Bureau of Alcohol, Tobacco, Firearms, and Explosives

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

Firearms Industry Consulting Group's
Comments in Opposition to Proposed Rule ATF 41P

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.

The Firearms Industry Consulting Group ("FICG"), a division of Prince Law Offices, P.C., represents numerous individuals, gun clubs, and Federal Firearms Licensees ("FFLs") in Pennsylvania with regard to State law issues. Furthermore, in relation to federal issues, FICG represents numerous FFLs across the United States in all matters relating to firearms. FICG actively works to defend, preserve, and protect constitutional and statutory rights of firearms owners, including through Article I, Section 21 of the Pennsylvania Constitution and the Second Amendment to the United States Constitution. In this comment, FICG represents the interests of its respective clients.

FICG's purpose is:

> To provide legal representation in the protection and defense of the Constitutions of Pennsylvania and the United States, especially with reference to the inalienable right of the individual

> citizen guaranteed by such Constitutions to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.

FICG's interest in this matter stems from its representation of numerous Pennsylvania citizens and FFLs nationwide who seek to make or acquire NFA firearms. In response to the NPR, FICG offers this public comment for consideration with respect to the proposed rule.

With the exception of ATF's proposal to add new section 479.90 with respect to decedents' estates, FICG opposes the remainder of the proposed rulemaking for the reasons set forth below and in the Exhibits to this Comment incorporated herein by reference.

I. PROCEDURAL IRREGULARITIES HAVE DENIED INTERESTED PERSONS A MEANINGFUL OPPORTUNITY TO COMMENT ON THE PROPOSED RULEMAKING

ATF has repeatedly violated the basic obligations designed to permit meaningful public participation in this rulemaking proceeding. Despite efforts by FICG and other interested persons to encourage compliance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501-559, other statutory provisions governing rulemaking, and fundamental due process, ATF has persisted on a course that ensures a waste of time and resources by all involved. It should be clear that ATF cannot proceed to promulgate a final rule without publishing a proper NPR and providing the necessary opportunity for *meaningful* public comment.

A. *ATF Failed to Make Available the Underlying Studies and Other Information Upon Which It Purportedly Relied in Formulating its Proposed Rule*

On August 29, 2013, a draft of the NPR signed by the Attorney General was posted on the Website of the Department of Justice shortly after it was announced that a draft had been

submitted for review by the Office of Information and Regulatory Affairs ("OIRA"). The NPR published on September 9, 2013, was identical to the August 29 draft with respect to expressly indicating that the proposal rested on certain studies and other underlying information. Once the August 29 draft was published, FICG advised ATF that none of the referenced materials had yet been placed in the rulemaking docket and requested that "[i]n order to ensure an adequate opportunity to comment on the ATF proposal, [we] respectfully request that you immediately make available the following documents together with any others upon which ATF relied in preparing the proposal." *See* Exhibit 1.

Specifically, FICG requested seven categories of information referenced in the NPR:

1. The National Firearms Act Trade and Collectors Association ("NFATCA") petition for rulemaking dated December 3, 2009, together with other documents exchanged with NFATCA or disclosing consultations with NFATCA on the subjects on the petition.

2. The "numerous statements" that ATF has received from Chief Law Enforcement Officers ("CLEOs") regarding purported reasons CLEOs decline to sign applications.

3. Documents regarding the denial of an unidentified person's application for transfer of a silencer and that individual's subsequent effort to procure transfer of the same silencer to a trust as to which the individual was the settlor.

4. Documents regarding the situation in Texas in which ATF became aware that "a member of a LLC was an illegal alien, living in the United States under an assumed name, and had a felony warrant outstanding" at the time "the LLC had 19 firearms registered to it".

5. Documents regarding the situation in Tennessee in which "ATF became aware of applications submitted to transfer two NFA firearms to a trust in which one of the trustees was a convicted felon."

6. Documents demonstrating the basis for ATF's "estimate" that, on average, legal entities have only two responsible persons, including the methodology for the survey of thirty-nine applications.

7. Documents reflecting the methodology for the selection of the sample upon which ATF based the estimate of an average of only 15 pages per submission for the proof of the existence and validity of a legal entity (*e.g.*, partnership agreements, articles of incorporation and corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures).

By e-mail dated September 4, 2013, Brenda R. Friend, the ATF contact person identified in the NPR, declined to make public any of the requested information. *See* Exhibit 2. Out of an abundance of caution, once the NPR was published, on September 9, 2013, FICG renewed its request in the event the previous denial had been premised on the request being premature. *See* Exhibit 3.

Despite these requests, ATF still declined to make public any of the requested information.[1] ATF did not merely fail to post materials to the eRulemaking site, none of the information was available in ATF's reading room as well. *See* Exhibit 4. Although ATF's Ms. Friend indicated this request would be referred for processing under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and FICG requested expedited processing, *see* Exhibit 5, the statutory time period expired with no response from ATF and FICG faxed its administrative appeal of the constructive denial to the Department of Justice ("DOJ"). *See* Exhibit 6. FICG submitted the comment it drafted on behalf of David M. Goldman (1899) previewing several of the arguments premised on ATF's failure to provide the information necessary to permit meaningful comment on the proposed rule. Only the following week did ATF respond, stating: "Your request is granted." Exhibit 7. But not a single responsive document was provided, only the NPR itself. *Id.* And despite notifying DOJ of that fact and that, consequently, the

[1] ATF also failed to include either of FICG's requests or Ms. Friend's reply in the rulemaking docket. In so doing, ATF concealed from interested members of the public the fact that underlying documents had been requested and that ATF declined to make them available. Omitting these items that clearly were identified as relating to this proceeding also raises the question of what other pertinent materials may have been excluded. *See infra* Part I(F)(1).

administrative appeal had not been mooted, *see* Exhibit 8, after DOJ's receipt of that notice, it inexplicable asserted: "Because ATF responded to your request, your appeal from ATF's failure to respond to your request is moot." Exhibit 9.[2] After counsel invested significant time preparing a complaint seeking judicial review of the matter, DOJ then notified FICG in a letter dated November 13 that it, *sua sponte*, had docketed a *new* administrative appeal as of November 5, *see* Exhibit 10, conveniently delaying the time for filing of a court action until just days before the comment period will expire. On December 5, the new appeal period expired without any further communication from DOJ. As a result ATF still has provided none of the documents underlying the NPR either in the docket or in response to the FOIA request.

It has long been understood that "[t]he process of notice and comment rule-making is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982). "If the [NPR] fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Id*. at 530. Providing access to materials like FICG requested has long been recognized as essential to a meaningful opportunity to participate in the rulemaking process. Where, as here, ATF acknowledges in the NPR that "this rulemaking *is in response* to a petition for rulemaking," 78

[2] Even counting from Ms. Friend's September 4 e-mail acknowledgment, the 20-day period for responding to a FOIA request had expired in ample time for the administrative appeal received by DOJ on October 22 to have been ripe. Mr. Goldman's comment was received by ATF on October 21. It was not until a week later when, by letter dated October 28, ATF purported to grant the request. ATF sent its response by regular mail that was received by FICG on October 30. That same day, FICG notified DOJ by e-mail and letter that ATF's purported grant of the FOIA request provided *none* of the requested documents and did *not* moot the *already-pending* appeal. The following day, without explanation, DOJ simply stated that the appeal was moot.

Fed. Reg. at 55,020 (emphasis added), and devotes six columns of discussion to the petition for rulemaking, 78 Fed. Reg. at 55,016 to 55,017, it is difficult to comprehend how ATF can refuse to make that petition available to persons interested in commenting on the proposed rule.[3]

The APA "'requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.'" *American Medical Ass'n, v. Reno,* 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (quoting *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)). In order to ensure that rules are not promulgated on the basis of data that to a "critical degree, is known only to the agency," the agency must make available the "methodology" of tests and surveys relied upon in the NPR. *Portland Cement Ass'n v. Ruckelshaus,* 486 F.3d 375, 392-93 (D.C. Cir. 1973).

An agency commits serious procedural error when it fails to reveal the basis for a proposed rule in time to allow for meaningful commentary. *Connecticut Power & Light,* 673 F.2d at 530-31. The notice and comment requirements

> are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

[3] More than a month after FICG requested a copy of the NFATCA petition from ATF, NFATCA purported to post the petition on its Website. There are reasons to question the authenticity of the posted document that can be addressed only by ATF's production of the petition it received for purposes of comparison. If, indeed, the posted document is authentic, it is difficult to conceive why ATF resists releasing the original petition. On the other hand, the document posted by NFATCA is unsigned, undated, contains formatting and grammatical errors, misstatements of substantive law, and is so cursory as to raise questions about ATF's characterization of it in the NPR. And, despite ATF's statement that the petition was received on December 3, 2009, 78 Fed. Reg. at 55016, the document posted by NFATCA appears to have been drafted *prior to* the April 2009 edition of the *National Firearms Act Handbook, see infra* note 7 and accompanying text, suggesting it may be an outline or early draft of the final petition.

International Union, United Mine Workers of America v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

In this rulemaking proceeding, ATF not only refused to make available the requested rulemaking petition, ATF refused to provide access to the documents that underlie all the key assumptions referenced in the NPR, from the details regarding the few instances that purportedly prompted the decision that more regulation was needed, to an explanation as to how criminalizing already criminal activity serves any purpose, to the reason that CLEOs refuse to sign Forms 1 and 4 as currently worded, to the methodology employed in supposedly "random" samples. The lack of access to those materials has seriously hindered the ability of interested persons to address anything that underlies the numerous apparent unsupported assertions in the NPR. Bringing forth any such material in support of a final rule will do nothing to remedy the fact that those materials were not available to inform the interested persons preparing public comments. If ATF intends to revise Part 479 in the manner proposed, ATF needs first to lay the foundation for a proposal and then expose that foundation to meaningful critique.[4]

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.[5] 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

[4] As noted above, ATF also has failed to produce any of these documents in response to FOIA requests filed by FICG and other interested persons. At least one FOIA request for the NFATCA petition and related documents has been awaiting an initial determination since January 2013.

[5] ATF failed to produce documents regarding any such instances in response to yet additional FOIA requests. *E.g.*, FOIA Request of Thomas H. Odom, Aug. 27, Sept. 30, Nov 4, 2013.

goal to which they aspire.[6] 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

1. *The Silencer Transaction*

ATF described 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 did not explain the basis of the prohibition or whether that basis was grounded in fact. ATF did not explain whether it investigated potential violations of the laws prohibiting false statements and referred the matter for prosecution.

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

[6] *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 11).

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 omitted 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 may show yet another safeguard: watchful FFLs.

ATF did 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 Act 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 on behalf of a legal entity 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).[7] As the public

[7] 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 (footnote continued)

comments make clear, FFLs take seriously this instruction. *E.g.*, Comments 0120, 0207, 0551, 0909, 1002.[8] And many individuals taking physical possession of NFA firearms on behalf of legal entities report going through NICS checks. *See, e.g.*, Comments 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. *See, e.g.*, Comments 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 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

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(footnote continued)

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.

[8] 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.

legal ability to possess.[9] 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 described 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. But ATF's characterization may be misleading.

ATF asserted 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 did 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 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?

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[9] 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.

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 was 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 did not represent that the prohibited person ever had *actual* possession of any of the firearms.[10] At most ATF suggested 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 did not even suggest was the case here -- that fact alone is insufficient to 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

[10] "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).

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 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 provided no information that suggests the prohibited person ever even established *constructive* possession.

ATF was also silent 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 did 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 asserted 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 said about the potential harm presented by this situation was: "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), (g)(1). ATF did not represent that upon conducting its investigation it determined that the individual was prohibited from owning a firearm.

ATF acknowledged, 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 below. *See infra* Part III(A).

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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 any problem* that existing law does not address. Despite identifying these shortcomings in the comment FICG filed on behalf of David M. Goldman [1899], ATF still refused to provide information that would permit an investigation into any of the instances. Closely related to ATF's failure to make available for public consideration any of the material underlying its proposal is ATF's conflicting statements regarding its proposal that can only serve to confuse and mislead interested persons.

C. *ATF Failed to Provide Any Explanation for Selecting its Proposal Over Alternative Measures ATF Had Under Consideration*

Part of the reasoned decision-making process the APA demands is that an agency evaluate not only its proposed solution but also significant alternatives. Where, as here, ATF had purportedly invested substantial time considering an alternative measure only to abandon it on the eve of publishing the NPR, it was appropriate for ATF to address the differences in costs and

benefits between the two alternatives. So as to permit informed public comment, ATF should have disclosed in its NPR that it had considered alternatives and expressly address its reasons for proposing one alternative over others, including a discussion of relative costs and benefits.

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.

As that abstract indicates, consistent with the NFATCA petition for rulemaking dated December 3, 2009, ATF contemplated that its proposed rule would "eliminate the requirement for a certification signed by the CLEO." While ATF is permitted to change course before publishing a proposed rule, certainly where ATF considered an alternative, internally and in discussions with NFATCA, over a period of years, that alternative warrants consideration and ATF must provide some reasoned explanation for the change in course. Relying on nothing more than a "conclusory statement would violate principles of reasoned decisionmaking." *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985); *see also Pearson v. Shalala,* 164 F.3d 650, 659 (D.C. Cir. 1999).

ATF did not explain how the alternative of eliminating the requirement for CLEO signature compared to its favored approach in terms of benefits to be obtained or costs to be imposed. Obviously there are differences in benefits and costs among the alternatives of (a) imposing new obligations on responsible persons associated with legal entities while *eliminating*

the CLEO signature requirement for individuals, the only applicants subject to that requirement, (b) imposing new obligations on responsible persons associated with legal entities while *retaining* the CLEO signature requirement for individuals, (c) imposing new obligations on responsible persons associated with legal entities while *changing* the description of the matters certified by the CLEO signature requirement for individuals, (d) imposing new obligations on responsible persons associated with legal entities while *retaining* the CLEO signature requirement for individuals and *expanding,* for the first time, the CLEO signature requirement to applicants using a legal entity, and (e) imposing new obligations on responsible persons associated with legal entities while *changing* the description of the matters certified by the CLEO signature requirement for individuals, and *expanding,* for the first time, the CLEO signature requirement to applicants using a legal entity. Yet, nowhere in the NPR did ATF undertake to compare the benefits and costs of these five different alternatives.

As noted above, *see* Part I(A), ATF declined to provide any information regarding specific statements from CLEOs regarding the reasons they did not sign forms or whether the rephrased certification would prompt any different response. ATF did not undertake to perform any sort of survey of CLEOs to ascertain the facts before selecting a new proposed course of action. The record contains many examples of situations where CLEOs refused to sign forms on bases contrary to ATF's unsupported assumption. *E.g.*, Comments 0002, 0009, 0020, 0040, 0042, 0048, 0052, 0061, 0064, 0065, 0074, 0075, 0083, 0085, 0086, 0087, 0104, 0111, 0115, 0122, 0123, 0125, 0127, 0132, 0137, 0138, 0156, 0157, 0162, 0165, 0171, 0992, 0993, 0994, 1002, 1076, 1269, 1899 pp. 33-38 & Exhibits. 2-4, 6. Moreover, ATF did not identify a single example of a situation since the development of the National Instant Check System ("NICS") where an individual applicant passed the NICS check only to be properly flagged as a prohibited

person by a CLEO. With no such examples, ATF carries a heavy burden to explain why its proposed rule is a superior alternative to the approach it studied and identified in the Semi-Annual Agenda, let alone additional variations.

ATF failed to provide information regarding the *marginal* benefits to be obtained by its favored approach over any of the alternatives. ATF failed to provide information regarding the *marginal* costs imposed by its favored approach over any of the alternatives. Substantive issues regarding the flaws in ATF's cost/benefit analysis are addressed below but it must be noted at the outset that ATF utterly failed to provide the information needed to permit meaningful public comment on its proposed rule. The NPR omitted entirely this important discussion and ATF compounded the error by refusing to make available any of the documents underlying the putative cost/benefit analysis.

D. *ATF Provided Conflicting Information Regarding Implementation of Any New Rule, Potentially Providing False Reassurance to Persons Interested in Filing Comments*

The summary of the proposed rule in the pre-publication drafts provided, in pertinent part: "The proposed changes include … photographs and fingerprints, as well as law enforcement certificate, *when the legal entity files an application* to make an NFA firearm or is listed as the transferee on an application to transfer an NFA firearm," 78 Fed. Reg. at 55014 (emphasis added). That statement suggests any new rule would not apply to existing entities with respect to previously approved authority to make or receive specific NFA firearms. The text of the actual proposed rule in the drafts, however, was less than clear.

Attorney Robert K. Merting reported that on the afternoon of August 29, 2013, he spoke by telephone with Brenda Friend, the contact person at ATF designated in the draft NPR. *See* Exhibit 12. He reported: "Ms. Friend specifically confirmed that the rule would not be

retroactive and those transactions already approved will stand." Merting also reported that in that conversation ATF advised him that applications pending at the time of the promulgation of a new rule would be processed under the existing rule rather than the new rule. Merting stated: "The current regulations still stand, and if you have been waiting to purchase NFA firearms now is the time. *Past transfers should not be affected by this rule change and those with firearms owned by a trust will be grandfathered in.*" *Id*. (emphasis in original).

The information Merting reports that he received orally is consistent with prior indications from ATF. During the NSSF/FAIR's 12th Annual Import Export Conference in Washington, D.C. on August 6-7, 2013, an individual inquired if a new regulation was implemented, would the applications pending approval be "grandfathered" or would they be returned. The response from the ATF spokesperson was that any new regulation would only apply to applications submitted after the effective date of the regulation. Any contrary approach would be exacerbated by ATF's backlog and a current processing time in excess of six months.

FICG identified these prior statements and requested that ATF revise the draft before publication in the *Federal Register* so as to inform the general public as to how any new rule would be implemented, rather than to privately provide oral guidance to selected individuals. *See* Exhibit 13. ATF declined to make any such revision before publication. By e-mail dated September 4, 2013, ATF refused even to confirm in writing that any new regulation would not be applied to "responsible persons" already in place with respect to trusts and other legal entities previously established for firearms as to which ATF had previously approved a making or transfer application. *See* Exhibit 2.

Interested persons should not be lulled into the belief that proposed regulations would not apply to them only to be blindsided by a final rule to the contrary. Nor should interested persons

be required to devote limited time and resources to addressing matters not at issue as a distraction from other important matters raised by the proposed rulemaking. The question of how ATF would implement any new regulation was a subject of concern among some of the very first public comments submitted in this proceeding.[11]

When the Nuclear Regulatory Commission proposed to change regulations applicable to nuclear power plants and "the original notice of proposed rule-making contained no indication of whether plants would be required to alter approved features to comply with the new regulations," a serious question of compliance with the APA was raised when NRC's final rule would apply three of the new requirements to plants already operating "regardless of whether they had received staff approval" under the prior regulations. *Connecticut Light & Power Co.,* 673 F.2d at 530. The court upheld the rulemaking only because the final rule encompassed "flexibility" in the form of permitting licensees to apply for exemptions from the new rule, tolled the new rules pending final NRC action on requested exemptions, and ensured that judicial review would apply with respect to NRC action on exemption requests. *See id*. at 530, 537. Here, in light of ATF's public statements, it would be improper for any final rule to impose new requirements on legal entities or their responsible persons except with respect to any new application to make or transfer a NFA firearm first filed after the effective date of any new regulation.

Even if ATF does not promulgate a final rule that it will attempt to apply with respect to legal entities as to which transfers were previously approved, the problem remains that ATF has needlessly confused the public and skewed the priority of issues interested persons would choose to address in public comments. Congress established the *Federal Register* and enacted the APA

[11] Comments expressing concern with the "grandfathering" or transition issues include 0093, 0255, 0473, 1076, 1270, 1936, and 3560.

to ensure *all* members of the interested public would have access to the same information regarding an agency's rules and a fair opportunity to be heard in the formulation of those rules.

E. *ATF May Have Confused Members of the Public by Posting Unrelated Material to the Docket, Including a Statement that the Comment Period was Closed*

With the publication of the NPR, the electronic portal at www.regulations.gov was opened. The only item placed in the docket at the same time as the NPR was a final rule entitled *Importation of Defense Articles and Defense Services: U.S. Munitions Import List*, codified in 27 C.F.R. Part 447. As the NPR addresses 27 C.F.R. Part 449, it was not immediately apparent what relationship the final rule has to the newly-proposed rule. The NPR contains no reference either to Part 447 or the U.S. Munitions Import List.

On September 10, 2013, FICG brought this matter to the attention of ATF, requesting that "[i]f the final rule was added to this docket by mistake . . . that it be removed as it would seem very likely to confuse interested persons who care to comment on ATF 41P." *See* Exhibit 14. FICG further pointed out that due to the presence of the final rule the "Primary Documents" page for ATF 41P contains the text "Comment Period Closed" which could lead some interested persons to believe that it was too late to submit comments with respect to ATF 41P.

ATF removed the apparently extraneous matter from the docket but did nothing to correct any misimpression an unknown number of interested persons may have received that it was too late to file comments. In light of the fact that more than 100 comments were filed in the period when the confusing material was posted, there must have been relatively heavy traffic to the site.

Two weeks later, FICG discovered a page on ATF's Website entitled "ATF Submissions for Public Comments" that contained references to two matters, neither of which was 41P. That page may be found here: http://www.atf.gov/content/contact-us/FOIA/ATF-submissions-public-comment. Again, fearing that interested persons who navigated to ATF's Webpage may have

been misled or discouraged from filing public comments, FICG requested that ATF post a reference on the page to this rulemaking and a link to the electronic portal at www.regulations.gov. *See* Exhibit 15. ATF has not updated that page or otherwise responded to the request.

In *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995), the court held that the NPR was inadequate when it obscured an issue the agency addressed in its final rule. The same danger is presented here, not because notice is hidden in a footnote in the background section of the NPR but rather because of the inclusion of extraneous material and the presence of words easily misunderstood to suggest the time to submit comments has passed. Like ATF's conflicting signals regarding how any rule would be applied to previously approved applications or applications pending at the time of the effective date of any new rule, its apparent error would seem to have required publication of a clarification in the *Federal Register*. Seemingly content to treat the entire rulemaking process as a charade, however, ATF made no effort to correct any misperception while there was still an opportunity for interested persons to submit comments.

F. *ATF Did, in Fact, Fail to Accept or Post Comments*

1. *ATF Failed to Include Pertinent Submissions in the Docket*

FICG physically inspected the docket at ATF's reading room after having made prior arrangements to review everything that had been placed in the docket. Despite oral assurances that everything was present, it was apparent that nothing other than public comments were made available. Nothing generated by ATF was in the docket, not even the *Federal Register* notice that initiated this proceeding or the petition to initiate a rulemaking upon which ATF purported to rely. As detailed in an October 3, 2013, letter to ATF, making matters worse, ATF refused to

acknowledge in writing what they orally confirmed, that everything had been provided. *See* Exhibit 4.

The physical inspection of the docket also revealed that ATF had selectively excluded correspondence clearly related to the rulemaking proceeding. FICG identified six items dating back to September 1 that had not been entered into the docket. FICG requested that all pertinent material be placed in the docket. *See* Exhibit 4. On October 24, 2013, ATF finally posted one of the six referenced items -- FICG's September 11, 2013 letter regarding ATF's delays in posting comments to the docket. Comment 1252. None of the other five referenced items were added to the docket by ATF prior to FICG's second physical inspection of the docket on November 15, 2013,[12] and ATF failed to otherwise respond to FICG's October 3 letter. Moreover, the explicit request in the October 3 letter that it be placed in the docket so as to alert others of omitted items was also apparently ignored by ATF.

FICG contacted ATF's Disclosure Division repeatedly beginning on November 6 to arrange a November 12 return visit to the reading room so as to inspect additions to the docket. By e-mail dated November 8, ATF declared that the reading room was closed and would not be available until November 15. *See* Exhibit 16. ATF did not explain how closing the reading room when the agency was open consistent was with its duty under FOIA. Moreover, ATF mandated that counsel for FICG submit documentation regarding his race, ethnicity, employment history, and other matters before it would permit him access to its reading room. *Id.* ATF has a statutory duty to provide public access to members of the public and where, as here, access is

[12] On the afternoon of November 14, ATF finally posted the comment FICG prepared on behalf of David M. Goldman [1899] that ATF had received on October 21. Exhibits to the Goldman comment included FICG's October 3 letter and the six missing items referenced therein. As of the morning of December 9, five of the six referenced items and the October 3 letter itself were in the docket only as a consequence of resubmitting them as exhibits to the Goldman comment.

denied during the very period when the public are supposed to be able to investigate matters as a basis for submitting comments on a proposed rule, ATF has denied a meaningful opportunity to participate in the notice and comment rulemaking process.

2. *ATF Failed to Permit a Ninety-Day Comment Period*

For weeks, ATF's reading room was closed to any inspection and no newly-received comments were posted for review on www.regulations.gov. Correspondence and telephone calls related to this proceeding went unanswered. While some furloughs due to the budget stalemate in Congress were inevitable, ATF determined which positions were "essential" for operations and apparently did not bother to retain anyone associated with this proceeding or the numerous pending requests for information. Weeks passed during which the public was denied access to material necessary to participate in the comment process in a meaningful manner.

In light of this disruption, on October 11, 2013, FICG requested that ATF extend the public comment period by one day for each day the public lacked access to the docket. *See* Exhibit 17 [1488]. No response has ever been received. In the meantime, other agencies acknowledged the need for such an enlargement of time. *E.g.*, Department of the Interior -- Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; Extending the Public Comment Periods and Rescheduling Public Hearings Pertaining to the Gray Wolf (Canis lupus) and the Mexican Wolf (Canis lupus baileyi)*, 78 Fed. Reg. 64192 (Oct. 28, 2013); Environmental Protection Agency, *Extension of Review Periods Under the Toxic Substances Control Act; Certain Chemicals and Microorganisms; Premanufacture, Significant New Use, and Exemption Notices, Delay in Processing Due to Lack of Authorized Funding*, 78 Fed. Reg. 64210 (Oct. 28, 2013); Department of the Interior -- Fish & Wildlife Service, *New Deadlines for Public Comment on Draft Environmental Documents*, 78 Fed. Reg. 64970 (Oct. 30, 2013); Department

of Labor -- Occupational Safety and Health Administration, *Occupational Exposure to Crystalline Silica; Extension of Comment Period; Extension of Period to Submit Notices of Intention to Appear at Public Hearings; Scheduling of Public Hearings,* 78 Fed. Reg. 35242 (Oct. 31, 2013); Department of Agriculture -- Food and Nutrition Service, *Supplemental Nutrition Assistance Program: Trafficking Controls and Fraud Investigations; Extension of Comment Period,* 78 Fed. Reg. 65515 (Nov. 1, 2013); Federal Communications Commission, *Revised Filing Deadlines Following Resumption of Normal Commission Operations,* 78 Fed. Reg. 65601 (Nov. 1, 2013); Federal Trade Commission, *Ganley Ford West, Inc.; Timonium Chrysler, Inc.; TRENDnet, Inc.; Pinnacle Entertainment, Inc.; Honeywell International, Inc.; Nielsen Holdings, Inc., et al.; Polypore International, Inc.; Mylan, Inc., et al.; Actavis, Inc., et al.; Agency Information Collection Activities (Consumer Product Warranty Rule, Regulation O, Affiliate Marketing Rule),* 78 Fed. Reg. 65649 (Nov. 1, 2013); Federal Communications Commission, *Revised Filing Deadlines Following Resumption of Normal Commission Operations,*78 Fed. Reg. 66002 (Nov. 4, 2013). As a result, ATF failed to mitigate the impact of its staffing decision upon the public interested in this proceeding.

From November 4 through November 6, the www.regulations.gov site was malfunctioning so as to prohibit the submission of comments as well as the inspection of comments that had already been posted. On November 7, 2013, FICG again requested that ATF extend the comment period. *See* Exhibit 18 [2198]. No response has ever been received. From November 10 through November 12, the www.regulations.gov site was again malfunctioning. On November 18, 2013, FICG again requested that ATF extend the comment period both due to lack of public access to the electronic docket and ATF's refusal to make available its reading room for physical inspection of the docket. Exhibit 19. As of that point all or a significant part

of twenty-two days of the comment period -- more than 20% of the total -- had been compromised by the lack of access to the docket. ATF determined that a ninety day period was appropriate for public participation in this proceeding. Nonetheless, it has inexplicably departed from that standard.[13]

3. *ATF Selectively Delayed Reviewing and Posting Comments Received*

Long after returning to normal staffing levels, days passed without the posting of any new comments despite the backlog of hundreds of comments received by ATF. At no time after October 16 did the number of comments posted on www.regulations.gov approach the number of comments received.[14] Yet, on October 23, 28, 29, 30, 31, November 5, 6, 7, 8, and 13, inexplicably not one comment was posted to the docket, conveniently delaying the posting of the comment FICG prepared for David M. Goldman [1899] from ATF's receipt on the morning of October 21, 2013 until the afternoon of November 14, 2013. *See* Exhibit 20. Once Mr. Goldman's comment was posted, suddenly the mysterious cause for delays in posting comments was ameliorated and comments were posted on every weekday from November 14 up to the deadline of December 9, except for Thursday and Friday of Thanksgiving week.

Moreover, the delay in posting material to the docket was not uniform. Upon inspection of the physical docket on November 15, it became clear that the overwhelming majority of comments received on October 21 were posted on November 1 [1620-1670, 1690-1700] if not earlier. Meanwhile another submission received in hardcopy on November 4 [1895] was posted

[13] FICG was not alone in requesting ATF extend the comment period in response to these problems. *See, e.g.*, Comments 1895, 1908. And FICG was not alone in raising concerns about ATF's delay in posting comments to the docket. *See, e.g.*, Comment 2435.

[14] On the evening of December 2 -- one week prior to the deadline for filing comments -- ATF had posted only 2876 of the 4106 comments received, leaving 30% concealed from public examination. On the evening of December 4, more than 35% of submissions were unavailable and on the morning of December 9, more than 46% of comments received had yet to be posted.

before the Goldman comment. An inquiry into the different treatment of these submissions failed to generate a meaningful response. *See* Exhibit 19(B). Only on the eve of a scheduled physical inspection of the docket during which FICG had made clear ATF was expected to produce a copy of Mr. Goldman's comment was it finally posted. *See* Exhibits 19(C) & 21.

After the second physical inspection of the docket revealed the extent to which ATF continued to exclude FICG submissions or delay posting them to the docket while processing correspondence and comments from other interested persons, FICG electronically submitted its November 18, 2013 letter via www.regulations.gov simultaneously with delivery to ATF. Upon completion of uploading the letter, a green "success" legend appeared and www.regulations.gov generated a "receipt" stating: "Your comment was submitted successfully!" See Exhibit 22. Nonetheless, on November 23, all that was posted was a blank template that contained neither the text submitted in the "comment" field nor the uploaded file. *Id*. A November 23 inquiry to the staff at www.regulations.gov generated a reply indicating that any error was attributable to ATF which manages the docket and documents. *Id*. Just as with respect to posting of the Goldman comment, only after FICG asked why its submission was missing from the docket was the matter addressed, on November 25. This experience raises the question what other material submitted for the docket by other interested persons was not properly posted.

* * *

Communications to ATF regarding the rulemaking simply disappeared into a void, occasionally receiving a reply but usually ignored, sometimes to be placed in the docket and at other times not, sometimes posted promptly and at other times withheld from public view for weeks. Despite inquiries, ATF has declined to provide any explanation for the seemingly arbitrary management of the docket. ATF delayed posting the Goldman comment and its broad

critique of the flaws in ATF's proposal, denying persons interested in filing comments of the information and arguments in that comment, while at the same time ATF apparently seeded the docket with submissions from proxies.

G. *ATF Has Distorted the Public Comment Process by Apparently Submitting Hearsay Information Via Proxies*

Compounding the problem of ATF refusing to make available any information with respect to any prior examples of a prohibited person misusing a legal entity to gain actual possession of a NFA firearm, *see* Part I(B), and selectively excluding material or delaying postings to the docket, *see* Part I(F), ATF has apparently turned to proxies to submit comments in its own rulemaking proceeding in an effort to bolster the suggestion of prior misuse of legal entities.

The most obvious example of this tactic appears to be the comment of ATF Special Agent Gregory Alvarez [0599]. Agent Alvarez alludes to existing regulations governing the transfer of NFA firearms to trusts and asserts: "I have personally seen this exclusion be taken advantage of. This person would have been found out long before acquiring multiple NFA weapons had he been required to submit fingerprints and photograph with his application." To the extent that anyone associated with ATF is putting on the record information known to ATF that ATF refuses to make available for investigation and rebuttal, it adds insult to injury to permit the matter to come into the record in that manner.

The second example is even more egregious as, on its face, it does not disclose the author's connection to ATF or reveal that the only information he is offering is what ATF leaked to him. Docket entry ATF-2013-0001-0437 is a public comment submitted by John Brown, apparently the very same John Brown who, as President of National Firearms Act Traders and Collectors Association ("NFATCA"), submitted the petition to initiate a rulemaking on which

ATF purports to base this proceeding.[15] Repeated efforts to ascertain from Mr. Brown the details of the incidents as to which he asserts he has knowledge met refusals as he disavowed direct, personal knowledge stating only that as a result of "working inside ATF for over ten years" he knew things he "should never know." *See* Exhibit 23. As with Agent Alvarez, it would thus appear that ATF is itself the source of this information. As with the carefully phrased statements in the NPR itself, such statements lack details that would permit anyone to verify the truth of the matter asserted, investigate the circumstances, and provide a meaningful comment on the substance of the underlying event (if, in fact, there is a valid underlying event and not just conveniently circulated rumors). The planting of comments that merely repeat to ATF the very information ATF purports to have but refused to submit to public critique exacerbates the problem of ATF's refusal to provide underlying information. *See* Parts I(A) & (B).

FICG also requested that NFATCA provide information regarding any instances of NFA misuse so as to permit investigation of the circumstances. *See* Exhibit 24. No reply has been forthcoming from that source either. As with ATF's statements in the NPR itself, Mr. Brown seemingly offers only vague allegations with no verifiable information.

Mr. Brown's connection to ATF extends beyond his acknowledgment that the information to which he alluded in his comment came from ATF itself. Indeed, as Richard Vasquez -- ATF's Chief of the Firearms Training Branch and previous Assistant and Acting Chief of the Firearms Technology Branch -- testified under oath only last year, Mr. Brown "interacted with ATF a lot," was a friend since at least 2006, had personally transferred two firearms to him, had transferred firearms to other ATF employees, visited ATF "to meet and

[15] Physical inspection of the entry in the docket demonstrates that the comment was authored by John Brown of Chantilly, Virginia, and associated with an e-mail address from which "John Battlefield Brown" corresponded directly with FICG. *See* Exhibit 23.

become personal with a lot of the offices" over a period of years, and provided him with information to pass along to ATF for ATF's use in a forfeiture proceeding. *See* Exhibit 25(A), pp. 202, 208-09, 226-32, 251, 255-56. Mr. Brown apparently went so far as to forward e-mails he had received from a FFL involved in litigation with ATF to ATF for ATF's use in the litigation against the FFL. *Id.*, pp. 232, 270. Indeed, Mr. Brown was not surprised to be characterized as a "confidential source" for Acting Chief Vasquez and ATF. Exhibit 25(E), pp. 611-12. Despite having acquired three machineguns illegally manufactured by George D. Clark, Mr. Brown seems to be the only FFL in that situation that ATF never referred for prosecution. Exhibits 25(A), pp. 255-56, 278; 25(C), pp. 396-97. In fact, ATF knowingly left Mr. Brown in possession of that contraband for six weeks and then promptly destroyed that evidence before the completion of prosecutions of other individuals in possession of Mr. Clark's machineguns. Exhibit 25(A), pp. 215-26, 278. In addition, during this same time period Mr. Brown, together with the attorney he reportedly hired to prepare the NFATCA petition upon which ATF now relies, hired two thirty-year veterans of ATF who simultaneously worked together with ATF to draft the *National Firearms Act Handbook*.[16] *See id.*, pp. 227-30 Ernie Lintner -- a specialist in ATF's NFA Branch and one-time Acting Chief of that Branch-- testified that he and other ATF employees met Mr. Brown at his place of business to discuss those revisions. *See* Exhibit 25(B), pp. 282, 332-34. And another NFA Branch employee, Daniel Pickney, testified to additional meetings held at ATF's Martinsburg, West Virginia, facility. *See* Exhibit 25(D), pp. 444-45, 459.

[16] The most benign characterization of the relationship between ATF and Mr. Brown (if not his other associates and NFATCA more broadly) would seem to be that ATF established an unauthorized "advisory committee" in violation of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. FACA requires public notice of the meetings of such groups, that meetings are open to the public, and that minutes are maintained of such meetings. With respect to discussions relating to the proposal at issue here, either ATF is withholding records of consultations with Mr. Brown and NFATCA in violation of FOIA or ATF failed to create such records in violation of FACA.

As particularly pertinent to this proceeding, Mr, Lintner testified that he and Gary Schaible -- another former Acting Chief of the NFA Branch -- met with Mr. Brown "about some suggested regulatory changed that we wanted to try and make." *See* Exhibit 25(B), pp. 333-34. That is, ATF employees testified under oath that regulatory changes that *ATF* wanted to advance -- quite likely the subject of this proceeding -- were the subject of a meeting with Mr. Brown, confirming his statement about working "inside ATF". Indeed, Mr. Brown testified that NFATCA "deals with ATF on a weekly basis" setting up "meetings with very high-level agenda." *See* Exhibit 25(E), p. 650. As noted above, multiple FOIA requests have sought documents from such meetings, at least one dating back to January 2013. *See supra* note 4.

ATF seeks to simultaneously prevent any investigation into the incidents to which it makes vague reference in the NPR while "planting" comments in its own docket to give further credence to the incidents.[17] This tactic denies a meaningful opportunity to comment on the proposal.

H. *ATF's Prior Lack of Candor Demonstrates a Heightened Need for Procedural Regularity*

The litany of procedural irregularities in this proceeding would undermine the efforts of an agency with a sterling reputation for fairness and candor. ATF has a well-documented record of "spinning" facts and engaging in outright deception of the courts, Congress, and the public. Many of the examples of such conduct arise precisely in the area of regulation of NFA firearms as detailed in the Motion in Limine filed in *United States v. Friesen,* CR-08-041-L (W.D. Okla. Mar. 19, 2009). *See* Exhibit 27. In light of that record, there is an even greater need for ATF to

[17] ATF also apparently gave special treatment to NFATCA submissions in this docket. A letter ATF received in hard copy on November 4 was posted on November 14. *See* Exhibit 26 (1895). The earliest any other material ATF received that same day was posted was November 19. *See* Comment 2136. Such prompt handling and posting to the docket contrasts sharply with ATF's treatment of FICG's submissions.

provide the underlying documents that would permit scrutiny of whether it has fairly characterized issues in the NPR, engaged in a fair consideration of alternatives it had under consideration, only inadvertently provided potentially misleading information about its proposed rule and its implementation, omitted pertinent submissions from the docket only through oversight, only accidentally failed to consider the request that after determining it appropriate to permit a 90-day comment period that it actually provide 90 days of access to its docket and 90 days of public access to its designated contact person, and that it had absolutely no knowledge that either its own Special Agent or a prior informant would act in an apparent effort to bolster ATF's unsupported assertions.

1. *ATF's "Institutional Perjury" Before the Courts*

ATF's NFA Branch Chief, Thomas Busey, advised ATF employees in the course of a training program that the National Firearms Registration and Transfer Record ("NFRTR") database had an error rate "between 49 and 50 percent" in 1994. Exhibit 27, p. 14. Yet, despite acknowledging such a high error rate, he observed that "when we testify in court, we testify that the database is 100 percent accurate. That's what we testify to, and we will always testify to that." *Id.* Judges have overturned their own imposition of criminal convictions upon learning of this information, *see, e.g., id.,* pp. 16-17, information that should have routinely been provided to defense counsel in advance of trial as *Brady* material.[18] *See also id.,* p. 6. It is difficult to imagine a more powerful admission that an agency had knowingly, repeatedly misled courts.

This blatant "institutional perjury" took place not only in the context of criminal prosecutions but also in support of numerous probable cause showings for search warrants.

[18] In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court required that government investigators and prosecutors provide criminal defendants with potentially exculpatory information.

Indeed, NFA Branch Chief Busey expressly addressed that situation. Despite acknowledging an NFRTR error rate of 49 to 50 percent, he told his ATF audience "we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4 waved in your face when you go in there to show that the guy does have a legally-registered [NFA firearm]. I've heard that happen." *Id.*, p. 15.

Using data obtained from ATF in response to FOIA requests, Eric M. Larson demonstrated that ATF apparently had added registrations to the NFRTR years after the fact, reflecting the correction of errors apparently never counted as errors. *Id.*, pp. 21-28. While reassuring courts as to the accuracy of the NFRTR, at the same time ATF seemed to be adding missing information to the database when confronted with approved forms that had not been recorded in the database. *Id.*, pp. 26-28. As a result of the questions raised by Mr. Larson, both ATF and the Treasury Department Inspector General conducted investigations. *Id.*, pp. 29-31.

In the course of the resulting investigations ATF's Gary Schaible recanted sworn testimony he had given years earlier in a criminal prosecution. *Id.*, pp. 30-33. The Inspector General's October 1998 report rejected Mr. Schaible's effort to explain away his prior sworn testimony, concluding: "National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed." *Id.*, pp. 32-33. It is difficult to understand how ATF could routinely provide Certificates of Nonexistence of a Record ("CNRs") to courts without disclosing that an unknown number of records were destroyed rather than processed for the NFRTR.[19]

[19] In *Friesen* itself, the prosecution introduced duplicate ATF records of the approved transfer of a NFA firearm (bearing the identical serial number), but differing in the date of approval. Exhibit 27, pp. 48-49. ATF could not explain the situation. *Id.*, p. 49. Nor could ATF find the original documents underlying the computerized entries. *Id.*, p. 52.

2. *ATF's Deception in Congressional Oversight*

In response to a Congressional inquiry, a DOJ Inspector General advised that a request for documents that reflected errors in the NFRTR had been "fully processed" when, in fact, the documents had merely been sent to another component -- ATF itself -- so as to delay disclosure. *See* Exhibit 27, pp. 12-14. Moreover, ATF changed the meaning of terms like "significant" errors thereby frustrating any attempt to ascertain the true error rate. *See id.,* p. 19. So too, when a congresionally-mandated audit found a "critical error" rate in the NFRTR of 18.4%, the Treasury Department Inspector General seemingly manipulated audit procedures at the instigation of the NFA Branch so as to produce a more acceptable figure. *Id.,* pp. 35-39.

Congress remained sufficiently concerned about inaccuracies in the NFRTR to appropriate $1 million (in Fiscal Years 2002 and 2003) for ATF to address remaining issues. *Id.,* p. 39. In 2007, however, Dr. Fritz Scheuren advised Congress that "serious material errors" continued to plague the NFRTR that ATF "has yet to acknowledge". *Id.,* p. 41.

As recently as June 2012, failure to answer questions about ATF's botched "Fast and Furious" gun-walking operation prompted the House of Representatives to find Attorney General Holder in both civil and criminal contempt. *See* John Bresnahan & Seung Min Kim, "Attorney General Eric Holder Held in Contempt of Congress," *Politicio,* June 26, 2012 (Exhibit 28). Moreover, ATF apparently plans to publish a proposed rule this very month that flagrantly disregards limitations on its appropriations. In the latest Semi-Annual Regulatory Agenda, ATF projects a December 2013 publication of a proposed rule (RIN 1140-AA41) addressed to FFLs. A recent press report indicates that ATF has already submitted the draft to OIRA for review. *See* Julian Hattem, "Feds Consider New Gun Regs," *The Hill,* Nov. 20, 2013 (Exhibit 29). That report quotes the White House as saying the proposed regulations "would target cases where

guns go missing 'in transit.'" *Id.* Yet, it would seem that such a proposal flies in the face of a prohibition on spending any ATF appropriations "to promulgate or implement any rule requiring a physical inventory of any business licensed under section 923 of title 18, United States Code."[20]

3. *ATF's Misleading of the Public*

When, after a prolonged period of evasion, ATF finally produced a transcript of NFA Branch Chief Busey's remarks in the training session in response to FOIA requests, the transcript had been "corrected" by ATF's Gary Schaible to minimize damage to ATF. *See* Exhibit 27, p. 17. Among those corrections, Mr. Schaible asserted that he was unaware that any ATF employee had ever testified that the NFRTR was 100% accurate.

In order to frustrate public inquiries into the Waco Raid, ATF participated in a game of "shifting the paperwork and related responsibilities" among DOJ components and other law enforcement agencies. *Id.*, pp. 13-14.

Former Acting Chief of the NFA Branch, Mr. Schaible, testified that ATF repeatedly -- in 2000, 2001, 2002, 2003, 2005, 2008 -- approved NFA transfer forms without following procedures to update the information in the NFARTR. *See* Exhibit 25(C), pp. 398-414. The consequence of those failures was that members of the public received contraband machineguns

[20] ATF appropriations are continued through January 15, 2014 by virtue of § 1101(a)(2) of the Continuing Appropriations Act, 2014, H.R. 2775. Sections 103 and 104 make clear that prior restrictions on ATF use of funds remain in effect. The law referenced as the source of the continued appropriations is Public Law 113-6. That law, the Consolidated and Further Continuing Appropriations Act, Public Law 113-6 (2013), § 110, substitutes "2013" for "2012" in Public Law 112-55, Division B, § 113(b)(3), thereby continuing ATF appropriations subject to all the same limitations as the prior year. Public Law 113-6 then explicitly states: "That, in the current fiscal year and any fiscal year thereafter, no funds made available by this or any other Act shall be expended to promulgate or implement any rule requiring a physical inventory of any business licensed under section 923 of title 18, United States Code." The referenced licensed businesses are FFLs.

accompanied by genuine ATF-approved forms indicating that the purchaser had acquired a legally-registered firearm, only to have ATF subsequently seize the machineguns from innocent purchasers.

* * *

ATF's long record of shading the truth to mislead courts, Congress, and the public, underscores the serious nature of the procedural irregularities in this rulemaking. In order to permit meaningful public participation, ATF must set aside its secretive tendencies and provide access to the materials it has placed in issue.

II. ATF'S PROPOSED RULE RAISES IMPORTANT CONSTITUTIONAL ISSUES

Because judicial review of any final rule promulgated by ATF may consider not only compliance with the APA but also all alleged violations of the U.S. Constitution, *see Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979), it is incumbent upon ATF to take such considerations into account in this rulemaking proceeding.[21] Where, as here, agency rulemaking would inherently impact constitutional rights, that impact is among the matters the APA requires the agency to consider in evaluating regulatory alternatives and to address in a reasoned explanation for its decision. *See R.J. Reynolds Tobacco Co. v. FDA*, 696 F.2d 1205 (D.C. Cir. 2012); *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999).

A. *The Second Amendment*

Nowhere in the NPR did ATF demonstrate the slightest awareness that it is proposing to regulate in an area involving fundamental constitutional rights. Congress has not amended the NFA since the U.S. Supreme Court confirmed that "the Second Amendment conferred an

[21] Agency determinations with respect to constitutional issues, however, are not entitled to any deference on judicial review. *See J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009) (*quoting Lead Indus. Ass'n Inc. v. EPA*, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980)).

individual right to keep and bear arms." *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008). Consequently, it would seem exceptionally important for ATF to consider the background constitutional issues in formulating policy, particularly where ATF's proposed rule would add significant new burdens to the exercise of this constitutional right by law-abiding citizens. Where fundamental, individual constitutional rights are at issue, an agency engaged in rulemaking to cannot rely on a conclusory assertion in order to "supplant its burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Florida Dep't of Business & Professional Regulation,* 512 U.S. 136, 146 (1994)

With respect to all the categories of firearms ATF regulates under the NFA, ATF must consider the numerous comments filed pointing out that extending the requirement for certification by CLEO to responsible persons of trust, corporations, and other legal entities constitutes a *de facto* ban of NFA firearms despite the determination of Congress and the particular State legislature that such firearms are appropriate for ownership and use by private citizens. A complete ban was what the Court invalidated in *Heller*. Whatever room remains for reasonable regulation by ATF, twisting the NFA to create a ban would seem to be foreclosed by the Constitution. "A statute which, under the pretense of regulating, amounts to a destruction of the right . . . would be clearly unconstitutional." *Heller,* 554 U.S. at 629 (*quoting State v. Reid,* 1 Ala. 612, 616-17 (1840)).

Entirely apart from the burden resulting from a CLEO certification requirement, it should be clear that at least certain categories of firearms regulated under the NFA have a constitutional claim to less restrictive regulation than ATF proposes (and, indeed, less than is currently imposed). The *Heller* Court identified several purposes served by that right including (1) "to

secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force," (2) "self-defense" which the Court termed "the *central component* of the right itself", and (3) "hunting." *Id.* at 599. In *dicta*, the Court determined that the Second Amendment extended to "arms 'in common use at the time' for lawful purposes like self-defense," *id.* at 624, but did not protect one's right to keep or bear "weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, or "dangerous and unusual weapons," *id.* at 627.[22] After *Heller,* at least certain categories of firearms may no longer be properly regulated under the NFA.

1. *"Silencers" or "Suppressors" Are Not Properly Subject to the NFA*

"Silencers" are not firearms in any conventional understanding of the term. It may have been the case in 1934 that Congress could have concluded they were "dangerous", "unusual", or not "typically possessed by law-abiding citizens", but that is no longer the case. Thirty-nine States have determined that private citizens may own and possess silencers. *See* Exhibit 30. More than thirty States permit silencers to be used in some form of hunting. *Id.* Silencers are the preferred means of hearing protection for many hunters as it does not interfere with the ability to hear prey and other hunters. *See* Verified Statement of Jay J. Quilligan (Exhibit 31), p. 6. Silencers are also the only viable hearing protection in many home-defense situations, where situational awareness is imperative and reverberations from walls increase the risk of hearing loss both for the shooter and any bystanders. *See id.*, pp. 5-7 & Ex. I.

Silencers are used by the military and law enforcement to protect against hearing loss. *See id.*, pp. 4-5 & Ex. A, C, D, E, F. They are used at shooting ranges and on hunting grounds to avoid disturbing neighbors. *See id.*, p 6. Ownership and use of silencers is hardly limited to the

[22] Those statements stand in contrast with the Court's observation that "the Second Amendment extends, *prima facia,* to *all* instruments that constitute bearable arms." *Heller*, 554 U.S. at 582 (emphasis added).

criminal element as is further evidenced by ATF's report that nearly a half million silencers are registered in the NFRTR. *See* ATF, *Firearms Commerce in the United States, Annual Statistical Update* (2013), p. 14. The primary constraint on the growing demand for silencers among the civilian population is ATF's ability to promptly process applications.

Given the obvious safety benefits from using silencers to protect against hearing loss, *see* Verified Statement of Jay J. Quilligan (Exhibit 31), pp. 3-11 & Ex. G-L, one must ask why they were ever subject to the NFA regulatory regime in the first place. The answer would seem to be an irrational concern that a "silent" firearm poses a risk to public safety. But that answer suggests that car mufflers should be strictly regulated so that pedestrians will be aware of the dangers of road traffic. No one would suggest such an absurd regulation for the reason that our common experience informs us that a car with a muffler is far from silent. It is also true that firearms with silencers are far from silent, even though that may be fact not as widely shared. Empirical data demonstrates that silencers reduce noise levels below the maximum safe exposure level but still are louder than car horns and chain saws. *Id.*, pp. 9-10 & Ex. J; *see also* Comment 1114, pp. 2-3.

While it may be reasonable to subject silencers to a regulatory regime like that for handguns, there is no longer any constitutional basis to subject them to NFA restrictions. Silencers are well-suited to each of the three purposes identified by the *Heller* Court, are no longer "unusual", and are neither dangerous in and of themselves or by virtue of producing a silent firearm discharge.

2. *Short-Barreled Shotguns, Short-Barreled Rifles, and "Any Other Weapons" are Not Properly Subject to the NFA*

Three other classes of firearms regulated under the NFA are no more dangerous than conventional shotguns and rifles. Short-barreled shotguns ("SBSs") and short-barreled rifles

("SBRs") fire the same ammunition, at the same velocity, and at the same rate of fire as guns with longer barrels. SBRs and SBSs seem to be subject to the NFA solely as a historical accident. In terms of possible rationales for regulation, the only feature that distinguishes them from longer versions of the same firearms would seem to be that they may be more easily concealed. Yet, neither SBSs nor SBRs are as easily concealable as a handgun. Only because Congress initially contemplated regulating handguns in a similar manner did it make any sense to distinguish between SBSs and SBRs, on the one hand, and longer shotguns and longer rifles, on the other hand. *See* Comment 1114, p. 4. Yet, Congress did not subject handguns to the NFA, *id.*, thereby producing the anomaly that continues -- without reason -- to this day.

In *United States v. Miller*, 307 U.S. 174 (1939), a case involving prosecution under the NFA, the Court concluded on the record before it that there was no evidence that the SBS at issue

> *at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178 (emphasis added). Whatever doubts the Court had in 1939 would be easily dispelled today.[23] SBSs as well as SBRs are in common use by law enforcement, *see, e.g.*, Verified

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[23] In fact, doubts might have been resolved differently in 1939 itself but for the fact that in *Miller*, "[t]he defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government." *Heller*, 554 U.S. at 623. Moreover, it appears that *Miller* was a "test case arranged by the government and designed to support the constitutionality of federal gun control" with a cast of characters including Miller, an informant who was previously granted complete immunity by the federal trial court in prior bank robbery prosecutions, a politically-motivated appointed defense counsel who did not object to U.S. Supreme Court review, and a trial court judge who had been an outspoken advocate of gun control yet held the NFA facially unconstitutional without making any factual findings, as well

(footnote continued)

Statement of Alan J. Galarza (Exhibit 32), and the military precisely because in certain situations they are superior to the alternatives. These categories of firearms are not limited to specialized units but are now sufficiently widespread that they are employed by the National Guard and the Naval Militia, making them, by definition, appropriate for militia service.[24] It would seem indisputable that they are among the types of firearms typically owned by law-abiding citizens for lawful purposes." *Heller,* 554 U.S. at 625.

It is generally understood that in confined quarters SBSs and SBRs may be easier to handle, which makes them particularly useful in home-defense situations. *See* Comment 1114, p. 3. And for someone of petite or slight build, hunting with SBSs and SBRs may be much easier than wielding a gun that is progressively heavier as its length increases. *Id.* Compared to long guns, a SBS or and SBR is "easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; [and] it is easier to use for those without the upper-body strength to life and aim a long gun." *Heller,* 554 U.S. at 629. ATF reports almost a quarter million registered SBSs and registered SBRs combined. *See* ATF, Firearms *Commerce in the United States, Annual Statistical Update* (2013), p. 14. Those facts illustrate that SBSs and SBRs are used for purposes that have nothing to do with perpetrating crime.

Firearms classified as "Any Other Weapon" ("AOW") are similarly misplaced under the NFA. The category does not literally encompass all other weapons as is clear by virtue of the fact that the NFA does not apply to pistols, revolvers, long shotguns, and long rifles. Rather

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(footnote continued)

as other indicia of collusion. Brian L. Frye, *The Peculiar Story of United States v. Miller,* 3 N.Y.U.J.L. & Liberty 48, 50, 56, 63-65 (2008).

[24] 10 U.S.C. § 311.

AOW is a term of art. Following placement of SBSs and SBRs in the original 1934 statutory text, is the phrase "or any other weapon, except a pistol or revolver, . . . if such weapon is capable of being concealed on the person." Traditionally, the AOW class of firearms contains gadget devices that are concealed by being disguised as something other than a firearm such as canes, pens, or briefcases. As with SBSs and SBRs, the fact that handguns are not subject to NFA regulation undermines any rational basis for imposing such requirements on AOWs. Moreover, AOWs generally attract the interest of gun collectors, not criminals. *See* Stephen P. Halbrook, 1 *Firearms Law Deskbook* § 6:14, at 666-67 (2012-2013 ed.). As a result, AOWs are among the types of firearms typically owned by law-abiding citizens for lawful purposes." *Heller,* 554 U.S. at 625.

* * *

In the event ATF determines to promulgate regulations that do not exclude silencers, SBSs, SBRs, and AOWs from the NFA framework, the serious constitutional issues provide ample reason for ATF to minimize the burdens on persons seeking to acquire and register such firearms through legal means. Given the number of ordinary household items that can be used as a silencer[25] and 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.

B. *Federalism Concerns*

ATF's proposed rule unnecessarily interferes with State law in several respects. *First,* it undermines State law by purporting to grant local law enforcement officers authority that State

[25] *See* Comment of Hill Country Class III, LLC d/b/a Silencer Shop, p. 5 & n.14. ATF has not yet added this comment to the docket.

law denies them. *Second*, it could require many States to rewrite laws regarding the internal governance of corporations, trusts, LLCs, and other legal entities so that instruments valid under State law will comply with the new definitions and obligations ATF proposes to adopt. *Third*, it could require regulated persons to act contrary to State law regarding disclosure of information relating to the private possession of firearms. And, *fourth*, it needlessly imposes significant costs on State and local governments that will detract from core law enforcement functions.

1. *Undermining the Autonomy of States to Set Statewide Firearms Policy*

By purporting to authorize State and local officials to exercise discretion that is not granted to them under State law, ATF interferes with the autonomy of each State to establish its own statewide firearms policy. For example, by statute the legislature of Pennsylvania has declared:

> No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

18 Pa. C.S. § 6120(a). To underscore the legislature's preemption of all local regulation of such matters, it also made violation of section 6120 a misdemeanor of the first degree. 18 Pa. C.S. § 6119. It does not matter whether or not the county or municipality has a home rule charter under State law. 53 Pa. C.S. § 2962; 16 P.S. § 6107-C(k). The highest court of the State has confirmed that "[b]ecause the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. . . . [T]he General Assembly, not city councils, is the proper forum for the imposition of such regulations." *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). The Pennsylvania Supreme Court has been "crystal clear" that *only* the General Assembly may establish policy with respect to the ownership, possession, and transfer of firearms, as the entire

field is preempted. *See National Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 82 (Pa. Cmwlth. 2009).

Pennsylvania law is not unique in this regard. Many other States explicitly preempt local control in these matters. *See, e.g., Cherry v. Municipality of Metro. Seattle*, 808 P.2d 746, 748 (Wash. 1991) (holding Washington's Uniform Firearms Act "is intended to preempt regulatory city, town or county firearms laws and ordinances"); *McMann v. City of Tucson*, 47 P.3d 672, 674 (Ariz. App. 2002) (observing that Arizona's statute declares firearms regulation "is of statewide concern" and prohibits political subdivisions from enacting "any ordinance, rule or tax relating to the transportation, possession, carrying, sale or use of firearms or ammunition or any firearms or ammunition components in this state"). ATF's CLEO certification requirement essentially invests individual local officials with *de facto* arbitrary power to establish policies directly contrary to State law, undermining the role of the State in our federal system.

2. *Intruding on State Law Governing Corporations, Trusts, and LLCs*

As a general matter, it is State law that governs the internal operations of corporations, trusts, and LLCs. ATF's ill-conceived effort at defining "responsible persons" of such entities interferes with such State law. To the extent ATF's proposed regulation deems certain individuals associated with legal entities to have powers merely by virtue of the title held by such individuals, it threatens to disrupt entire bodies of well-settled law of the several States.

By essentially requiring ATF prior approval before individuals assume roles with corporations, trusts, and LLCs, ATF interferes with the operation of State law. Many of these entities hold assets other than NFA firearms and serve additional purposes. Corporations and LLCs are used to own and operate businesses of all varieties. Trusts are used for estate planning and numerous other purposes. *See* Comment of David M. Goldman (1899), pp. 14-32.

New corporate officers (perhaps appointed by a new board of directors) owe duties to shareholders under State law but ATF would seemingly suspend the ability of the officers to comply with such requirements for periods of nine months or longer while ATF processes the paperwork the proposed rule would require. And if one of the new officers resided in a jurisdiction where a CLEO refuses to sign forms, ATF may well frustrate the will of the shareholders with respect to matters entirely unrelated to NFA firearms. With respect to trusts, it would seem that ATF's proposal would interfere with the ability of a probate court judge to appoint a successor trustee, either because the court had limited jurisdiction or the judge was not the chief judge of the court. Mindless interference with the ability of States to govern such entities undermines powers reserved to the several States.

3. *Undermining State Laws Prohibiting Disclosure*

Many States limit the disclosure of information regarding ownership of firearms. *E.g.,* 18 Pa. C.S. § 6111(i).[26] (And federal law itself limits disclosure of information from tax forms.) The CLEO certification requirement undermines those laws by mandating that an applicant share such information with one or more CLEOs without, in turn, imposing any obligation on the CLEOs to protect that information.[27] In light of the anti-firearm animus demonstrated by some CLEOs, ATF's requirement frustrates State policy.

These concerns are not hypothetical. Recent years have seen local government disclosure of the addresses where residents own firearms. *E.g.,* David Goodman, "Newspaper Takes Down

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[26] *See also* William Bender, "Gun Shy: City Published Personal Information of Some Gun Owners," *Daily News,* Oct. 23, 2012 (Exhibit 33), p. 2 ("Pennsylvania is among 29 states with laws to protect the confidentiality of gun permit holders").

[27] Federal law does prohibit a *transferor* from disclosing non-public information regarding a transferee, *see* 18 U.SC. § 922(s)(5), but, by its terms, that prohibition does not extend to CLEOs who receive information in connection with a request to sign an application.

Map of Gun Permit Holders," *New York Times*, Jan. 18, 2013 (Exhibit 34); Victor Fiorillo, "These Philadelphians Want Gun Permits," *Philadelphia,* Aug. 15, 2012 (Exhibit 35); William Bender, "Gun Shy: City Published Personal Information of Some Gun Owners," *Daily News,* Oct. 23, 2012 (Exhibit 33). And some government officials have been directed to disclose such information about political opponents for purely partisan purposes. *E.g.*, Tom Shortell, "Former Northampton County Sheriff's Deputy Cleared for First-Time Offenders Program," *The Express Times,* Aug. 14, 2013 (Exhibit 36).

4. *Unfunded Mandate on CLEOs*

ATF's proposed regulation would not only retain, but would expand the requirement of CLEO certifications, imposing significant burdens on State and local officials. Were ATF to mandate action by CLEOs it is clear that such a requirement would violate the anti-commandeering principle articulated in *Printz v. United States*, 521U.S. 898 (1997). Yet, it is no answer to that objection to assert that CLEOs have discretion to determine the level of resources to devote requests for certification or to ignore them altogether. 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.

The comments submitted in this docket detail 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. The comment FICG prepared for David M. Goldman [1899] documented one such example in Florida. 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* Comment 1899, pp. 36-37 & Ex. 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* Joe Palazzolo, "Silencers Loophole Targeted for Closure," *Wall Street Journal*, Oct. 3, 2013 (Exhibit 37).

That example is not unique as is demonstrated by other comments filed in this proceeding. Craig Scott 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. *See* Comment 1002. 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.*, Comments 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." Comment 0006.

III. ATF'S PROPOSAL EXCEEDS ITS STATUTORY AUTHORITY

From the outset, it is clear that the NFA was designed to provide a basis for prosecution of "gangsters" with untaxed, unregistered firearms and not as a regulation of law-abiding citizens

who complied with the law. ATF has turned the statutory scheme on its head, imposing ever more draconian burdens on law-abiding citizens who seek to make and acquire NFA firearms while diverting resources to do so from investigating and prosecuting criminals who use illegal means to obtain NFA firearms.

ATF describes the NFA in terms that go beyond the statutory text. 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.* (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.

A. *Congress Prohibited "Undue or Unnecessary" Restrictions*

Congress has, in fact, legislated to *limit* the authority of ATF to impose more burdens on law-abiding citizens. Congress was aware of ATF's over-zealous interpretation of the NFA when it enacted the Firearms Owners' Protection Act ("FOPA"), Pub. L. 99-308, 110 Stat. 449 (1986). It would be an understatement to say that Congress thought ATF had reached the maximum boundary of its rulemaking and enforcement authority. Well aware of ATF's history, *see supra* Part I(H), Congress made clear in FOPA that ATF's regulation and enforcement activities of *legal* owners of firearms -- like those who seek to register firearms under the NFA -- had already gone too far. Congress found that not only were statutory changes needed to protect *lawful* owners of firearms, but that "enforcement policies" needed to be changed as well. FOPA § 1(b). In doing so, Congress reaffirmed that "it is not the purpose of this title to place *any undue or unnecessary* Federal *restrictions or burdens* on law-abiding citizens with respect to the

acquisition, possession, or use of firearms," *id*. (emphasis added), signaling in the strongest possible language that ATF should not impose yet additional burdens on law-abiding citizens in response to mere speculation that criminalizing already criminal activity might have some marginal benefit. Yet, that is precisely what ATF's proposed rule would do.

ATF's proposed rule would add new precautions on top of existing precautions on top of existing criminal liability. To say that such a regulation is "unnecessary" or imposes an "undue" burden is to state the obvious.

- 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. But the absence of benefits is not simply a matter of policy preferences in this setting, Congress expressly directed ATF not to impose any additional "unnecessary" burdens on law-abiding owners of firearms and the existing statutory penalties eviscerate any possible claim that the proposed regulation is necessary.

B. *Independent of FOPA, ATF Lacks Statutory Authority*

Even without consideration of FOPA, there are ample reasons to doubt that Congress authorized ATF to formulate the proposed regulation. *First,* Congress itself determined that legal entities were appropriate means to own NFA firearms when enacting the NFA itself in 1934. There is simply no "loophole" in the statute for ATF to address. *Second,* Congress did not authorize ATF to add to the statutory requirements for making or acquiring NFA firearms; ATF may merely prescribe the appropriate forms for identification of the parties. *Third,* Congress itself rejected the proposal to require a CLEO certification as part of the statutory scheme.

1. *Congress Determined Legal Entities May Own NFA Firearms*

In the original NFA as enacted in 1934, Congress expressly defined the persons who may own NFA firearms as including corporations and other legal entities. It cannot be maintained that ownership by such entities is merely a modern development or that Congress was ignorant of the difference between natural persons, on the one hand, and legal entities, on the other hand. Any regulation ATF adopts in the guise of regulating which legal entities may own NFA firearms that has the practical result of denying all such entities within a jurisdiction is blatantly inconsistent with the statutory scheme. Moreover, when Congress first enacted the NFA, it expressly provided that "*if the applicant is an individual*" his application "shall include

fingerprints and a photograph" of the applicant. NFA § 4(a) (emphasis added). The congressional determination to limit that requirement to natural persons was not accidental. As has been observed repeatedly in comments filed in this docket, criminals are not inclined to go to the trouble and expense to establish legal entities in order to gain access to *registered* NFA firearms when they can illegally make or acquire firearms at less expense. For almost eighty years ATF has shared that view of the statute. In all that time, ATF has failed to identify any misjudgment by Congress.

2. *Congress Did Not Authorize ATF to Add Substantive Requirements*

Congress enacted a comprehensive scheme for the making or transfer of NFA firearms. The statute itself specifies the exclusive substantive requirements for who may lawfully possess NFA firearms and the criteria for applications to do so. ATF was charged only with the task of preparing the forms to be used in the process and the incidental procedures associated with such processing. *See* Comment of Hill Country Class III, LLC d/b/a Silencer Shop, pp. 37-39.

Where Congress granted ATF substantive authority it did so explicitly, as in the case of determining which firearms should be considered curios and relics.[28] and which firearms are "not likely to be used as a weapon" or which do or do not serve any "sporting" purpose.[29] Notably, those determinations call for technical expertise with respect to the characteristics of specific firearms, not controversial decisions regarding what persons should be permitted to own or possess firearms. ATF has no more authority to require a CLEO certification than it does to

[28] *See* 26 U.S.C. § 5845(a) ("The term 'firearm' shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.").

[29] *See* 26 U.S.C. § 5845(f) ("The term 'destructive device' shall not include . . . any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.").

require a person seeking to acquire a NFA firearm to prove that he owns a gun safe, that he resides outside a gun-free school zone, or that he has completed a certain level of training with the type of firearm.

3. *Congress Rejected CLEO Certification*

When Congress rejected the proposal to include a *statutory* CLEO certification requirement, *see id.*, pp. 29-30, it did not merely leave to ATF the determination whether such a requirement should be imposed by regulation. Instead, Congress omitted from the comprehensive statutory scheme key provisions necessary for any CLEO certification to function.

Congress did not designate federal funds to serve as an inducement for State and local officials to review applications and provide certification. Congress did not establish a procedure for an applicant to appeal from an improper denial. And Congress did not extend the prohibition on disclosure of applicant information to CLEOs, *see supra* note 27, clearly indicating that Congress did not intend for ATF to interject them into the application process.

It is only because ATF has forced CLEO certification into a comprehensive regime that left no room for such added requirements that ATF now finds a regulatory mess of its own making. Rather than exacerbate the problem by imposing yet more substantive requirements that find no basis in the statute, ATF should return to the regime Congress enacted by eliminating altogether the CLEO certification requirement as it had long announced was its intent. *See supra* Part I(C).

IV. POLICY CONSIDERATIONS DO NOT SUPPORT ATF'S PROPOSED RULE

Even if numerous procedural irregularities did not bar ATF from promulgating a final rule in this proceeding, and neither the U.S. Constitution nor the scope of statutory authority

served as an obstacle, there are ample reasons ATF should dramatically modify its proposed rule. *First,* ATF's assumptions lack statistical validity. *Second,* ATF's reasoning relies on false premises. *Third,* the costs of the proposed rule are much greater than ATF acknowledged.

A. *ATF's Assumptions Lack Statistical Validity*

As pertinent to a statistical inquiry, there are two classes of matters asserted in the NPR that demand investigation but which share certain common flaws. *First,* and most vitally, is the issue of whether ATF identified a statistically significant basis to conclude that the existing system of regulation should be revised. ATF made only three anecdotal references relative to the overall population of matters subject to ATF regulation. 78 Fed. Reg. at 55016, 55023. *Second,* with respect to estimating the costs that would be imposed by ATF's proposed rule, ATF purported to derive values from samples of "randomly selected" applications. ATF concluded "that each legal entity has an average of two responsible persons," *see* 78 Fed. Reg. at 55020, and that "the average number of pages in the corporate or trust documents" required to be submitted is "15 pages," *see* 78 Fed. Reg. at 55021.

1. *There Is No Statistically Valid Evidence of a Problem to Be Addressed*

ATF maintains a registry of NFA firearms. The most recent count of items in the NFRTR exceeds 3.5 million. *See* ATF, *Firearms Commerce in the United States, Annual Statistical Update* (2013), p. 14. Moreover, many of those firearms have been in existence for decades.

Despite the number of NFA firearms, ATF's entire rulemaking effort is apparently premised on no more than three examples of situations over an unspecified number of years in which, according to ATF's unverifiable assertion, a responsible person hypothetically had access to a NFA firearm held by a legal entity other than a FFL. ATF reported that 40,700 such legal

entities sought permission to make or acquire a NFA firearm in 2012 alone. 78 Fed. Reg. at 55020. ATF estimated an average of two responsible persons associated with each of those legal entities, for a total of 81,400 individuals gaining access to NFA firearms in 2012 alone. The number of individuals who have access to NFA firearms through association with a legal entity is cumulative, not simply the number approved in any one year. ATF's publication *Firearms Commerce in the United States Annual Statistical Update* (2013) contains year-by-year data on NFA firearms and associated forms dating back to 1990. *Id.*, Exhibits 6, 7, 7a. But ATF's summary failed to distinguish between forms submitted by non-FFL legal entities and other applicants.

The use of legal entities to hold NFA firearms was authorized by Congress in the NFA itself, enacted in 1934. ATF acknowledged that hundreds of legal entities annually made or acquired NFA firearms. The NPR recited that the number of such forms increased from 840 in 2000, to 12,600 in 2009, to the 40,700 in 2012. 78 Fed. Reg. at 55016. The total number of legal entities with NFA firearms is known only to ATF but would seem to number in the tens of thousands if not hundreds of thousands.[30] The number of individuals with access to NFA firearms by via association with a legal entity would represent a multiple of the number of legal entities.[31]

[30] If the number of such forms averaged 840 for each year from 2000 through 2008, and averaged 12,600 for each year from 2009 through 2011, the total number of such forms through the end of 2012 would total over 80,000. But that computation assumes, as ATF seemed to assume, that each form represented a unique legal entity rather than that a legal entity submitted two or more forms.

[31] Calculation of the number of individuals with access to NFA firearms as a multiple of the number of legal entities assumes, as ATF seemed to assume, that no individual is associated with two or more legal entities.

With even the 81,400 individuals ATF that counted for calendar year 2012 having access to NFA firearms, three examples represent such a minute fraction that no statistically valid prediction can be made that there are any other instances of this problem. ATF has refused to make available any information regarding the three examples that would permit meaningful inquiry into whether they are at all representative of the problem ATF claims now requires attention.

If, nonetheless, ATF were to go forward with its effort to formulate and impose a new rule, whatever benefits ATF claims would seem to require discount to reflect the very few instances in which there is any reason to believe the new rule would provide additional protection. That is, the *marginal* benefit of added restrictions would be on the order of 3/81,400 or, stated otherwise, the marginal cost needs to be multiplied by a factor of 81,400/3 to be measured against the total benefit.

2. *ATF's Sampling Methods for Cost Estimates Are Invalid*

Both ATF's estimate of the average number of responsible persons per legal entity and its estimate of the average length of documentation of a legal entity fail to demonstrate that they complied with basic safeguards to ensure valid results. 78 Fed. Reg. 55020, 55021. ATF's brief description and refusal to provide documentation of the methodology employed raise more questions than the NPR answers. For any valid result, it is essential that ATF used methods that ensure against selection bias but there is no indication ATF did so.

In one estimate, ATF surveyed a sample of "applications for corporations, LLCs, and trusts," 78 Fed. Reg. at 55020, while in the other estimate ATF surveyed a sample of only "corporation or trust documents," 78 Fed. Reg. at 55021. ATF provided no explanation for including LLC documents in one sample and not the other.

What is most troubling, however, is that in one instance ATF considered a sample "of 39 recent randomly selected paper (hardcopy) applications," 78 Fed. Reg. at 55020, while in the other instance ATF reviewed "documents for 50 recently randomly selected paper (hardcopy) submissions," 78 Fed. Reg. at 55021. Without a valid explanation for the difference in sample sizes the results are highly suspect.

No explanation was offered for either sample size, let alone the discrepancy between the two. A sample size designed to produce a valid result in which one can have confidence requires consideration of whether the population from which the sample is selected is relatively homogeneous. ATF did not express any appreciation of that fundamental concept. ATF refused to disclose the actual data from each entry in the sample thereby concealing the range of variation within the sample. There is no reason to believe that the population of 40,700 applications from which the samples were drawn (if, indeed, they were drawn from the pool of applications in 2012) reflected a homogeneous group. Indeed, the public comments filed in this proceeding suggest a wide diversity as authors indicated the number of trustees (or other responsible persons) and length of legal instruments. The comment FICG submitted on behalf of David M. Goldman documented the wide variations within the population from which ATF purported to randomly select its sample. *See* Comment 1899, Part II(C), Part IV(A) & (B). In such a heterogeneous population, a much larger sample size of the population of 40,700 (if that is from where they were drawn) would be required to produce a statistically valid estimate of the characteristics of an "average" legal entity. *See* Comment of C. Seidler [1737].

* * *

There is no statistically-significant evidence of the problem ATF purports to address with the proposed rule, even if one credits the three anecdotes. In weighing costs and benefits of the

proposed rule, ATF must discount the benefits (or multiply the costs) to reflect the very few examples from the large population of individuals with access to NFA firearms via legal entities. ATF estimates of the number of responsible persons per legal entity and the length of documentation of each legal entity cannot form the basis for any valid evaluation of the costs of the proposed rule as a result of lack of transparency in methodology, inadequate description of the data in the sample, the likelihood of selection bias, the unexplained difference in the sample sizes, and the small sample size relative to the overall population.

B. *ATF Relies on False Premises*

ATF's proposed rule is based on several false premises, including that *registered* NFA firearms constitute a significant threat to public safety, that legal entities exist to frustrate ATF regulation, and that CLEOs refuse to sign forms due to concerns about civil liability.

1. *There Is Little Evidence of the Misuse of Registered NFA Firearm*s

As noted above, none of the three examples ATF mentioned in the NPR illustrate that a prohibited person ever gained access to a NFA firearm by virtue of an association with a legal entity, *see* Part I(B), and even if those three instances were credited -- which ATF's refusal to provide underlying information precludes, *see* Part I(A)-(B), -- they do not amount to statistically significant evidence of a broader problem, *see* Part IV(A)(1). 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. Recently proposed legislation confirms that even gun control proponents recognize the efficacy of regulation under the NFA. *See* Exhibit 11. ATF failed to explain, let alone demonstrate, the need for a change in regulations

2. *Legal Entities Serve Many Legitimate Purposes*

ATF seems to have started from the premise that legal entities owning NFA firearms exist exclusively to make use of a "loophole" in the law. In fact, however, legal entities serve many legitimate and beneficiary purposes. The comment FICG prepared for David M. Goldman documents the many reasons trusts are established including tax planning, estate planning, family law and elder law issues, sharing of assets among family members, regulatory compliance, and protection against over-zealous application of the "constructive possession" doctrine. *See* Comment 1899, pp. 14-21. Corporations, LLCs, and other legal entities are formed for a similarly wide-range of purposes, including the management of active business concerns.

Corporations and LLCs, like trusts, are employed by careful, law-abiding citizens to avoid the trap of "constructive possession." The NFA makes it unlawful for any person "to

possess a firearm that is not registered to him in the [NFRTR]." 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 or working in the same business establishment 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 or to a fellow manager of a business, it is simple prudence that drives many owners of NFA firearms to use a legal entity rather than continuing to hold the firearm as an individual. The cost of establishing a legal entity and naming oneself and one's spouse as trustees or pales in comparison to potential imprisonment for up to ten years, fines of up to $250,000, and forfeiture of the firearm. *See* 18 U.S.C. § 3571; 26 U.S.C. §§ 5871 & 5872. The same is true of a business owner who form a corporation or LLC and designates his managers as employees authorized to use the firearm. 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 and businesses 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 legal entity to ensure compliance with the law, particularly if a spouse or co-worker has the combination to the gun safe or knows where the key is kept.

3. *ATF Misapprehends Why CLEOs Refuse to Sign Forms*

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 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, 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.*

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. *See* Part I(A). 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.

Numerous comments from this docket were identified in the comment FICG prepared for David M. Goldman to illustrate that many CLEOs simply oppose civilians having firearms. *See* Comment 1899, pp. 34-36. The Verified Statement of Alan J. Galarza (Exhibit 32) demonstrates that even an active duty law enforcement officer could not obtain the signature of a CLEO in his own office. The Verified Statement of Thomas F. Braddock, Jr. (Exhibit 38) documents the refusal of CLEOs in Luzerne County, Pennsylvania, to sign ATF Forms based on the belief that civilians should not own NFA firearms. His experience is further confirmed by the independent experience of another resident of Luzerne County. *See* Comment of Anthony Smith [1269].

The comment FICG prepared for David M. Goldman also documented instances 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. *See* Comment 1899, pp. 36-37. Subsequently filed comments validate that observation. *E.g.,* Comment 1908.

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. When asked directly whether the change in wording would prompt a different attitude, CLEOs have given no indication that it would do so. *See* Verified Statement of Thomas J. Braddock, Jr. (Exhibit 38), p. 2; Letter from Cumberland County (North Carolina) Sheriff's Office (Exhibit 39); Declaration of Ernest J. Myers (Exhibit 40). The response from the Orlando (Florida) Police Department is illustrative:

> Unfortunately, we do not believe the proposed language amendment will change our position with respect to whether the Orlando Police CHief should execute these forms for firearms transfers. It remains our position that the local law enforcement chief executive officer should not be involved in, or liable for, individual firearms transfers.

Exhibit 40. While the number of CLEOs who responded to this inquiry within the limited time permitted by ATF, *see* Part I(F)(2), may seem small, the significant point is that ATF apparently failed to even ask the question, preferring willful ignorance to meaningful input from CLEOs.

C. *ATF Underestimates the Cost of the Proposed Rule*

Virtually every cost ATF identified was grossly underestimated and ATF failed to even acknowledge several of the largest costs its proposed rule would impose. Only the most egregious errors are addressed here.

1. *Number of Responsible Persons Per Legal Entity*

ATF's estimate of two responsible persons per legal entity cannot be credited. *See* Part IV(A)(2). The comment FICG prepared for David M. Goldman demonstrated that either ATF drew too small a sample from a highly heterogeneous population or that most legal entities do not support ATF's concern of multiple individuals having access to firearms through a single legal entity. *See* Comment 1899, pp. 42-43. The alternative explanation is that ATF engaged in gross selection bias. Any of the possible explanations undermine the estimate. In contrast, Mr. Goldman provided a significantly higher estimate based on his extensive experience. Numerous

comments supported Mr. Goldman's explanation that ATF underestimated a key multiplier of the costs to legal entities. The Comment of J.A.K.[32] describes a trust that dramatically departs from ATF's estimated average. That trust currently has twenty-one responsible persons and that number will only increase over time.

2. *Length of Documentation of Legal Entity*

ATF's estimate of fifteen pages as the length of documentation of a legal entity suffers from the same defects. *See* Part IV(A)(2). The comment FICG prepared for Mr. Goldman again demonstrated that ATF's "sample" was either too small or that there is a vast differentiation in the complexity and safeguards of trusts (and other legal entities) that ATF failed to consider in proposing a one-size-fits-all rule. *See* Comment 1899, pp. 43-45. Again, the alternative explanation is such gross manipulation of the sampling method as would explain ATF's refusal to disclose it methodology or any underlying work papers. *See* Parts I(A), IV(A)(2). The Comment of J.A.K. describes a trust that illustrates how far ATF is from the mark. J.A.K.'s trust "is about fifty pages in length plus additional assignments, and declarations that comprise another 20+ pages."

3. *Cost of Fingerprints and Photographs*

J.A.K. also reported significantly higher costs for fingerprinting and photographs than ATF considered. Where ATF relied on a cost of $24 for fingerprinting, *see* 78 Fed. Reg. at 55021, J.A.K. reported a cost of $35. Where ATF relied on a cost of $8 for photographs, *id.*, J.A.K. reported a cost of $15. Because ATF has provided no supporting documentation, *see* Part I(A), it is unclear whether ATF surveyed only providers of these services in highly-competitive,

[32] J.A.K. has submitted a comment to ATF using the specified procedure to protect the author's identity. The comment bears reference number 1jx-894b-gm85 and has not yet been assigned a docket number.

urban markets. In more rural areas, it may be considerably more difficult to obtain these services and the time required to do so may also be much greater than ATF assumes. One commenter from rural Pennsylvania reported the need to contact six police departments, taking hours, before finding someone willing to fingerprint him. *See* Comment of Anthony Smith (1269).

4. *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, 1899, pp. 45-46. 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. 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. 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.

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 $2,250 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.

5. *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 importance of silencers to protect against hearing loss has already been extensively discussed above, in the comment FICG prepared for Mr. Goldman, in the Comment of Hill Country Class III, LLC d/b/a Silencer Shop, and in other comments. *E.g.*, Part II(A)(1), Comment 1899, pp. 46-48.

Jay J. Quilligan, M.D., who specializes in ear, nose, and throat issues and who evaluated soldiers for hearing loss, puts a dollar estimate on those costs. Considering only the direct costs of medical care, testing, and hearing aids, Dr. Quilligan determined a minimum cost of $15 million. *See* Verified Statement of Jay J. Quilligan, M.D. (Exhibit 31), p. 11. Because hearing loss is cumulative with exposure, Dr, Quilligan explains that the incidence and severity of hearing loss will quickly multiply that figure. *See id.* Given the number of individuals exposed to the harmful noise from firearm discharge,[33] when disability is added to the direct medical costs, Dr. Quilligan explained that the result is "staggering" and "likely to exceed $100 million."

[33] The National Shooting Sports Foundation recently estimated the number of licensed hunters at 14,630,000. See Exhibit 41. Total recreational shooters exceed 30 million. *See* Exhibit 31, Ex. I, pp. 93-94. Even that larger figure does not include bystanders.

Id. Considering the "Value of a Statistical Life" method for preventing injuries, as this Administration employs in other contexts, amply supports that conclusion.[34]

6. *Failure to Distinguish Small Entities*

Many non-FFL legal entities (particularly corporations and LLCs) are likely to be small businesses that either maintain NFA firearms because they provide security services to other businesses or for defending the property and employees of the small business itself. Many CLEOs are likely representatives of small governmental entities. ATF made no effort to identify the number of such small businesses and small governmental entities. Having failed to do so, it is difficult to understand how ATF could certify compliance with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612.

The very purpose of the Regulatory Flexibility Act is to encourage agencies to consider whether the costs of a proposed rule may fall disproportionately upon small entities. There is no indication ATF did more than pay lip-service to that requirement. Costs that may seem minor to a large corporation can destroy a small business. Costs that a large metropolitan police department or State-wide agency might be able to absorb could easily have a disproportionate impact on a small, rural police department. ATF should give meaningful consideration to *flexibility* in its proposed regulation so as to accommodate small entities.

D. *The Proposed Rule is Unworkable*

As pointed out in the comment FICG prepared for David M. Goldman, the proposed rule is simply unworkable. *See* Comment 1899, pp. 39-40. The overly broad concept of a "responsible person" creates a host of practical problems discussed in many of the comments

[34] *See* 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 42), pp. 8-9.

filed in this docket. Where responsible persons reside in different jurisdictions, the traps and burdens are manifest, especially in light of ATF's processing time. *E.g.,* Comments 1340, 1908, 1961; Comment of Glenn D. Bellamy *et al.,* pp. 19-20.[35] The Comment of J.A.K. documents in detail the thwarted efforts of a settlor to communicate with CLEOs in other jurisdictions where "responsible persons" associated with the trust reside. All of the other problems associated with the proposed rule are exacerbated by ATF's failure to carefully define a "responsible person".

E. *ATF Inadequately Addresses the Effect on Decedent's Estates*

Among the legal entities addressed by ATF's proposed rule are decedent's estates, although ATF does so in an entirely different manner than the remainder of its proposed rule. ATF's proposed rule, proposed section 479.90a, allows a transfer of an NFA item to proceed tax-free on a Form 5, rather than on a Form 4, for estates, which is consistent with its current practice and procedure. *See NFA Handbook* § 9.5.3.1. ATF's rationale for this distinction is that an estate administrator only holds the items temporarily, for a time determined by State law, and the administrator represents the decedent. 78 Fed. Reg. at 55018. ATF also relies upon the fact that the transfer is effectuated "by operation of law," in that it is an involuntary transfer to a person, as defined in section 479.11, according to the estate planning document, regardless of whether through a will, trust or other form of estate planning document or through the intestacy law of that State, whereby a beneficiary of any type is named. *Id.*

However, in its proposed rule, ATF has failed to fully document and codify its current practices and procedures, making it unclear as to whether its current practices and procedures will apply under proposed new regulation 479.90a. ATF's failure to codify its current practices and procedures, on the one hand, or to explain the reasons for a departure therefrom, on the other

[35] This comment has not yet been posted to the docket.

hand, deprives the public of a meaningful opportunity to comment on the proposal for reasons apart from those set forth above. *See* Part I.

1. *Section 479.90a Fails to Indicate That It Is Applicable to Estates and Trusts, Equally*

ATF's newly proposed section 479.90a, in relation to administration and transfer of NFA firearms in an estate, fails to acknowledge and codify ATF's current practice and procedure of equally applying the same rules, regulations and exceptions to distributions from trusts, as are applied to estates. The section is entitled "Estates" and the entire section speaks of estates and includes terms, such as executor, administrator, and personal representative, which are directly related to an estate, but fails to specify that such is also applicable to trusts and trust administration. ATF has long treated estates and trusts in the same manner regarding administration and distribution to an ultimate beneficiary. The title should be changed to "Estates and Trusts" and the term "trustee" should be included along with executor, administrator and personal representative.

2. *Possession of NFA Firearms During the Pendency of Estate and Trust Administration*

ATF's proposed section 479.90a provides that "the executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate (collectively 'executor') may lawfully possess the decedent's NFA firearm during the term of probate without such possession being treated as a transfer from the decedent." 78 Fed. Reg. at 55020. Section 479.90a fails to expressly state that a "trustee" may maintain possession during the pendency of the administration of the estate or trust without a transfer occurring. If any final rule is promulgated by ATF, it should include "trustee" along with executor, administrator and personal representative in section 479.90a.

3. *Section 479.90a Should Expressly Address the Role of an Attorney*

In the context of estate administration, proposed section 479.90a provides that the "executor, administrator, personal representative, or other person authorized under state law to dispose of property in an estate" can maintain lawful possession during the pendency of the estate without constituting a transfer. The list of persons so authorized, however, fails to include the attorney for the estate or trust, as is ATF's current practice.

In administering an estate or trust, issues can arise requiring the attorney to take possession of the firearms so to effectuate distribution to the beneficiaries. Such issues can arise when an executor/executrix, personal representative, attorney in fact, or trustee resides in a different State than that in which the estate or trust is located. For example, an executor of an estate, who resides in New Jersey, could be appointed as executor of an estate in Pennsylvania, for a Pennsylvania decedent, who owned NFA firearms. Clearly, the New Jersey executor cannot submit an ATF Form 5320.20 and gain ATF approval to move the NFA firearms to New Jersey, as NFA firearms are unlawful in New Jersey. Although ATF has permitted individuals to utilize safety deposit boxes for storage of NFA firearms, most, if not all, banks now prohibit storage of operable firearms in a safety deposit box. A similar situation may arise when an executor/executrix, personal representative, attorney in fact, or trustee is a prohibited person under State or federal law. Permitting the attorney representing the estate or trust to lawfully take possession of the firearms, pending final distribution to the beneficiaries, would obviate the need for proceedings to remove the prohibited person, thereby saving estates and trusts a substantial sum in fees and costs.

4. *Transfers of NFA Firearms from Estates and Trusts*

ATF's asserts that "[t]he new section [489.90a] also would clarify that the executor may transfer firearms held by the estate on a tax-free basis when the transfer is to a beneficiary of the estate; when the transfer is to persons outside the estate, the executor must pay the appropriate transfer tax." 78 Fed. Reg. at 55020. While adding some clarity in one regard, this statement raises other issues. It is currently ATF's practice that the tax-free transfers to a beneficiary of an estate do not require a CLEO signature.

As stated in the *NFA Handbook* in the section captioned "distributions to heirs"

> Although these distributions are not treated as "transfers" for purposes of the NFA, Form 5 must be filed by an executor or administrator to register a firearm to a lawful heir and the form must be approved by ATF prior to distribution to the heir … When a firearm is being transferred to an individual heir, his or her fingerprints on FBI Forms FD-258 must accompany the transfer application. The application will be denied if the heir's receipt or possession of the firearm would violate Federal, State, or local law. *The law enforcement certification on the form need not be completed.*

NFA Handbook § 9.5.3.1. As ATF considers the transfer from an estate or trust transfer to be an involuntary transfer by operation of law, whereby it is necessary to document in the NFRTR, as soon as practically possible, the individual or entity currently in possession of the NFA firearm, this exception to the general requirement of an individual to submit a CLEO signature is warranted and necessary. Accordingly, if ATF does not abandon the CLEO certification requirement altogether, this exception to the CLEO certification requirement should be codified in the final rule.

Proposed section 479.90a fails to define in any coherent manner what constitutes a person "outside the estate," although it excludes those persons from a tax-free transfer. Without defining what constitutes a person "outside of the estate," the proposal provides no guidance on

what ATF seeks to implement and will likely result in unequal application in the absence of a specific definition. Consider the situation of a beneficiary who either resides in a jurisdiction that prohibits private ownership of NFA firearms or is unable to obtain a CLEO signature (in the event ATF neither abandons the CLEO certification requirement altogether nor codifies the existing exception to that requirement), so that the estate or trust is required to liquidate the firearm and provide the value thereof to the beneficiary. In that event is the transfer of the NFA firearm to the FFL or, if within the same state, to the purchaser, a transfer to a person "outside the estate?" This would be to treat the same beneficiary differently, resulting in extra tax being due and an overall loss in value to the beneficiary.

If a named beneficiary executed a valid disclaimer, *see* 26 U.S.C. § 2518, so that the NFA firearm passed to a different individual, would that be considered a transfer to a person "outside the estate"? If a valid estate planning document granted a limited power of appointment, is the person designated pursuant to such a power a person "outside the estate" even if within the limited class of individuals specified by the decedent? In the case of a minor beneficiary, would the transfer of the NFA firearm to a trustee to obligated to hold that asset for the specific benefit of the minor beneficiary be a transfer to a person "outside of the estate"?

It seems obvious ATF never considered the cost incurred by a beneficiary in any of these situations either when formulating the proposed rule or when estimating its costs. If forced to liquidate the NFA firearm, the estate, trust, or beneficiary must pay a $200 transfer tax *per item*. Where the decedent was a collector of firearms that cost could amount to a considerable sum. A ten-item collection would thus cost the estate, trust or beneficiary $2,000 in taxes. While it is easy to *imagine* a scenario in which ATF's proposed rule adds hundreds of thousands, if not

millions, of dollars to the cost of implementation, without any analysis by ATF, it is impossible to know the actual cost.

V. LESS BURDENSOME ALTERNATIVES TO ATF'S PROPOSED RULE

While ATF has not demonstrated that there is any problem to be addressed by its proposed rule, as explained in Part I(B), III(B), and IV(B) 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.

As explained at length in the comment FICG prepared for David M. Goldman, some instruments include important safeguards that go far to alleviate ATF's stated concern. *See* Comment 1899, pp. 29-32. For example, many trusts add to the existing criminal prohibitions by imposing 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. *See also* Comment of J.A.K., p. 4 (outlining steps taken to educate the family about NFA regulation).

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 detailed in the comment FICG prepared for Mr. Goldstein, and ATF has not properly distinguished between individuals in those different roles when defining a "responsible person." *See* Comment 1899, pp. 21-26. The same is true of other forms of legal entities. 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 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.[36] 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 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. *See* Comment 0993.

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 5320.20 -- machine guns, destructive devices, SBRs, and SBSs. *See* 27 C.F.R. § 478.28. The omission of silencers and AOWs was not inadvertent. *See* ATF, "When Permission is Required

[36] 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. Moreover, in other contexts, DOJ describes NICS as highly successful. *See* Comment of Hill Country Class III, LLC d/b/a Silencer Shop, pp. 10-15.

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. For similar reasons, AOWs should be eligible for the same treatment. *See* Part II(A)(2).

Silencers (or "suppressors") are important safety devices that ATF should subject to minimal regulation within the NFA framework. 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.

CONCLUSION

ATF has made a mockery of this proceeding, engaging in numerous tactics designed to deny meaningful public participation. As a result ATF cannot promulgate any final rule that hopes to survive judicial review without starting fresh. In doing so, ATF should consult with a broad cross-section of interests familiar with the laws governing trusts, estates, and business entities rather than a select few. Independent of such problems, moreover, there is ample reason to question whether ATF regulation of certain firearms under the NFA is consistent with the Second Amendment and federalism concerns. ATF's proposal stretches far beyond any statutory authority. If ATF were to overcome those problems, the fact remains that its proposal is built upon statistically invalid assumptions and false premises. ATF failed to quantify *any* benefit from the proposed rule and substantially undercounted the cost it would impose, including a failure to consider at all some of the largest costs. The proposed rule is demonstrably unworkable and many less-burdensome alternatives exist to address any legitimate concerns.

Even the one portion of the proposal that heads in the right direction -- dealing with decedent's estates -- fails to define terms with sufficient specificity as to permit meaningful comment. If that section is intended to codify existing ATF practices, it fails in several key respects. Alternatively, if that section is intended to depart from ATF's established practices, there is no stated justification for doing so and the result is a proposal that is internally inconsistent in the manner in which it treats fiduciaries..

Respectfully submitted,

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