NRA-ILA

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030-7400

# Comments of the National Rifle Association Institute for Legislative Action in Opposition to Proposed Rule ATF 41P

**Introduction**

The National Rifle Association Institute for Legislative Action (NRA-ILA) is a 501(c)(4) organization dedicated to protecting the fundamental, individual right to keep and bear arms for defensive and other legitimate purposes. Many of the National Rifle Association's more than five million members legally own or desire legally to own firearms regulated by the National Firearms Act (NFA)[1] for lawful use. Many of these same National Rifle Association (NRA) members also desire to benefit from the legal, estate planning, and tax benefits offered by holding their NFA firearms in trust. On behalf of these members, we respectfully submit these comments in opposition to the Bureau of Alcohol, Tobacco, Firearms and Explosives' proposed rule published under Docket Number 41P in the September 9, 2013, edition of the Federal Register at pages 55014 through 55029 (41P).

The many hundreds of comments already published in opposition to 41P exhaustively catalog its various problems and potential for absurd consequences. For example, a comment submitted by David M. Goldman, an attorney who specializes in trusts and estates, details how 41P is based on an

[1] 26 U.S.C.A. §§ 5801-5872. When referring to firearms regulated by the NFA, this comment uses the shorthand

unsophisticated and inaccurate view of the law governing trusts and estate planning.[2] Mr. Goldman's comment also explains how ATF materially underestimates the costs of its proposed rule. Other attorneys,[3] law enforcement officers,[4] and firearm manufacturers,[5] among many others with relevant expertise and experience, have thoroughly explained 41P's pitfalls, ambiguities, and shortcomings. These comments alone surely establish that the rule is flawed in its legal and factual premises and is unworkable in practice.

From NRA-ILA's perspective, however, the main problems with the proposal arise from its intention to expand the role of state and local chief law enforcement officers (CLEOs) in the NFA approval process.[6] Three points in particular demonstrate why this aspect of 41P should be abandoned.

First, its requirements are not authorized by the NFA and are therefore illegal for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to impose. Second, the requirements could effectively block even those who are lawfully entitled to receive and possess NFA firearms from doing so under the very regime Congress created, and most states recognize, for this purpose. On the other hand, ATF has articulated no reason why the current regime has proven unworkable or how imposing these additional burdens on responsible, law-abiding persons would enhance public safety.

---

[2] Comment -1899. The comments on 41P have been assigned an identification number that have a common prefix, "ATF-2013-0001-," followed by a unique four digit number. All comments are cited to using this four digit number.

[3] *See*, *e.g.*, Comments 2346, 1607, 0836, 0456, and 0206.

[4] *See*, *e.g.*, Comments 2449, 2346, 1590, 0581, and 0259.

[5] *See*, *e.g.*, Comments 1177 and 1114.

[6] The specific provisions to which NRA-ILA objects in 41P are the revisions to 27 C.F.R. §§ 479.11, 479.62, 479.63, 479.84, 479.85, and 479.90, *except* as they pertain to: (1) incorporating Form 5330.20 information into §§ 479.63 and 479.85 and the corresponding forms; and (2) the elimination of the phrase "or that the transferee will use the firearm for other than lawful purposes" from the law enforcement certificate provisions of §§ 479.63 and 479.85. NRA-ILA does not object to the proposed addition of § 479.90a.

## I. 41P's Expanded Chief Law Enforcement Certification Requirements are *Ultra Vires*

Nowhere does the language of the NFA itself provide for or contemplate any role for local officials in administering its provisions. Needless to say, it is a federal revenue act, and the presumption is therefore that it will be administered by federal authorities.

Nevertheless, since 1985, regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) have specifically required participation by *state or local law* enforcement officials in the approval of applications to transfer a firearm under the NFA.[7] Under these regulations, the transferor must execute an ATF Form 4, Application for Transfer and Registration of Firearm, to be filed and approved by the Director of ATF, before the transferee may take receipt of the firearm.[8] In the case of an individual transferee, the Form 4 must include a photograph of the applicant, two properly completed FBI fingerprint cards, and a "certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director [of ATF]."[9] The certificate must state that

> the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.[10]

---

[7] Prior to 1985, transfers could also be approved by specified federal officials. *See Lomont v. O'Neill*, 285 F.3d 9, 12 (D.C. Cir. 2002).

[8] 27 C.F.R. § 479.84.

[9] 27 C.F.R. § 479.85. This certificate requirement is commonly and herein referred to as the "CLEO sign-off."

[10] *Id*. Similar application and identification requirements for individuals apply under NFA regulations to the making of NFA firearms. 27 C.F.R. §§ 479.62 – 479.63. For the sake of brevity, this comment will address itself to the transfer provisions, which most directly concern NRA members. Nevertheless, the same flaws that will be discussed in the transfer context also inhere in the making context. This comment should therefore be read to apply to both such contexts.

The Director will not approve an application without the required certification.[11]

The Fifth Circuit found a similar precursor to these regulations to be "so out of keeping with the statute as to be ultra vires."[12] Later iterations of the CLEO sign-off have repeatedly been challenged in court as unconstitutional. Several of these cases were decided adversely to those challenging the regulations on standing grounds, as the challengers had failed to exhaust every possible avenue for CLEO sign-off made available by the regulation.[13]

A later published case, *Lomont v. O'Neill*,[14] did address the merits of the CLEO sign-off in the case of an individual. The plaintiffs in that case raised a number of claims, including that the sign-off requirement lacks a statutory basis and is arbitrary and capricious. The plaintiffs noted that the only basis specified for denial of a transfer application in the NFA itself is "if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."[15] They also complained that the regulation allows state and local CLEOs to act arbitrarily in deciding whether or not to execute sign-offs and effectively insulates their decisions from scrutiny under the federal Administrative Procedures Act.

Regarding the claim that the NFA does not authorize the CLEO sign-off requirement, the court's opinion merely notes that the NFA grants broad rulemaking authority "governing application forms [to make and transfer firearms], including regulations pertaining to the identification of the transferee, the

---

[11] *See Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996).

[12] *Weyer v. U.S.*, 429 F.2d 74, 77 (5th Cir. 1970). The dispositive issue in that case was whether the NFA paperwork requirements that applied at the time, considered in the context of Texas state laws concerning the possession of machine guns, violated appellant's Fifth Amendment right against self-incrimination.

[13] *See Steele v. Nat'l Firearms Act Branch*, 755 F.2d 1410 (11th Cir. 1985); *Westfall*, 77 F.3d 868; *Doe v. ATF*, No. 3:94CV1699 JBA, 1997 WL 852086 (D. Conn. 1997) (unpublished).

[14] 285 F.3d 9 (D.C. Cir. 2002).

[15] *See* 26 U.S.C.A. § 5812 (a).

transferor, and the firearm."[16] It also states that in specifying one basis for denial of an application, the NFA did not necessarily foreclose other bases for denial.[17]

This reasoning, however, is notably superficial. It does not account for how statutory provisions that grant certain rulemaking authorities over the application's "form" and procedures to be followed in identifying the transferee and firearm encompass the authority to give state and local officials what amounts to veto power over the transfer of an NFA firearm, even to one who is not legally prohibited from receiving or possessing it. In discounting the NFA's specified basis for denial of an application, the opinion also ignores the basic principle of statutory interpretation *expressio unius est exclusio alterius*, which holds that courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply …."[18] In other words, if Congress had meant to establish additional requirements for the granting of an application other than the ones it actually mentioned, it would have said so.

Regarding the claim concerning the arbitrary and capricious nature of the certification provision, the court construed this to be a facial attack on the regulation.[19] Thus, it held plaintiffs to the standard that "the regulation could not be upheld in any case" and that "allegations regarding the specific circumstances of several plaintiffs were meant to show as much."[20] While it did not deny plaintiffs' assertions regarding CLEOs' practices in refusing to consider or in adding their own requirements for

[16] *Lomont*, 285 F.3d at 16 (citing 26 U.S.C. §§ 5812, 5822).

[17] *Id*. at 16-17.

[18] *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).

[19] *Lomont*, 285 F.3d at 17-18.

[20] *Id*. at 18.

consideration to the certification process, the court held that "a regulation is not itself 'arbitrary and capricious' merely because it might be applied in an arbitrary fashion by those implementing it."[21]

Yet the court specifically noted that its holding was limited and that it did not necessarily foreclose an "as-applied" challenge under proper circumstances:

> We therefore sustain the certification regulations as against plaintiffs' facial attack. We have not decided whether, in a particular application, the regulations would be arbitrary and capricious-for instance, when every qualified local and state official has decided not to issue certifications for anyone within their jurisdiction, or when unlawful conditions are attached to the issuance of a certification. …
>
> We … express no views on the merits of a complaint, brought by a proper plaintiff, claiming that the certification regulations were arbitrary and capricious as applied to him. [22]

The upshot of this case law is that the CLEO sign-off provision remains vulnerable to statutory and constitutional challenges, even in the context of individual applicants.

The potential for challenges to the validity of the CLEO sign-off requirement would be even greater under 41P's expansion of that concept to the context of legal entities such as trusts and corporations. The sections of the NFA cited by *Lomont* as authorizing the CLEO sign-off make clear that the prerequisites for the CLEO running his or her own background check, i.e., fingerprints and photographs, apply to *individual* applicants.[23] Once again, the doctrine of *expressio unius est exclusio alterius* would counsel against extending similar requirements to transfers involving legal entities. To whatever degree it might be conceivable that Congress intended with the NFA to enlist state and local CLEOs to vet applicants to make or receive NFA firearms by running criminal background checks, nothing

---

[21] *Id*. at 17 (citations omitted).

[22] *Id*. at 17-18.

[23] "A firearm shall not be transferred unless … the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, *if such person is an individual*, the identification must include his fingerprints and his photograph …." 26 U.S.C.A § 5812 (emphasis added). *See also* 26 U.S.C. §§ 5822.

in the act even remotely suggests such vetting would apply to other than applicants who are individuals. Indeed, it strongly suggests the opposite.

Also, as discussed in the next section of this comment, the provisions of 41P would expose state and local CLEOs who participate in the sign-off procedure for legal entities to even more uncompensated labor and liabilities than they face in the context of individual applicants. The disincentives are obvious, and for many CLEOs, would undoubtedly be grounds for them to opt out of participation. It would also give state and local CLEOs even more authority to "veto" transfers that would otherwise be possible under federal and state laws. Currently, otherwise eligible transferees who cannot find a willing CLEO to approve their applications have the option of processing the transfer through a legal entity. That somewhat mitigates the harm posed by the CLEO sign-off requirement. Should that option be foreclosed, however, the harm posed by unwilling CLEOs would be unavoidable, and more viable legal challenges would result.

Notably, all the above cases also arose in the days before *District of Columbia v. Heller*,[24] which expressly recognized that the Second Amendment protects an individual right to keep and bear arms for defensive and other legitimate purposes. The outcome in one of the aforementioned cases explicitly relied in part on the false premise that "an individual has no constitutional right to possess firearms" and that no due process claim could therefore arise from being unable to take possession of an NFA firearm.[25] Whether misinterpretation of the Second Amendment led to a more dismissive approach by the courts in the other cases is not clear. What is clear, however, is that courts have since been forced to acknowledge that the Second Amendment is not the nullity some once believed it was. Whether or

[24] 554 U.S. 570 (2008).

[25] Doe, 1997 WL 852086 at *5.

not the individual Second Amendment right is dispositive in any given case, courts cannot "ignore what appears to be an ascendency of second amendment rights in federal jurisprudence."[26]

To summarize, in doubling down on what is already a suspect legal requirement for the making and transfer of NFA firearms, ATF all but guarantees that it will face additional legal challenges to that requirement.

## II. 41P's Expanded CLEO Sign-off Requirements Would Effectively Block Otherwise Eligible Persons from Exercising Their Rights to Possess NFA Firearms Under Federal and State Laws

As a legal matter, the NFA is formally a revenue-generating law. It is not a firearms ban. Congress, as well as the legislatures of most states to various degrees,[27] has acknowledged that people have legitimate reasons for owning and acquiring NFA firearms and has accordingly prescribed a process for doing so.

State and local law enforcement officers are not compelled by federal law,[28] nor can they be,[29] to participate in the CLEO sign-off procedures of the NFA. As the foregoing case law, common experience, numerous comments,[30] and even the language of 41P itself make clear,[31] many CLEOs will not do so, regardless of the applicant's legal eligibility. In some cases, CLEOs have also been reported to have imposed special conditions for their participation (such as waiver of Fourth Amendment rights

---

[26] *Coram v. State*, 996 N.E.2d 1057, 1072 (Ill. 2013).

[27] *See State Laws and Published Ordinances – Firearms, 2010-2011, 31st*, Bureau of Alcohol, Tobacco, Firearms and Explosives (Nov. 2012) *available at* https://www.atf.gov/files/publications/download/p/atf-p-5300-5-31st-editiion/2010-2011-atf-book-final.pdf (containing state and local laws governing access to NFA firearms).

[28] *See Lomont*, 285 F.3d at 14. The current and proposed versions of 27 C.F.R. §§479.63, .85 do not require a local certifying official to act on or even consider an applicant's request for a certificate.

[29] *See Printz v. United States*, 521 U.S. 898, 935 (1997).

[30] *See*, *e.g.*, Comments 2596, 2183, 1607, 1250, 0836, 0456, 0507, 0206. Even police officers complain of being refused the required certification. *See*, *e.g.*, comment 0581.

[31] 78 Fed. Reg. 55017 (Sept. 9, 2013).

against warrantless home searches) that are not authorized by law and that impose additional burdens on the applicant.[32]

Under current law, persons who cannot obtain a CLEO sign-off have the option of having the firearm registered to a legal entity such as a trust. In this case, the CLEO does not participate in "approving" the transfer. Such arrangements do not create loopholes; they are merely another means of complying with the law. The NFA,[33] and even ATF regulations,[34] repeatedly make distinctions between requirements applying generally and those applying specifically to individuals. Needless to say, if a prohibited person were to receive a firearm registered to a legal entity or to use that firearm to commit a crime, applicable laws would remain fully enforceable. Yet under 41P, an otherwise eligible person would under all circumstances remain subject to the potentially shifting whims of CLEOs, whose refusal to participate could become a law unto itself.

In its analysis of this issue, ATF attributes CLEOs' reluctance to approve transfers to "a concern of perceived liability; that signing an NFA transfer application will link them to any inappropriate use of the firearm."[35] Rule 41P proposes to address this concern by striking the requirement that CLEOs certify they have no information that "the transferee will use the firearm for other than lawful purposes." The inference is that while the rule contemplates an expanded role for the CLEO sign-off, it will be offset by removing the main disincentive they have to participate.

This analysis, however, fails to recognize the true nature of the problem, and the proposal underestimates the increased burdens and liabilities it would impose upon CLEOs.

---

[32] *See Lomont*, 285F.3d at 17; Dane Schiller, *Sheriff to consider machine gun permits on case by case basis*, HOUS. CHRON. (Jun. 17, 2013) *available at* http://blog.chron.com/narcoconfidential/2013/06/sheriff-to-consider-machine-gun-permits-on-case-by-case-basis-if-he-is-ever-asked-to-sign-one/.

[33] *See* 26 U.S.C.A. §§ 5802, 5812(a)(3), 5822, 5848.

[34] *See* 27 C.F.R. §§ 479.11, 479.23, 479.34, 479.62, 479.63, 479.84, 479.85, and 479.90.

[35] 78 Fed. Reg. 55017 (Sept. 9, 2013).

First, the supposed legal liabilities of CLEO participation are greatly exaggerated. A CLEO's decision to participate in approving an NFA transfer would normally be cloaked with qualified immunity,[36] and the incidence of individuals using registered NFA firearm to commit crime is exceedingly rare. Other reasons obviously underlie the reluctance or refusal displayed by many CLEOs.

One common basis for refusal is that some CLEOs are ideologically opposed to firearms possession by private individuals in general or their possession of NFA firearms in particular. A media account from Pennsylvania, for example, notes that a local sheriff would not approve transfers because he does not believe persons outside of law enforcement should have machine guns.[37] According to the report, the sheriff said he would rather "lose his job than sign the form."[38] Another report quotes a sheriff from North Carolina as stating, "I don't see any purpose for [machine guns] in the civilian world."[39] A police chief from Oklahoma told a reporter, "I can't find any legitimate need for a machine gun … except to caress them."[40] Similar accounts abound, including in the comments submitted in response to 41P.[41] If a CLEO refuses even to consider approving a transfer because he opposes the right of "ordinary" people to possess firearms, changing the law enforcement certificate's contents will not make a difference.

Other CLEOs simply fear the public relations or political consequences of being perceived as "arming the public." Some gun control advocates and media outlets loudly criticize the practice of

---

[36] *See Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994) (no § 1983 or negligence liability for a police chief who approved an officer's application for a machine gun the officer subsequently used in a homicide).

[37] Michael P. Buffer, *Sheriff refuses to sign machine gun forms*, CITIZEN'S VOICE (Apr. 29, 2013), *available at* http://citizensvoice.com/news/sheriff-refuses-to-sign-machine-gun-forms-1.1480856.

[38] *Id.*

[39] Scott Sexton, *Federal gun laws complex, tricky*, WINSTON-SALEM J. (Jan. 8, 2013), *available at* http://www.journalnow.com/news/columnists/scott_sexton/article_3f1a424c-5949-11e2-b7d6-001a4bcf6878.html.

[40] Arnold Hamilton, *Tulsa Debate Targets Machine Guns*, DALLAS MORNING NEWS, (Jan. 8, 1989).

[41] *See, e.g.,* Comments 2256, 1250, 0507. *See also* supra n. 30.

CLEOs participating in sign-offs, regardless of the care or due diligence with which the CLEOs act.[42] Considering that approvals for firearm transfers are not part of the core law enforcement functions of patrol and detecting and investigating crime, CLEOs who are already overextended in those areas may opt out of participating in the NFA certification process simply to foreclose one more avenue of public scrutiny and political pressure. Again, this would not be cured by changing the form of the certification.

Another problem is that the NFA provides no funding mechanism for state and local CLEOs to participate in the transfer process, notwithstanding that a conscientious CLEO may expend considerable resources in satisfying himself or herself of an applicant's eligibility. To the extent ATF incorporates CLEOs in the transfer process, moreover, it does not prescribe a standardized vetting procedure. This, like the decision of whether to participate at all, is left entirely to the CLEOs' discretion. Based on its determination not to abolish the CLEO sign-off – which ironically was a key request of the petitioner cited in 41P[43] – ATF apparently believes CLEOs have something to add to the FBI fingerprint check and automated database inquiries that ATF itself performs on individual applicants.[44] Yet ATF does not explain what its expectations are in this regard or attempt to identify what CLEOs actually do or should do that ATF does not already do.[45] ATF certainly does not provide any empirical evidence to quantify the value added by state and local CLEOs' additional procedures, whatever they might be.

---

[42] *See* e.g., Sarah Huntley, *Florida popular place for machine guns, automatic weapons*, Assoc. Press (Jan. 3, 2000); Mark D. Karlin, Reduce the Firepower On the Streets, CHI. TRIB., Feb. 18, 1991, *available at* http://articles.chicagotribune.com/1991-02-18/news/9101160206_1_gun-deaths-machine-guns-gun-violence; Feb. Tom Mooney, *Outlaw silencers, machine guns, feds urge N.H.*, NASHUA TELEGRAPH, Jan. 10, 1986, at 22.

[43] Mark Barnes, *Request for Rulemaking*, National Firearms Act Trade & Collectors Association, (Dec. 3, 2009) *available at* http://www.nfatca.org/pubs/NFATCA_petition1209.pdf.

[44] ATF's own background check procedure for NFA transfers is detailed at 78 Fed. Reg. 55017.

[45] ATF claims in its analysis at 78 Fed. Reg. 55017 that "not all state criminal history records meet the standard for inclusion in the Interstate Identification Index database … and only 50 percent of arrest records in the database have final dispositions." Yet it does not claim that the records not meeting the standard for inclusion would necessarily be serious enough to result in legal disqualifications for firearm, nor does it claim state and local CLEOs have easier access to disposition information on arrests than do federal officials. Indeed, the FBI's NICS division must deal with exactly the same circumstances when processing background checks for non-NFA firearm transfers.

While much has been said in other comments about ATF's underestimation of the costs its rule would impose,[46] suffice to say here that this lack of standardization for the CLEO vetting procedure makes any attempt to quantify its existing costs, as well as ATF's attempt in 41P to estimate the additional costs imposed by the rule, border on the frivolous. It also leaves CLEOs, who are staking their reputations on and investing their time in the process, to guess at what they are supposed to do and very likely to repeat at their own expense work that ATF also performs. Particularly for CLEOs who have no authority under state or local law to charge for their part in the certification procedure, the disincentives are plain.

Even taking ATF's minimalist estimate of two "responsible persons" per legal entity at face value, CLEOs would have at least *twice* as much work in processing transfers to legal entities as to individuals. That, plus the ambiguity in how far the "responsible person" requirement extends, could lead CLEOs to avoid sign-offs for legal entities altogether. Whatever liabilities CLEOs already perceive in participating in the certification process, they could not but be multiplied under the changes contemplated by 41P.

Also, ATF's own analysis identifies yet another problem: CLEOs would have to certify that the photographs and fingerprints of all "responsible persons" who are included in the application belong to each person as represented. As ATF seems to acknowledge, these steps in the process would be more likely to occur off the CLEO's premises for certain types of entities with a large contingent of responsible persons. The responsible parties affiliated with a legal entity, moreover, could well reside in multiple jurisdictions, introducing yet further complications. Clearly, CLEOs could not confidently make this certification in the case of fingerprints without actually taking the fingerprints themselves, watching

---

*See* FBI, *National Instant Criminal Background Check System Fact Sheet*, http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet (last visited Dec. 3, 2013). Is ATF suggesting that NICS checks performed by the FBI for firearm transfers are inadequate?

[46] *See, e.g.,* Comments 1899, 1837, 1114.

someone else do it, or having the fingerprints painstakingly examined against a known sample. Similarly, if the CLEO were unfamiliar with the person's appearance, he or she would not have any clear means of judging the authenticity of a photograph. Even if the CLEO were familiar with a person's general appearance, he would also have to rule out the possibility, for example, that the person has an identical twin. This remaining certification requirement is thus even more burdensome in the case of 41P.

ATF's analysis of the CLEO certification issue does not adequately consider the bases that CLEOs have for refusing to participate in the process. While we agree the current requirement that forces CLEOs executing the certification to speculate about applicants' future intentions or actions is untenable, that alone does not explain why many CLEOs refuse to participate. Ideology, politics, public perception, and resource constraints surely play as much, if not more of, a role. The proposed rule does nothing to alleviate these concerns, and indeed, is likely to exacerbate them.

The most likely outcome of 41P's new CLEO sign-off procedures is to suppress ownership of NFA firearms through legal entities. This would eliminate a safeguard that benefits both CLEOs and the law-abiding members of the public who are eligible to acquire and possess NFA firearms. Without this safeguard, people who would otherwise qualify to exercise their rights under federal and state laws will be deprived of the opportunity to do so. Should this happen, it would almost certainly provoke legal and perhaps legislative action.

ATF's has a duty to administer the NFA, not to nullify it. Again, the NFA is a revenue measure, but ATF is seeking to create a rule that would almost certainly decrease the revenue generated by the law. The potential costs associated with reduced collection of transfer taxes, moreover, are not reflected in ATF's accounting of the measure's economic impact.

## III. ATF Has Failed to Justify the Costly and Consequential Changes 41P Would Pose or Show that Current Procedures and Safeguards Inadequately Protect Public Safety

The use of lawfully-owned NFA firearms to commit violent crime is exceedingly rare.[47] Our own research found only four occurrences documented in media accounts and case law.[48] Nothing suggests that additional background checks would have made a difference in any of these cases. We found no cases whatsoever in which an NFA firearm registered to a private legal entity (as opposed to an individual) was used to commit a crime.

Perhaps more to the point, ATF itself fails even to argue in its proposed rule that registered NFA firearms are frequently, or even infrequently, used in crime. The three "near misses" ATF cites where a prohibited person was found to be in some way associated with a legal entity do not even establish that any prohibited individual actually obtained possession of a firearm registered to the entity, much less that the person misused it. As another comment aptly notes, much information is missing about the cited episodes and what information is provided proves nothing so much as the effectiveness of current safeguards in identifying and preventing unauthorized access.[49]

---

[47] When testifying before Congress in 1986, acting ATF director Stephen Higgins said that he knew of less than ten instances of legally registered machineguns being used in crimes. *Legislation to Modify the 1968 Gun Control Act: Hearing Before the H. Comm. on the Judiciary*, 99th Cong. 1165 (1986). Whether this number included non-violent offenses, such as failing to file an appropriate form when traveling with a machinegun across state lines, is unknown.

[48] Two cases involved homicides committed by police officers with automatic weapons. *See Galliano v. Borough of Seeaside Heights*, 2007 WL 979850 (D.N.J. 2007) (unpublished); *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994). A third involved a physician who reportedly used a "machine gun and a silencer" registered to him to kill a colleague. See *Doctor's Violent Past Was Kept Hidden*, CLEVELAND PLAIN DEALER (Nov. 7, 1998). The fourth involved a man who apparently was murdered with a .22 cal. handgun equipped with a suppressor that was registered to him and that was believed to have been stolen by his wife. *See Rudin v. State*, 86 P.3d 572 (Nev. 2004). Yet another case involved an attorney with no criminal history who discharged what was described as a "9mm machine gun" during a casino robbery. *See Riebel v. State*, 790 P.2d 1004 (Nev. 1990). Whether the firearm was lawfully registered to him or how he otherwise obtained it, however, is not mentioned in the court's opinion.

[49] Comment 1899.

Also, federal case law recognizes the distinction between possession and ownership rights in the context of prohibited persons.[50] That a prohibited person retains a property interest in a firearm through a legal entity has no public safety implications unless and until the person actually takes possession of it. Case law also recognizes that persons cohabiting with prohibited persons are not thereby barred from possessing firearms within the home.[51] Indeed, NRA has obtained documents from ATF through a Freedom of Information Act request in which ATF validates such living arrangements, provided measures are taken to prevent access to the firearms by the prohibited person.[52] Yet in such cases, the firearms may still provide some incidental benefit to the prohibited person, such as making the home safer from violent crime or providing game meat for the household's consumption.

ATF simply has not made the case that violent criminals are using legal entities to acquire NFA firearms, and the expense, delay, scrutiny, and documentation involved in the process all suggest that those with bad intentions have good reason to seek alternatives. Indeed, FBI statistics show year in and year out that criminals who use firearms to commit murder most often resort to ordinary handguns.[53] Needless to say, other simpler, cheaper, and less visible options than establishing a trust or other legal entity exist for criminals who wish illegally to obtain them.

ATF's concerns seem grounded in the fact that trusts and legal entities are an increasingly popular way to acquire NFA firearms, not in empirical evidence that this popularity has led to more

---

[50] *See U.S. v. Zaleski*, 686 F.3d 90, 94-95 (2012); *United States v. Miller*, 588 F.3d. 418, 419-20 (7th. Cir. 2009); *Cooper v. City of Greenwood, Miss.*, 904 F.2d. 302, 305 (5th. Cir. 1990).

[51] *See United States v. Griffin*, 684 F.3d 691, 699 (7th Cir. 2012).

[52] *See, e.g.,* Letter from Acting Director of the Dallas Field Division (Jan. 6, 2009) (advising that firearms ownership is possible while cohabitating with a prohibited person as long as the non-prohibited person "takes steps to ensure that the prohibited person does not have access to firearms and ammunition store or maintained within the residence") (on file with author).

[53] Federal Bureau of Investigation, *Crime in the United States 2011*, Expanded Homicide Data Table 8: Murder Victims by Weapon, 2007-2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-8. In each of the five years reported in the table, rifles or shotguns of all types were used less often to commit homicide than knives or cutting instruments, blunt objects, or "personal weapons" such as hands and feet.

diversion or criminal misuse of such firearms. The proposed rule states: "the number of Forms 1, 4, and 5 involving legal entities that are not Federal firearms licensees increased from approximately 840 in 2000 to … 40,700 in 2012. There accordingly has been an increase in the number of individuals who have access to NFA firearms but who have not undergone a background check."[54] Yet ATF does not suggest that these people have been acquiring these firearms for illegal use. If so, one would expect ATF to show a rise in reported cases of NFA firearm-related crime. Nothing of the sort is claimed. Again, ATF's own figures demonstrate that the current regime is adequate in preventing diversion of NFA firearms for criminal purposes. That the number of transfers could increase exponentially with no demonstrable increase in diversion or criminal misuse is both impressive and reassuring. The fact that people are enthusiastically embracing their rights under the NFA does not automatically provide justification for suppressing them.

**Conclusion**

Given the foregoing, NRA urges ATF to abandon 41P's provisions that expand the CLEO sign-off requirement to the context of legal entities. The provisions are ambiguous, confusing, and unnecessary. They are not authorized by the NFA and are nearly certain to be followed by legal action. Also, they have the potential, if not the aim, to deprive eligible persons from exercising their rights under the law.

The CLEO sign-off provisions found in ATF's regulations are based on antiquated and unrealistic notions that criminal records are maintained mainly at the state and local levels and that sheriffs and police chiefs have special personal knowledge of the individuals within their jurisdictions. Unlike at the time of the NFA's enactment in 1934, most criminal record information, and certainly most that is serious enough to warrant restrictions on firearm acquisition, is available to ATF through the federal databases enumerated in the proposed rule itself. The United States is also much more populated and

[54] 78 Fed. Reg. at 55016.

urbanized than in 1934, and CLEOs are less likely to have personal knowledge of their individual constituents. The days of Sheriff Andy Taylor, while perhaps the source of fond memories for many, are no longer the paradigm in which the NFA operates.

In light of these facts, ATF would be better served by eliminating the CLEO sign-off entirely, rather than expanding it. The "responsible person" and background check provisions of the proposed rule are solutions in search of a problem and should be withdrawn.