in tax planning provides some or all beneficiaries a right of withdrawal over certain trust assets. A *Crummey* trust is designed to permit withdrawal of annual additions to the trust up to the amount of the annual gift tax exclusion for each beneficiary. This form of trust has been in use for more than fifty years. *See Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968). Or, a trust may give a beneficiary the annual right to withdraw the greater of \$5,000 or up to 5% of the value of the trust. *See* 26 U.S.C. § 2514(e). ATF has not shown the slightest awareness of the impact its proposed rule could have on such trusts.

5. *Regulatory Compliance*

As referenced above, in Part I(B)(1), where regulatory prohibitions prevent a person from taking possession of an asset, trusts have been used so as to permit the person to maintain his ownership interest in those assets without violating the regulations. *E.g.*, *Water Transport Ass'n v. Interstate Commerce Comm'n*, 715 F.2d 581 (D.C. Cir. 1983) (citing *Illinois Cent. R.R. v. United States*, 263 F. Supp. 421, 424 (N.D. Ill. 1966) (3-judge court), *aff'd mem.*, 385 U.S. 457 (1967)). Federal appellate courts recognize the validity of such an arrangement even with respect to a prohibited person's ownership interest in firearms. *See United States v. Zaleski*, 686

F.3d 90 (1st Cir. 2012); *United States v. Miller*, 588 F.3d 418 (7th Cir.2009); *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990). A contrary rule may well constitute a "taking" within the meaning of the Fifth Amendment to the U.S. Constitution -- a challenge most certain to be presented if ATF adopts its proposed rule. Just because a prohibited person is not permitted to take *possession* of firearms he may own does not mean there is no value to a family heirloom he may wish to pass to another family member. And just because a person is prohibited *today* from possessing firearms does not mean that a successful appeal, a pardon, or a petition to restore his firearms rights may not permit him to do so in the future.

A trust provides a well-established means to maintain regulatory compliance without exercising possession. Perhaps the most common example involves minors who are presently prohibited from possession of NFA firearms but who will in the ordinary course of events outlive that prohibition. A ten year old boy may be prohibited from inheriting possession of his grandfather's short-barreled rifle. But a trust can hold that firearm for the boy until he comes of age at which point he can go through the normal NFA transfer process. What possible interest does ATF have in putting the boy through burdensome background check requirements years before any actual physical transfer? What sense would it make to subject him to fingerprinting and background checks years before a physical transfer? And if the boy does not want the firearm or becomes a prohibited person, why should he not be entitled to receive the value of the firearm by having the trustee legally transfer it to someone else?

6. *Protection Against Over-Zealous Application of the "Constructive Possession" Doctrine*

Turning attention specifically to the context of trusts written in contemplation of holding firearms as trust assets, there is another very common reason individuals establish trusts. The NFA makes it unlawful for any person "to possess a firearm that is not registered to him in the

National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d). It does not matter whether or not the person in possession is prohibited from possessing firearms generally. And possession includes not only "actual possession" but also "constructive possession." As a result, when an individual lawfully obtains a NFA firearm and properly registers it in his individual name, he potentially puts at risk anyone else who, viewed *ex post*, on a fact-specific inquiry, is deemed to know of the NFA firearm and have access to it (including residing under the same roof as the person to whom the firearm is registered). See *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2013); see also *United States v. Fambro*, 526 F.3d 836, 839 (5th Cir.2008); *United States v. Booker*, 436 F.3d 238, 242 (D.C. Cir. 2006); *United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir.1993); *United States v. Morris*, 576 F.3d 661, 666 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1313 (2010).

In light of the severe criminal prohibitions for "possession" of a NFA firearm that is registered to one's co-habiting spouse, it is simple prudence that drives many owners of NFA firearms to use a trust rather than continuing to hold the firearm as an individual. The cost of establishing a trust and naming oneself and one's spouse as trustees pales in comparison to potential imprisonment for up to ten years, fines of up to \$10,000, and forfeiture of the firearm. See 26 U.S.C. §§ 7871 & 7872. Even if ultimately vindicated, the financial cost and emotional toll of a criminal defense can be devastating. The proposed rule could expose hundreds of thousands of families to the potential of such liability.

With prosecutions actually brought against an individual who merely held a suppressor for a few minutes and another against an individual who grabbed a short-barreled shotgun to protect the life of another, the fear of such liability at the hands of over-zealous federal officials is very real. See *United States v. Valentich*, 737 F.2d 880, 881 (10th Cir. 1984); *United States v.*

Newcomb, 6 F.3d 1129, 1134 (6th Cir. 1993). As a result, even when it is contemplated that a NFA firearm will only ever be used by one individual, law-abiding citizens may feel compelled to establish a trust to ensure compliance with the law, particularly if a spouse has the combination to the gun safe or knows where the key is kept.

Where multiple members of a family (or a group of friends) anticipate that more than one of them may wish to use a NFA firearm, under existing law a trust (or other legal entity) is the only practical means to do so. Consider the situation of an individual who acquires a suppressor for his use when hunting. If his brother desires to borrow the suppressor, under current law without a trust (or other legal entity), a \$200 tax payment and eight month wait is required. And when the brother has finished his hunting trip, it would be another \$200 tax payment and another eight month wait to legally return the suppressor. For an item lawful to own in thirty-nine States and lawful to use in at least certain forms of hunting in more than thirty States, that alternative is simply impractical. Given that suppressors are a means to protect against hearing loss while hunting, ATF should certainly evaluate the impact of its proposed rule with respect to such harm to the extent it makes it more difficult for hunters (and other users) to acquire or share such items.¹⁰

* * *

The foregoing examples of the many different uses of trusts share a common feature. The law treats the structure as sufficient to create enforceable obligations and honors those obligations. It is not assumed that a trust is a mere sham to be disregarded. Instead, each trust is individually examined with respect to specific legal relationships and legal standards. The

¹⁰ The harm due to hearing loss likely exceeds several times over the costs ATF did include in its cost/benefit analysis. In fact, based on OSHA standards for maximum noise exposure levels, the cost is likely above the \$100 million threshold requiring a full regulatory impact statement.

fiduciary duties outlined in law provide the guarantee that the trust will be administered according to its provisions.

B. *Trusts Have Many Different Roles with Different Powers*

ATF seemingly lumps together everyone associated with a trust under the heading "responsible person" without showing any understanding of the very different roles that exist in trust law and the powers associated with those roles. The proposed rule defines a "responsible person" as

In the case of a trust, any individual, including any grantor, trustee, or beneficiary, who possesses, directly or indirectly, the power or authority under any trust instrument or other document, or under state law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust

78 Fed. Reg. at 55026 (proposed rule § 479.11(a)(1)). That definition is either so overbroad as to encompass everyone, on the one hand, or so vague as to provide no notice who is covered, on the other hand. An examination of common roles with respect to trusts should illustrate the many problems inherent in this proposed definition.

1. *Settlor*

The "settlor" is merely the person who establishes a trust. There is nothing inherent in the role of settlor that entails any control of assets once placed into trust, provides any right to possess or use trust assets, or entitles the settlor to any beneficial interest at any future time. How will ATF process a Form 4 in the name of a trust with an identified settlor? Will ATF mechanically read the first twelve words of the proposed regulation, point to the term "settlor" and demand fingerprints, photographs, and certification from a chief law enforcement officer ("CLEO")? Or, will ATF review the trust document and make a determination whether, under the law of the applicable State, the settlor retains the power to "receive" or "possess" the firearm?

Will ATF hire scores of attorneys trained in the trust law of various jurisdictions to make that inquiry (as well as experts in the law of corporations and LLCs)? And, if ATF is to make a case-by-case inquiry into the powers of trust settlors (and other persons associated with the trust), is that determination also included in the fifteen minutes ATF estimates an examiner will review the paperwork of each responsible person?¹¹ See 78 Fed. Reg. at 55022.

2. *Trustee*

The "trustee" is the person who holds legal title to the trust property and who manages it for the purposes specified in the trust. Typically a trustee would have the power to "receive" or "possess" the firearm once it was transferred to the trust. As such, trustees are the individuals associated with a trust who are most properly classified as responsible persons. In trusts specifically drafted to hold NFA firearms and permit for their use, it would be a stretch to classify anyone other than a trustee as a responsible person.

But what is typical is not invariably the case. A trust may divide responsibilities among multiple co-trustees so that, for example, one trustee manages a family business while another manages a stock portfolio and perhaps a third manages certain personal property that includes one or more NFA firearms. Would ATF argue that all three trustees are responsible persons or only the third? Would it make a difference if State law permitted a trustee to be removed and replaced by majority vote? If the trustees had a fiduciary duty under State law not to diminish the value of trust assets and use of an NFA firearm would involve wear that might require repair, would they still be responsible parties?

¹¹ The question is rhetorical. Unless ATF mechanically applies a test that merely considers the label put on a particular role, it would seem ATF has not considered the cost to review the trust document and applicable State law to ascertain the powers associated with that role under the specific trust document. It would also seem that significant attorney time at a rate above \$30.80 per hour would be required to resolve the matter in many instances.

One distinction appears on the face of the proposed regulation but it is not even clear if it is intentional or simply a further reflection of the failure to consider the myriad variations encountered in trusts. ATF proposes to limit its definition to "any *individual*, including any . . . trustee". It would seem that ATF (intentionally or inadvertently) excluded from its definition of responsible persons a legal entity acting as trustee (or settlor or beneficiary). A corporate trustee (or trust company) would thus not be regulated as a responsible person. Or, will ATF take the position that various officers and directors of the corporate trustee must be treated as responsible persons so that officers and directors of Wells Fargo and other large financial companies that act as corporate trustees will spend countless hours being fingerprinted for every trust they administer that may happen to have an NFA firearm among its assets? Certainly the proposed regulation needs to address this issue more directly.

3. *Successor Trustee*

A "successor trustee" is a person designated to act as trustee if and only if the designated trustees are unable or unwilling to serve. More often than not, a successor trustee never assumes the office of trustee. If ATF's proposed rule were applied as written, calling for a determination of the power of a successor trustee at the time of transfer (rather than in light of some possible, future role), an ordinary successor trustee would not be a responsible person. But will ATF process a Form 4 without fingerprint cards, photographs, and a CLEO certification from a successor trustee?

It makes no more sense to require a successor trustee to qualify as a responsible person in advance of assuming the power of a trustee than it would to have to require Henry Kissinger to have been born in the United States in order to serve as Secretary of State, on the off chance that in the order of succession he might become President. To alleviate any problems in

administering the regulations, ATF should revise its proposed rule to *expressly* exclude successor trustees from the class of responsible persons until such time as they come to the power of a trustee.

4. *Beneficiary*

The beneficiary of a trust is the person for whom the trustee manages the trust assets.¹² During the term of the trust there is nothing inherent in the role of beneficiary that would grant the power to transfer or possess a NFA firearm held by the trust.

A beneficiary may only ever have the right to income generated by the trust without ever being entitled to the underlying assets generating the income. Or, a beneficiary may be entitled to receive all or a portion of the trust assets (including any NFA firearm) at some future date or upon some contingency. A typical arrangement might hold NFA firearms in trust during the lifetime of the settlor to be distributed to beneficiaries upon the settlor's death. In that event, during the lifetime of the settlor, no beneficiary has the right to possess or transfer any NFA firearms held by the trust. Such beneficiaries do not fit the definition of responsible parties in the proposed rule.

The absurdity of treating every beneficiary as a responsible person is illustrated by comparing the situation to that of a decedent's estate. If the rule regarding "responsible persons" of a trust were applied when an individual executed a Will, all those designated to receive personal property would be subject to fingerprinting, photographs, and a CLEO certification

¹² The proposed rule interjects added confusion through its use of the term "beneficiary" in connection with an estate. *See* 78 Fed. Reg. at 55028 (proposed rule § 479.90). Under a Will, a person receiving a gift of personal property receives a "bequest" while a person receiving a gift of real property is a "devisee." If the bequest is denominated in cash value rather than particular property, the recipient is a "legatee." If no Will is present and the estate is distributed under intestate succession, those receiving property are the decedent's "heirs". If ATF means for a distribution to trust beneficiaries upon the death of the settlor to be governed by this provision, some additional cross-reference is needed rather than simple use of the term beneficiary.

even though the individual executing the Will was twenty-five years old and in good health. By the same logic, a twenty-five year old without a valid Will might be required to have his spouse, children, or parents undergo the process due to the mere possibility that he could die intestate.

ATF does not advance such an absurd arrangement with respect to a decedent's estate (or with respect to an individual applicant). What is missing, however, is ATF's explanation of why the same approach is not applicable with respect to beneficiaries under a trust. This internal inconsistency in the proposed rule reflects a fundamental misunderstanding of the varied uses of trusts and the powers associated with the different roles created by a trust.

5. *Contingent Beneficiary*

The contingent beneficiary of a trust is even further removed from control of trust assets than an ordinary beneficiary. Typically, a contingent beneficiary only advances to the role of beneficiary if the ordinary beneficiary predeceases the vesting of trust assets for purposes of distribution. In the case of a simple trust designed to hold NFA firearms during the life of the settlor and to distribute them upon his death, only if the ordinary beneficiary died before the settlor would the contingent beneficiary stand to receive trust assets. In such an arrangement, as long as the ordinary beneficiary lives the contingent beneficiary has nothing more than a mere expectancy. And as long as the settlor lives neither the ordinary beneficiary nor the contingent beneficiary have any right to receive or possess any NFA firearms held in the trust.

* * *

As the foregoing review of the roles associated with a trust should indicate, the Notice of Proposed Rulemaking is flawed in at least one of two respects. If the definition of responsible person with respect to trusts were applied so as to turn on the labels associated with different roles, one is left to wonder how a supposedly random survey of documents establishing legal

entities revealed an average of only two individuals per legal entity. Either ATF excluded all but trustees in conducting its count (and so should rewrite the description of responsible person more narrowly) or ATF excluded major costs associated with the proposed rule. Major costs underestimated by ATF would be attributable to not counting beneficiaries, successor trustees, and others as responsible persons as well as the time spent to ascertain which settlors, for example, retained powers that might classify them as responsible persons. The definition of responsible person and the average number of responsible persons per legal entity simply cannot be reconciled. Despite this discrepancy, ATF has refused requests by counsel for **David M. Goldman** to produce documents showing the methodology of the purported survey. *See* Exhibit 2.

C. *Trusts Are Extremely Varied*

Not only are trusts adapted to a broad range of purposes and involve individuals in distinctly different roles, the provisions of trust documents vary in pertinent ways. And even where the text of the trust provisions may appear identical, because trusts are creatures of State law and different States may interpret provisions differently, trusts may function differently from one another. ATF does not seem to have considered some of the major variations and how they might influence the need for additional regulatory burdens.

1. *Voluntary or Mandated by Law*

One fundamental divide in trust law distinguishes between trusts a settlor voluntarily establishes and trusts established by operation of law. As noted above, courts have the power to declare a "constructive trust" as a means to do equity between the parties. Where a court (or statute) creates the terms of the trust, there is less indicia that the trust was established to

facilitate the improper transfer of NFA firearms. This situation is one of many where logic dictates less need for intrusive ATF regulation, particularly as it may conflict with a court ruling.

2. *"Testamentary" or "Inter vivos" (or "Living")*

Another distinction may be drawn between trusts that are established by a decedent's Will, on the one hand, and trusts that are established during the lifetime of the settlor, on the other hand. ATF treats this circumstance regarding the creation of a trust as irrelevant. Given the proposed framework for addressing NFA firearms held by a decedent's estate, it is far from clear why a testamentary trust should be subject to more intrusive regulations. To the extent that ATF relies on the fact that a person making a Will would not likely include his own death in some hypothetical plot to transfer a NFA firearm, the same could be said for a testamentary trust.

An *inter vivos* trust (sometimes called a "living trust") is established by the settlor during his lifetime. There is nothing suspicious about creating such a trust but it does lack one additional safeguard against abuse: the element of the settlor's death.

3. *"Revocable" or "Irrevocable"*

Another important distinction that can be drawn between types of trusts refers to the power retained by the settlor. Testamentary trusts are not the only form of trust where the settlor retains no power to alter the trust structure. In an *inter vivos* trust, a settlor may provide that he retains the power for the remainder of his lifetime to revoke, alter, or amend the terms of the trust, including the designation of trustees and beneficiaries. Or, a settlor may surrender such power making the trust irrevocable.

If a trust is irrevocable, it would seem that unless the settlor expressly reserved some particular power with respect to the trust, the settlor would not be a responsible person within the

definition of the proposed rule. Because of the greater surrender of control involved in an irrevocable trust, there is less reason to believe it is designed to permit an improper transfer.

If a trust is revocable, however, the power of beneficiaries would be even further diminished. Beneficiaries would not only lack a currently active power to possess trust assets but they could be removed as beneficiaries so that even any future power to possess trust assets would be speculative.

This distinction illustrates that the one-size-fits-all approach of ATF's proposed rule fails to examine how different types of trusts and different trust structures impact the determination of who actually has the power to receive or possess any NFA firearms held by the trust. The labels of the roles mean very different things depending upon such factors as whether the trust was established *inter vivos* and the settlor retained the power to revoke. And the presence of certain such factors or combination of factors can indicate whether a trust was primarily established for estate planning or tax planning purposes and only incidentally involves a NFA firearm.

4. *Limited in Term or Perpetual*

Most trusts are designed to function for a limited period of time such as the lifespan of the settlor or a surviving spouse, or for a generation or two. Some trusts, however, are designed to last for centuries if not in perpetuity.¹³ Generally speaking, one would expect that the longer the term of a trust the more likely the settlor established the trust primarily for dynastic estate planning purposes and not to facilitate any short term transfer of a NFA firearm. Again, however, ATF seems to treat as identical trusts with vastly different purposes, individuals with vastly different powers with respect to the trust, and trusts of greatly different form and structure.

¹³ The common law Rule Against Perpetuities has been abolished by statute in some jurisdictions while others vastly extend the permitted time through a "wait and see" approach.

5. *General Asset Trust or Firearm-Specific Trust*

Another important distinction that may be drawn between different forms of trusts involves the assets the trust is designed to hold and the actual trust assets. To the extent a trust holds a variety of valuable assets and not simply NFA firearms, there is all the more reason to believe that the trust is *bona fide* and not merely a means to facilitate improper transfers. One cannot draw the converse inference, however, because trusts specifically designed to address issues related to firearms may contain provisions that provide added safeguards. To the extent a trust includes special provisions to address matters relating to possession, transfer, and transportation of NFA firearms, protection against access by prohibited persons, and the like, the trust is *less* susceptible to abuse.

* * *

ATF's estimate that the trust documents it receives only average two responsible persons per trust and only fifteen pages in length demonstrates that ATF did not examine many documents associated with sophisticated estate plans, trusts designed to last for hundreds of years, or even documents containing numerous provisions designed to ensure compliance with the NFA. Trying to impose a regulation designed in another context on such trusts will only cause greater expense and uncertainty.

D. *Many Trusts Include Numerous Specific Safeguards Regarding Firearms*

ATF did not address the adequacy of terms contained in many trusts that are designed specifically to ensure compliance with the regulation of firearms. **David M. Goldman, GunTrustLawyer.com**, and other **Gun Trust Lawyer®** affiliates, have introduced many innovations designed to assure that NFA firearms held in trust are not improperly possessed, transferred, or used. The *inter vivos*, revocable trust includes many safeguards including:

1. *Safeguards with Respect to the Settlor*

Mr. Goldman's standard trust expressly provides for the possibility that the settlor may become ineligible to possess NFA firearms and, in that event, specifically requires a trustee or successor trustee must qualify to possess trust assets both under the NFA and State law. The settlor's power to amend or revoke the trust is expressly limited so that when the trust holds any NFA firearms, no amendment is permitted that would violate the NFA.

2. *Safeguards with Respect to the Trustees*

Mr. Goldman instructs the settlor, in writing, to have each trustee execute a witnessed declaration before the trustee is allowed access to the trust property. The declaration does not simply ask the trustee to signify that he is not a prohibited person; it lists the various bases that could render him prohibited from possessing firearms. In doing so, the declaration requires each trustee to review the criteria. The declaration also contains an agreement that the trustee will not permit any other persons (not authorized by the trust) to use NFA firearms that are trust assets. And the declaration also directs the trustee to review the firearms laws of the applicable State.

Prohibited persons are forbidden to serve as trustees and are deemed to have resigned upon becoming ineligible. If a trustee becomes a prohibited person, the trust requires that he inform the settlor, all current trustees, beneficiaries, and the ATF. He must "immediately" transfer all trust property to another trustee.

The provision permitting trustees to accept additions to the trust following the death of the settlor require the trustees to ascertain that any NFA-regulated firearms have been properly transferred before accepting them. With respect to payments related to the settlor's death, trustees are reminded that they may not sell or distribute NFA-regulated firearms without complying with the applicable laws.

Both of the alternative provisions for termination of the trust expressly require transfer of NFA-regulated firearms prior to termination. And the provision for distribution to beneficiaries upon termination prohibits trustees from distributing NFA firearms to any beneficiary who is a prohibited person.

The provision addressing the removal of trustees requires transfer of NFA firearms to a different trustee *prior* to removal and advises that if the location of the firearm will change to notify ATF on a Form 5320.20. Trustees are prohibited from resigning as long as they possess any trust property subject to regulation under the NFA. The provision dealing with successor trustees requires that all trustees and successor trustees must qualify to possess NFA firearms under state laws and the NFA. Even the provision for a court-appointed trustee specifically advises that only a person qualified under the NFA and State law may be appointed. Trustees are further advised that with respect to NFA firearms, they may not act through an agent using a power of attorney.

Trustees are advised of their obligation to safeguard property including the responsibility to prevent ineligible persons from accessing NFA firearms. The trustee powers of sale, investment, purchase, storage, division of property, and distribution of assets all contain express limitations imposed by the NFA. Additional reminders are included regarding the use of FFLs and the age requirements for trustees when purchasing firearms. Trustees are advised that if the trust holds any NFA firearms and the trust is combined with other trusts, the Goldman trust containing specific safeguards regarding NFA firearms must be the surviving trust.

The provision for distribution of assets upon termination of the trust expressly instructs trustees to ascertain whether any beneficiary is a prohibited person and, if so, to liquidate the

appropriate portion of the trust property so that any distribution to that beneficiary represents only the value of firearms rather than any actual firearms.

Mr. Goldman's standard amendment to a trust for purposes of adding or changing trustees requires each trustee to sign a new declaration that he is not a prohibited person. In addition, that amendment requires each trustee to reaffirm, under oath, that he will resign as trustee if he becomes a prohibited person at any time.

3. *Safeguards with Respect to the Beneficiaries*

The many instructions to the trustees are designed to require that they not make any distribution of a NFA firearm to a beneficiary who is a prohibited person. Nothing in the trust provides a beneficiary the authority to possess or use trust assets prior to distribution.

4. *Additional Safeguards*

Every single page of the sample trust contains a note referencing source material with respect to NFA firearms. In addition, NFA or Title II firearms are addressed thirty-five times in the nineteen pages of the trust document. These frequent reminders ensure that those administering the trust who reference even just one key provision are on notice of the applicable obligations, without having to read the entire document. Moreover, important terms and concepts are defined including the criteria that would render someone a "prohibited person". Defined terms including NFA and ATF further ensure that anyone reading the trust will be familiar with the applicable sources of law. A detailed memorandum accompanies the trust and sets forth additional details regarding the possession, use, transportation, and storage of NFA firearms.

III. ATF's PROPOSED RULE IS UNWORKABLE

A. *ATF Relies Upon a False Premise Regarding CLEO Refusals to Sign*

ATF acknowledges that one of the driving forces that prompted many individuals to establish trusts and legal entities in order to make and acquire NFA firearms has been the refusal of many chief law enforcement officers ("CLEOs") to sign forms. 78 Fed. Reg. at 55017. Rather than eliminate the CLEO certification on forms submitted by *individuals*, as ATF repeatedly signaled was its intent,¹⁴ however, the proposed rule would extend the certification requirement to forms submitted by legal entities thereby compounding the problem. Moreover, ATF does not merely propose that a designated person obtain CLEO certification on behalf of the legal entity, the proposed rule would require each and every "responsible person" to obtain CLEO certification. The only way ATF avoided the recognition that such a proposal would effectively preclude individuals in many jurisdictions from making or obtaining firearms that both Congress and the respective State legislature determined are appropriate for private ownership -- either as an individual or now in connection with a trust or other legal entity -- was to suggest CLEOs had not signed in the past due to concern about civil liability and a rephrasing of the certification would now produce a different result. *Id.*

¹⁴ 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.

In October 2012, ATF published that description and indicated that it contemplated publishing a NPR in July 2013. In October 2011, ATF indicated the NPR was scheduled for May 2012.

ATF purportedly based its conclusion on the reason why CLEOs do not sign forms with the current language on "numerous statements from chiefs of police, sheriffs, and other CLEOs expressing discomfort with the portion of the certificate that requires them to state that they have no information to suggest that the individual will use the firearm for other than lawful purposes." *Id.* Once again, however, ATF has refused to subject the referenced statements to public scrutiny. Requests by counsel for **David M. Goldman** that ATF place such documents in the rulemaking docket or provide them in response to a Freedom of Information Act request have been denied. *See* Exhibit 2. Contrary to ATF's unsupported assertion, numerous public comments in this proceeding document in detail the refusal of CLEOs to sign the certificate for entirely different reasons so that any change in wording cannot reasonably be expected to produce a different result.

1. *Many CLEOs Oppose Civilians Having Firearms*

It is clear that many CLEOs refuse to sign forms to make or acquire NFA firearms because they simply reject the judgment of Congress and the respective State legislature that private citizens should own firearms. Or, to the extent many refuse to sign out of concern for liability, it is clear they are speaking of political, not civil, liability that a change in phrasing will do nothing to eliminate.

Public comments on this issue are numerous and specific, with some including quotes, copies of correspondence, and newspaper reports that document the rationale of the CLEOs involved.

- Michael F. Gallo [0992] directly quoted his sheriff's refusal and described his encounters with other CLEOs who would not sign either because they did not want civilians in their jurisdiction to have firearms or because of concern for political liability.

- Stuart Fleming [0993] identified the year and names the sheriff and chief of police who refused to sign his forms and the reasons they provided. He attached copies of e-mails reflecting their position.
- The Texas Marksmen [0994] identified by name and jurisdiction two CLEOs who refused to sign forms and the reasons they provided.
- Thomas F. Braddock, Jr. [_____] ¹⁵ not only named and quoted his sheriff, he included correspondence with officials regarding the encounter, and quoted from published news accounts in which the CLEO acknowledged his reasons for "never" signing forms for NFA firearms.

Many other comments in the docket noted similar encounters that simply demonstrate that ATF relied upon a false premise in retaining and expanding the CLEO certification requirement. *E.g.*, 0040, 0042, 0048, 0052, 0061, 0064, 0074, 0075, 0083, 0085, 0086, 0087, 0104, 0115, 0122, 0125, 0127, 0132, 0137, 0138, 0156, 0162, 0165, 0171. "CLEOs refuse to sign due to politics, not for fear of liability; enough said." [0002]

I live in a county in Kansas where our CLEO is opposed to the possession of Class III items by civilians. He simply will not approve them, for anyone. I am a lawyer, a CCH licensee, a CCH instructor, among other things. That my CLEO should be given the power to deny me the right to own a particular type of weapon because of his political persuasion is, simply, just not right. [0009]

"This allows anti-gun sheriffs and police chiefs to block ownership of NFA weapons just because they don't like them." [0020] *See also* 0115, 0120, 0128. Some CLEOs "won't sign off on the form 4's because 'they don't think you should have it.' That is the exact quote I got my local CLEO. He is an anti-gun police chief and doesn't want anyone owning these items when it is perfectly legal to do so in my state." [0065]

One attorney who prepares legal entities for his clients explained:

. . . A vast majority of my clients are simply enthusiasts and collectors that have grown weary of being stonewalled by a CLEO

¹⁵ Mr. Braddock's comment, although submitted to ATF in September, has not yet been placed in the docket or assigned an identifying number. A copy of his comment is attached as Exhibit 4.

with whom they have fundamental disagreements on public policy related to the possession of firearms (and items regulated by the NFA in particular). In short, although they are not legally disqualified from owning an item regulated by the NFA, they are effectively prohibited from obtaining one because local law enforcement is uncooperative.

To change the wording of the CLEO certification would accomplish nothing. The purpose of a Form 1, Form 4, or Form 5 is to permit an individual to create an item regulated by the NFA or to permit that person to lawfully acquire one. If possession of such items by a civilian is disfavored by a CLEO, they will persist refusing to execute these certifications. [0111]

Other comments suggested that the CLEO certification requirement was misused by CLEOs for improper purposes such as "the ability of CLEOs to demand campaign donations or favors in exchange for signatures on ATF Forms." [0054] *See also* 0157, 0165. Law-abiding citizens will be subjected to "inevitable cronyism and abuse by local law enforcement officials" and be left " at the mercy or whim of [CLEOs] in order to exercise their constitutional rights." [0123]

2. *Some CLEOs Do Not Sign Because of Limited Resources*

There are also documented cases of CLEOs who will not sign forms to make or transfer NFA firearms because of the burden it places on the limited resources of their agencies. **David M. Goldman** is aware of one such example in Florida where he was asked to comment on the situation. The sheriff of St. Johns County had for years signed forms but when the volume of work became so great that he anticipated needing to task a second officer to handle background checks for NFA certifications, he decided it was time to make a change. By a posting on the sheriff's Facebook page he encouraged individuals seeking to make or acquire NFA firearms to establish a trust so as to alleviate the burden on his agency. *See* Exhibit 5. In light of this

rulemaking and the large number of additional certifications it would require, the St. Johns County situation was recently revisited in an article in the *Wall Street Journal*. See Exhibit 6.

That example is not unique as is demonstrated by comments filed in this proceeding. Craig Scott [1002] observed that the new sheriff for Harris County, unlike his predecessors, at least held out the hope that he might approve forms, provided that he could impose yet additional requirements upon owners of NFA firearms. The newspaper story Mr. Scott attached confirmed that because previous administrations had refused to process requests the new sheriff starts with a backlog of hundreds of applications. If the proposed rule is promulgated all the applications that previously would have avoided the signature requirement will be added to that backlog and given the number of responsible persons per legal entity, a substantial new burden will fall upon the department.

Additional comments expressed concern with the costs the proposed rule would place on CLEOs. *E.g.*, 0002, 0012, 0030, 0061, 0143, 0187, 0191, 0194, 0221, 0222, 0223, 0224, 0378, 0467. For CLEOs to "even attempt to process the volume of applications by responsible parties, seeking to purchase a suppressor for example which is legal for hunting in the State of Texas, they would be neglecting their primary duties of law enforcement and the pursuit of criminals." [0006]

3. *The Proposed New Certification*

Because ATF relied on a false premise as to the reason CLEOs do not currently sign forms, its proposed change in the wording of the certification is not likely to prompt many CLEOs to change their approach to the process. Worse than that, however, the new certification may actually make it less likely some CLEOs will be willing to sign forms.

Is a CLEO who does not fingerprint and photograph a responsible person associated with a legal entity likely to certify that he "is satisfied that the fingerprints and photographs accompanying the application are those of the applicant"? 78 Fed. Reg. at 55018. If not, then counting judges and prosecutors as CLEOs hypothetically available to sign forms -- when they lack the facilities to take fingerprints, for example -- is misleading. Is a CLEO likely to certify that a photograph has been taken in the past year?

There is no reason to expect a CLEO will be more willing to certify that he has "no information indicating that possession of the firearm by the [applicant] would be in violation of state or local law" than he would be to certify that he has no reason to believe the applicant "will use the firearm for other than lawful purposes." There is no evidence ATF consulted with law enforcement officials or organizations to ascertain whether they perceived any significant distinction between the two statements.

* * *

Instead of changing the text of the certification in a manner that would accomplish nothing given the actual reasons CLEOs refuse to sign and expanding that requirement to apply to all responsible persons of legal entities, ATF should completely eliminate the certification requirement. Many comments provided numerous additional reasons for ATF to do so. *E.g.*, 0031, 0085, 0086, 0111, 0116, 0125, 0129, 0134, 0136, 0140, 0144, 0145, 0148, 0165, 0172. One commenter observed: "I believe if the requirement for a CLEO's signature was removed, 98%, or more, of the transfers to legal entities would stop." [0171] Even law enforcement officers advocated the complete elimination of the CLEO certification requirement. *E.g.*, 0140.

B. *The Proposed Rule Places an Unreasonable Burden on Lawful Owners of Firearms and CLEOs*

The combination of extending the CLEO certification requirement to all responsible persons, with respect to all legal entities, within the limited timeframe proposed is entirely impractical. ATF suggests permitting a thirty day period within which a responsible person newly associated with the legal entity must file a Form 5320.23 together with fingerprint cards, photographs, and the CLEO certification.

A few common situations reveal the problems with requiring CLEO certification in that context. Consider the situation of a law-abiding citizen who established a trust and, under current law, acquired one or more registered NFA firearms when he is confronted with any of the following events:

- He gets married and the CLEO will not sign the form for his new wife, simply because the CLEO does not believe private citizens should have firearms. Can an arbitrary act of a local official prohibit a married couple from sharing property?
- Due to physical limitations, his elderly mother moves into his home and, concerned with the doctrine of constructive possession, he seeks to add her to the trust. Again, the CLEO refuses for a reason entirely unrelated to the background of the individuals involved. Must both mother and son be at the mercy of law enforcement officers with respect to liability for constructive possession?
- His son turns twenty-one and he wants to add him as a trustee so that the son can lawfully use the suppressor when hunting. Although the son is not a prohibited person and is qualified under law to own NFA firearms, the CLEO refuses to sign the form.
- He has an old friend visit from out of State and names her as an additional trustee so they can go hunting together. The local CLEO will not sign directing the visitor to get her home CLEO to do so. After the hunting trip she returns to her home State where NFA firearms are not legal for private use. No CLEO will sign the form within the permitted thirty days. Are both persons now retroactively guilty of an improper transfer for the

- hunting trip? If the settlor removes his friend as trustee within the thirty days is a form even required?
- His wife is a co-trustee but she is in the military and is deployed overseas at a time when he wants to purchase a new suppressor. There is no "CLEO" available to her. Is he precluded from making the purchase because she is listed as a trustee even though she is thousands of miles away and the couple's local CLEO would willingly sign?
 - He names all his minor children as beneficiaries of the trust, only to receive trust assets after his death when the youngest reaches age twenty-five. The trust specifically instructs trustees not to distribute any firearms held by the trust to any prohibited person. He is living and his children are ages seven, four, and two. Which, if any, of his children need to get a CLEO certification, fingerprints, and photographs if he is submitting a form now to acquire a new NFA firearm?
 - He wants to acquire a new NFA firearm for the trust. One of his co-trustees is in a coma (or otherwise physically incapacitated) for a presently indeterminate length of time. Does the co-trustee's physical condition remove him from the definition of a responsible person? If not, must the settlor somehow obtain a CLEO certification for the co-trustee?
 - He is the patriarch of a large family. The trust assets include several NFA firearms that are stored at the family's hunting cabin in a jurisdiction where they are permitted. All the children and grandchildren are trustees, as are their spouses. All the great-grandchildren are conditional beneficiaries. The extended family of thirty is dispersed across four States and nine counties. Some of the family members live in States that do not permit NFA firearms and, consequently, are unable to obtain CLEO certification. Is the trust precluded from acquiring a new NFA firearm that will be kept at the cabin because one CLEO a thousand miles away refuses to sign for one of the grandchildren?

As these situations illustrate, the proposed regulation is not well thought out. It creates traps for the people who seek to legally obtain and register firearms. It interferes in the operation of trusts that have added safeguards to ameliorate any concern of misuse. It needlessly multiplies costs for law-abiding citizens.

C. The Consequence of Retaining and Extending a CLEO Certification Requirement

As hundreds of comments already filed in this proceeding make clear, the consequence of retaining CLEO certifications for individuals is that individuals will continue to turn to legal

entities as a way to their rights to make, acquire, and possess firearms that both Congress and the respective State legislature have determined are appropriate for private citizens. The result of extending the CLEO certification requirement to apply to 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 State legislature. A *de facto* ban of NFA firearms is the result.

Some comments suggest that ATF should adopt a regulation that -- if the CLEO certification is retained and expanded -- would require CLEOs to sign forms unless there was a valid reason to deny the application of a particular person. Although needlessly involving CLEOs in the process already imposes burdens upon them, ATF claims that there is no unfunded mandate, presumably because ATF maintains CLEOs have discretion to not act at all. Affirmatively requiring CLEOs to act, as some have suggested, would clearly violate the anti-commandeering principle articulated in *Printz v. United States*, 521U.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 the infringement of Second Amendment rights of individuals that ATF requires to obtain such certification from CLEOs. 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 effectively denies a right that Congress confirmed by statute.¹⁶

¹⁶ Part of the problem might be attributable to a 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> (emphasis added). It describes the \$200 tax imposed by the NFA as having been designed "to discourage *or eliminate* transactions in these firearms." *Id.*

IV. ATF UNDERESTIMATES THE COST OF ITS PROPOSED RULE

Whatever odd sampling methodology ATF used to determine that the documents evidencing a legal entity average fifteen pages in length and that the average number of responsible persons per legal entity is only two is highly suspect. Although counsel for **David M. Goldman** has requested information about the purported sampling that might display selection bias or other explanations for the results, ATF repeatedly has refused to provide any documentation. *See* Exhibit 2. Based on the fact that **Gun Trust Lawyer®** has produced more than 5,000 trusts for its clients, Mr. Goldman can confirm from his own experience what so many public comments have already observed: ATF underestimated the cost of its proposed rule.

A. *Number of Responsible Persons Per Legal Entity*

In Mr. Goldman's experience, trusts typically have one settlor who also acts as a trustee, between three and five co-trustees, and an average of two beneficiaries. Trustees alone then number between four and six regardless of whether ATF narrows its definition of "responsible person" so as to exclude beneficiaries. As a result, the cost per legal entity is at least two or three times higher than ATF estimated for fingerprints, photographs, and time seeking a CLEO signature. If beneficiaries are included, those cost per legal entity are three to four times higher than ATF estimated.

In order to arrive at an average of merely two responsible persons per legal entity by counting only settlors and trustees, for every trust that falls in the range of Mr. Goldman's experience there would need to be *at least* two or four trusts with one person serving both as

(emphasis added). But Congress has never "prohibited" NFA firearms or "eliminated" the ability to 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 with the enactment of the Firearms Owners' Protection Act, Pub. L. 99-308, 100 Stat. 449 (1986).

settlor and sole trustee.¹⁷ If beneficiaries were included in the definition of responsible persons, then for every trust that falls in the range of Mr. Goldman's experience there would need to be *at least* five or seven trusts with one person serving in all three roles of settlor, trustee, and beneficiary,¹⁸ an arrangement that seems rather unlikely. As a result, it would seem ATF's estimate of two persons per legal entity is very low, which many public comments already filed in this proceeding have reported. *E.g.*, 0019 (six); 0128 (five); 0456 (four to eight). And ATF counted only a fraction of the costs per legal entity. *E.g.*, 0062.

The alternative explanation is that ATF is flooded with legal entities that have only one individual serving in all the various roles. If that is the case, one has to question the legitimacy of ATF's concern as the only individual who would be permitted to take possession of a firearm for the legal entity would have to undergo a NICS check in connection with the Form 4473. Moreover, if legal entities involving only one individual were the source of ATF's concern, the proposed rule is grossly overbroad and would seem to create greater problems when applied in any other context. As the number of responsible persons per legal entity increase so do all the complications related to persons living in different jurisdictions with different CLEOs and different laws.

B. *Length of Documentation of the Existence and Validity of Legal Entities*

ATF proposes to require that when applications are made in the name of a trust, the application must include "declarations of trust with any trust schedules, attachments, exhibits, and enclosures." 78 Fed. Reg. at 55021. Based on another supposedly random sampling of

¹⁷ 1 trust with 4 people + 2 trusts with 1 person = 3 trusts with 6 people = 6/3 people per trust -- or -- 1 trust with 6 people + 4 trusts with 1 person = 5 trusts with 10 people = 10/5 people per trust.

¹⁸ 1 trust with 6 people + 4 trusts with 1 person = 5 trusts with 10 people = 10/5 people per trust -- or -- 1 trust with 8 people + 6 trusts with 1 person = 7 trusts with 14 people = 14/7 people per trust.

"documentation evidencing the existence and validity of the entity," ATF arrived at the conclusion that such documentation averaged fifteen pages in length.¹⁹ *Id.*

Mr. Goldman can confirm that the sample revocable trust used by **Gun Trust Lawyer®** is perhaps twice the length ATF estimated. The trust document itself is nineteen pages, not counting exhibits and other attachments. Attachments include a page for assignment of property and another for recording contributions. Witnessed statements from each trustee in addition to the settlor add another two pages per trustee: the signed "Trustee Declaration" and the notarized signature page. As noted above, in Mr. Goldman's experience trustees alone number between four and six. With the correct signature pages for four trustees, the sample revocable trust runs to twenty-five pages, not counting a Certification of Trust, an explanatory memorandum, or other matter potentially beyond the scope of ATF's proposed rule. At six trustees, the sample trust comprises twenty-nine pages, just shy of twice ATF's estimate.

The cost of copying an additional fifteen pages may not seem like very much but the difference is significant in two respects. *First*, as with virtually every other cost the proposed rule would impose, ATF seems to have seriously underestimated the burden that would be placed on law-abiding citizens. *Second*, for fifteen pages to represent the *average* length of documentation submitted to ATF then for every trust in the range of twenty-five pages in length there must be another of only five pages or so in length. It would seem likely ATF reviewed few, if any, of the longer trusts when formulating its proposed rule. Although the longer trust likely has important provisions designed to ensure firearms registered to it are at least as safe as

¹⁹ ATF offers no explanation for the varying size of its samples. When computing the average number of persons per legal entity, ATF reviewed 39 applications, 78 Fed. Reg. at 55020, surely an unusual sample size, but when computing the average length of documentation ATF reviewed 50 applications, *id.* at 55021. In the absence of access to the methodology employed by ATF, the unexplained difference strongly suggests sampling bias.

firearms registered to an individual, ATF would impose the same additional burdens despite different levels of safeguards.

C. *Omitted Costs*

There are several major categories of costs that ATF failed to consider altogether. At least two of those costs must be considered before imposition of ATF's proposed rule.

1. *Lost Tax Revenue*

As many comments already filed in this proceeding have observed, ATF failed to account for additional significant costs such as the lost taxes from fewer NFA transfers and on the income lost on the sale of NFA firearms. *E.g.*, 0002, 0030, 0034, 0058, 0061, 0236. ATF estimated it received 40,565 ATF Forms 1 or 4 submitted in 2012 for non-FFL legal entities. *See* 78 Fed. Reg. at 55,021. If even half that number of applications would not be submitted due to the added processing burdens of the proposed regulations, that would seem to represent an annual loss of more than \$8 million per year in stamp tax alone, in addition to the lost income taxes on manufacturers, distributors, and dealers. *See also* 0290, 0355.

For every Form 1 that ATF's proposed rule would discourage, the U.S. Treasury will not receive a \$200 tax payment. For every Form 4 that is not submitted because of added burdens imposed by the proposed rule, a \$200 tax payment (\$5 in the case of Any Other Weapons) will be lost. With 40,700 applications submitted by legal entities in 2012, many of which were established precisely because an individual could not obtain a CLEO certification, if even half that number were not submitted because a responsible person associated with the legal entity could not obtain CLEO certification, more than \$8 million in tax revenue would be lost.

To the extent a decline in business would cause small FFL dealers and custom manufacturers to cease dealing in NFA firearms, the U.S. Treasury would forego an annual

payment of at least \$500 as they surrendered Special Occupational Taxpayer ("SOT") status. Every small custom manufacturer that determines it is no longer profitable to continue in business would cease annual payments of at least \$2,500 to the U.S. Treasury under the International Traffic in Arms Regulations ("ITAR"). *See* 22 C.F.R. § 122.3. Less directly, there would be a loss in income tax revenue both for the entity operating the FFL as well as for the individual owners and employees. All those sums would be in addition to the \$8 million lost on NFA tax stamps.

2. *Hearing Loss*

As many comments already filed in this proceeding make clear, there are many citizens who encounter the restrictions of the NFA solely because they seek to make or acquire suppressors (or "silencers") for hearing protection while engaged in lawful, recreational shooting. The overwhelming majority of States -- thirty-nine in all -- agree with the judgment of Congress that suppressors should be available for private citizens. *See* Exhibit 7. Indeed, thirty-one States authorize the use of suppressors in at least some forms of hunting. *Id.* Because hunters need to maintain situational awareness with respect to approaching prey and other hunters,²⁰ suppressors may be the only practicable form of hearing protection.

In many, if not most, self-defense situations suppressors would also be the only form of hearing protection available. The reverberations from a firearm discharge in the enclosed

²⁰ These considerations may explain the findings that hunters consistently used hearing protection less than 5% of the time during hunting activities but were more likely to wear hearing protection while target shooting. Gregory A. Flamme, et al., "Auditory Risk to Unprotected Bystanders Exposed to Firearm Noise," 22 *J. Am. Acad. Audiology* 93 (2011) (attached as Exhibit 8).

quarters of a home would add to the need for hearing protection.²¹ Yet, the need to hear an intruder or communicate with family members added to the urgency of the situation would make resorting to ear protectors impracticable.

The noise of unsuppressed firearm discharge is one of the leading causes of noise-induced hearing loss.

The level of impulse noise generated by almost all firearms exceeds the 140 dB peak SPL limit recommended by the Occupational Safety and Health Administration (OSHA) and the National Institute of Safety and Health (NIOSH). Exposure to impulse noise levels in excess of 140 dB SPL can lead to noise-induced hearing loss (NIHL).

Michael Stewart, *supra* note 21, at 40. It is estimated that in the absence of adequate hearing protection, there can be a 7% hearing loss for every five years spent hunting. *Id.* And most individuals seem to significantly underestimate the degree of hearing loss. *Id.* at 46. Even in situations where other forms of hearing protection may be available, medical literature supports the conclusion that suppressors are more effective at hearing protection. Physician Matthew Parker Branch reported the results of his tests in the peer-reviewed *Journal of the American Academy of Otolaryngology -- Head and Neck Surgery Foundation*: "The muzzle-level suppressors studied on these weapons and calibers reduced sound levels well below the likely noise reduction of either earplugs or earmuffs." Exhibit 10. As a safety device it would seem that in virtually any other context regulation would strongly encourage the use of suppressors.

Because ATF's proposed rule would impose obstacles to the making and acquisition of suppressors, it seems undeniable that a significant number of shooters who would prefer to use suppressors as a form of hearing protection will be unable to do so. Over time, the continued

²¹ "Increasing the duration of firearm noise by shooting in an enclosed, reverberant environment increases auditory risk." Michael Stewart, et. al., "Risks Faced by Recreational Firearm Users," *Audiology Today* 38, 40 (Mar.-Apr. 2011) (attached as Exhibit 9).

exposure to the noise will result in permanent hearing loss for many of those shooters. With that hearing loss come substantial medical costs and partial disability resulting in lost productivity. Given the number of hunters alone, those costs likely dwarf all the other costs that would be imposed by the proposed rule.²²

* * *

The underestimated costs and the costs that ATF completely failed to consider combine to outweigh whatever scant *marginal* benefits the proposed rule would generate.

V. ATF HAS IGNORED LESS-INTRUSIVE ALTERNATIVES

While ATF has not demonstrated that there is any problem to be addressed by its proposed rule, as explained in Part I above, whatever concerns ATF may reasonably advance could be addressed by alternatives that impose less cost and involve less intrusion into the affairs of law-abiding citizens.

A. *A More-Nuanced Approach to Legal Entities*

ATF seemingly fails to consider the wide variety of trusts and other legal entities that may be distinguished by differences in purposes and structure. Certainly many, if not most, legal entities have indicia that should alleviate concern that they may be misused to permit improper access to NFA firearms. ATF's one-size-fits-all solution fails to recognize the many variations in the instruments that establish legal entities.

Some instruments include important safeguards that go far to alleviate ATF's stated concern. For example, many trusts add to the existing criminal prohibitions by imposing

²² A study by the National Shooting Sports Foundation concluded that in 2011 there were 14,630,000 paid hunting licensing holders. Total recreational shooters exceed 30 million. In addition to shooters, bystanders are at risk for hearing loss with many firearms generating noise that exceeds the maximum safe level for exposure to even a single discharge. *See* Gregory A. Flamme, *supra* note 20, at 99-101.

fiduciary duties upon the trustees that explicitly require (1) disclosure should any one of the trustees become a prohibited person, (2) automatic resignation as trustee if a person becomes prohibited, (3) prompt surrender of any trust assets held by the individual who became prohibited, (4) action by the other trustees to collect trust assets from the prohibited person, and (5) action by the other trustees to assure the prohibited person does not receive actual possession of any firearms held by the trust. Such provisions also serve the important function of educating the trustees of their continuing obligations long after the trust has acquired a NFA firearm and the trustees have been in place, something that ATF cannot address directly.

ATF has not explained why instruments that contain some combination of these added safeguards do not adequately address its concerns. Inasmuch as ATF proposes to require the submission of the documentation establishing each legal entity, it would seem that a preliminary determination should be made whether a particular legal entity does not incorporate sufficient safeguards before imposing additional regulatory burdens upon that entity.

In sum, because each trust, like each corporation and LLC, is designed to address the particular needs of a given situation under the laws of the specific applicable State, rather than try to impose a uniform mandate on such varied entities, ATF should first determine that those who create and operate a particular legal entity have not taken appropriate safeguards. Only after such a determination should ATF impose any sort of default requirements. Such safeguards could include the nature and purpose of the legal entity, the presence of a corporate trustee or manager, and specially-designed provisions addressing firearms issues. Even when ATF determined that a particular legal entity should be subject to additional scrutiny, there is no reason to require that everyone associated with the entity be treated as a responsible person.

B. *More Nuanced-Approach with Respect to Responsible Persons*

There are many different roles with respect to trusts, as discussed above, and ATF has not properly distinguished between individuals in those different roles when defining a "responsible person." A great deal of clarification is needed to prevent the definition from being so vague and over-broad as to be unworkable.

One way to appropriately narrow the definition of a "responsible person" can be found in the very context from which ATF seems to borrow the concept. If the concept of a "responsible person" is borrowed from the FFL context for the NFA ownership context, it is likely that many professionals preparing instruments for legal entities will -- just as they do for their FFL clients -- carefully designate one or more responsible persons, imposing special fiduciary duties upon them, perhaps even requiring that they provide a record of fingerprints and photographs, or undergo some sort of periodic background check. The point is that those who best know the particular legal entity and individuals associated with it make the initial determination of who should be designated a responsible person.

Just as every employee of an FFL 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 ATF could require the designated responsible person with respect to a legal entity to take precautions to prevent a prohibited person from gaining access to NFA firearms.

In the case of FFLs, if someone designated as a responsible person on the license becomes prohibited, ATF does not require the FFL to choose between surrendering the license or

divesting itself of ownership of all firearms (which for a FFL would amount to much the same thing). Instead, ATF recognizes that the other individuals named on the license have every incentive to immediately restrict access of the prohibited person so he has no actual possession and to promptly remove him from the license so that he will not even have constructive possession. If such a regime is adequate with respect to retailers of NFA firearms, it is unclear why anything more is required of the end-users.

It should be sufficient for trusts (and other legal entities) to designate one or more responsible persons who would undergo a background check without requiring that everyone associated with the legal entity go through such a process. Simply because some form of background check is appropriate with respect to one or more responsible persons, it does not follow that the check reflected in ATF's proposed rule is appropriate.

C. *More Nuanced Approach with Respect to Background Checks*

ATF's proposed rule fails to consider the different forms of background checks available, creating a false dichotomy between the suggestion that there is no check at all on 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, the availability of NICS has rendered CLEO certification obsolete. ATF concluded otherwise in the preamble to its proposed rule but without providing a reasoned explanation. 78 Fed. Reg. at 55017. ATF acknowledges that even in the absence of a CLEO certification, ATF already has "a fuller picture of any individual than was possible in 1934." *Id.* Rather than treat the existence of a superior system as dispositive, however, ATF speculated -- as one may do with any system of background checks -- that the results "may" be more accurate by adding additional layers of certification. A reasoned explanation, however, requires consideration of the *likelihood* that CLEO certification would identify any proper basis

for denying an application other than the information available through a NICS check. 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.²³ Indeed, even in the context of FFLs, ATF does not require CLEO certification. What is the possible justification for imposing burdens on an end-user of a firearm that ATF does not impose on the dealers of those firearms?

In the event that ATF concludes that, at least in some circumstances, responsible persons must submit fingerprints, it is not clear why the use of physical cards is necessary. Other federal agencies rely upon digital fingerprint technology. Stuart Fleming [0993] described systems used by the Securities & Exchange Commission and the Transportation Security Agency. Together with the use of digital photography, such a step could permit use of eForms.

For those responsible persons with respect to whom ATF determines that a background check is appropriate, it is not clear that every class of NFA firearm requires the same level of scrutiny. The burdens of more-intrusive background checks associated with respect to some firearms may far outweigh the benefits

D. *A More-Nuanced Approach with Respect to NFA-Regulated Firearms*

ATF's proposed rule draws no distinctions among the various classes of "firearms" regulated under the NFA. In other contexts, however, ATF recognizes that a one-size-fits-all approach to regulation is not warranted. For example, ATF only restricts transportation of certain NFA firearms through the use of authorization in response to submission of a Form

²³ To the extent ATF asserts that sometimes, with respect to some jurisdictions, the information in NICS is not "as complete as possible," 78 Fed. Reg. at 55017, ATF (as a component of the Department of Justice) should not impose additional burdens simply due to the fact that another component of the same Department has not fulfilled its mandate.

5320.20 -- machine guns, destructive devices, short-barreled rifles ("SBRs"), and short-barreled shotguns ("SBSs"). *See* 27 C.F.R. § 478.28. The omission of silencers and Any Other Weapons ("AOWs") was not inadvertent. *See* ATF, "When Permission is Required to Move NFA Firearms," FFL Newsletter (Mar. 2013) Vol. 2. ATF should consider a similar approach rather than subject *all* NFA firearms to more burdensome requirements.

The only rationale ever advanced for regulating SBRs and SBSs differently than rifles and shotguns generally has been that the shorter versions were more concealable. But handguns are even more concealable and a simple NICS check is considered sufficient for them. If ATF were to permit legal entities to acquire SBRs and SBSs on a NICS check, a FFL could file an eForm 4 (or eForm 1), the transaction could be processed promptly, and NFA Branch resources could be reallocated to other matters. Given the ease with which a criminal could make his own SBR or SBS by cutting down a long gun, it is difficult to fathom how it is possible to justify an imposition greater than a NICS check on a legal purchaser of a firearm that will be registered with ATF.

Suppressors (or "silencers") are important safety devices that ATF should subject to minimal regulation within the NFA framework. Because they are subject to the NFA, they are required to be registered with ATF. Beyond collecting the information currently required when a legal entity submits a Form 4 (or Form 1) and requiring a NICS check, however, there is no justification for imposing the substantial costs associated with increased hearing loss. Indeed, by decreasing the lengthy wait time by permitting purchases of suppressors to take advantage of the eForms and NICS systems, ATF would not only free NFA Branch resources to deal with other matters, a likely increase in sales would generate additional tax revenue. Avoiding the

imposition of additional regulatory burdens with respect to the making and acquisition of suppressors would also alleviate the largest category of costs associated with the proposed rule.

* * *

If ATF proceeds to formulate a final rule in this matter, it must seriously consider the differences among the entities and firearms subject to regulation.

Respectfully submitted,

Thomas H. Odom
Firearms Industry Consulting Group,
a Division of Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, PA 19505
888-313-0416

October __, 2013

Counsel for David M. Goldman

LIST OF EXHIBITS

- Exhibit 1: Senator Diane Feinstein summary of proposed legislation
http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=10993387-5d4d-4680-a872-ac8ca4359119
- Exhibit 2: FICG Letter to ATF dated Oct. 3, 2013 (and materials referenced therein)
- A -- FICG letter to ATF dated Sept. 1, 2013
 - B -- ATF e-Mail Response to FICG dated Sept. 4, 2013
 - C -- Rep. David M. Maloney, Sr. letter to ATF dated Sept. 6, 2013
 - D -- FICG letter to ATF dated Sept. 9, 2013
 - E -- FICG letter to ATF dated Sept. 10, 2013
 - F -- FICG letter to ATF dated Sept. 11, 2013
- Exhibit 3: Memorandum from Polly Trottenburg & Robert S. Rivkin to Secretarial Officers & Modal Administrators, "Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses" (Feb. 28, 2013)
- Exhibit 4: Comment of Thomas J. Braddock, Jr. (and materials referenced therein)
- A -- Letter to Luzerne County District Attorney, Stephanie Salavantis (Apr. 22, 2013)
 - B -- Letter to Pennsylvania Attorney General, Kathleen G. Kane (May 22, 2013)
 - C -- Letter from Chief Deputy Attorney General (Office of Civil Law), Robert A. Mulle (July 1, 2013)
- Exhibit 5: St. Johns County Sheriff Facebook Posting (July 11, 2012)
- Exhibit 6: "Silencers Loophole Targeted for Closure," *Wall Street Journal*, Oct. 3, 2013
- Exhibit 7: Silencer Legality & Ownership Map,
<http://americansilencerassociation.com/education/>
- Exhibit 8: Gregory A. Flamme, et. al., "Auditory Risk to Unprotected Bystanders Exposed to Firearm Noise," *22 J. Am. Acad. Audiology* 93 (2011).
- Exhibit 9: Michael Stewart, et. al., "Risks Faced by Recreational Firearm Users," *Audiology Today* 38, 40 (Mar.-Apr. 2011).
- Exhibit 10: Article by Matthew Parker Branch, M.D.