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December 6, 2013

Brenda Raffath Friend
Mailstop 6N-602
Office of Regulatory Services
Bureau of Alcohol, Tobacco, Firearms and Explosives
U.S. Department of Justice
99 New York Ave., NE
Washington, DC 20226

Re: ATF 41 P – 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. 78 Fed. Reg. 55014 (September 9, 2013).

Dear Ms. Raffath Friend:

The National Shooting Sports Foundation (NSSF), the trade association for America's firearm industry, respectfully submits comments concerning the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Notice of Proposed Rulemaking that would amend the regulations concerning making or transferring a firearm under the National Firearms Act (NFA), ATF 41 P.

Our primary concern is that ATF lacks statutory authority to extend the CLEO certificate requirement to what it calls "responsible persons" of a legal entity such as a trust or corporation. The NFA is part of Title 26 of the United States Code, which includes the following pertinent definition: "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). The NFA provides that a firearm shall not be transferred, inter alia, unless "the transferee is identified in the application form in such manner as the Secretary¹ 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. § 5812(a)(3). Thus, Congress expressed its intent that fingerprints and a photograph shall be required only of a transferee who is an individual.

ATF has no authority to require a CLEO certificate in any case. The NFA is administered by the Attorney General. The Attorney General lacks authority to delegate his duties to a person who is not even an entity or employee of the federal government and who has not been voluntarily deputized to carry out such duties. A CLEO is not a federal agency, and any arbitrary or capricious actions, or failure to act, of a CLEO are not subject to review under the Administrative Procedure Act (APA). The Attorney General

¹ "The Secretary" means "the Attorney General" in the NFA. § 1111(k)(2), P.L. 107-296, 116 Stat 2135 (2002).

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may not insulate his own actions, which are subject to APA review, by asking CLEOs, who are not covered by the APA, to carry out his duties.

Aside from ATF's lack of authority to extend this requirement, we do not generally oppose a change to require a single responsible person at a trust or corporation to submit to a fingerprint based background check in order to obtain an NFA. In other words, rather than requiring that every responsible person submit to a background check, we urge ATF to require background checks, fingerprints and photographs for only one trustee (grantor) and one corporate responsible person. We believe that the proposed language defining the term "responsible person" is overly broad in scope. The background check requirement is imposed on each and every transfer to a person, including trusts, corporations and the other legal entities mentioned. For example, a corporation who acquires NFA firearms on a Form 4 for its business would be required to submit numerous sets of fingerprints and photographs for each acquisition it might make. Besides imposing an unnecessary burden on registrants, such additional paperwork imposes a burden on the NFA Branch itself.

Under the current rules, Section 479.63 states that the applicants must affix a photograph of themselves on Form 4 as well as include a completed FBI Form FD-258 (Fingerprint Card). The regulation also requires an individual seeking to obtain an NFA item to have the chief law enforcement officer (CLEO) of the individual's jurisdiction certify that the individual will not misuse the item and is not prohibited by state law from possessing the item. While the former requirement is being eliminated by this rule, additional language has been added to the CLEO's certification to state that the CLEO is satisfied that the fingerprints and photograph accompanying the form are those of the responsible person.

While this change might now cause some CLEOs who have not previously certified ATF NFA forms out of fear of liability that might result from misuse of the listed weapon to agree to certify, this remains a burdensome process for both the registrants and the CLEO. In fact, the burden is now increased because the CLEO will have to certify for all responsible persons. We believe that these requirements will continue to result in CLEOs refusing to certify, counter to the intent of state laws allowing the legal possession of NFA items.

Rather than maintaining and expanding this onerous process without statutory authority, we urge ATF to revise the NPRM to eliminate the CLEO certification step from the process for individuals and to avoid adding this additional layer of duplicative bureaucracy to the process for trusts. Rather than maintaining the certification process and extending a variation of the process to trusts, ATF should consider shifting to a notification process. This would remove the unnecessary burden from CLEO without sacrificing security. The current forms could be revised to require merely that the CLEO be notified by the submission of a copy of the form.

This would be a positive change for a number of reasons:

- Historically, the reason for the CLEO certification was that the records demonstrating whether the individual should be allowed to possess the item were not in electronic databases. Today, the FBI conducts fingerprint-based background checks with access to national databases. This makes the CLEO certification redundant at best and, in many cases, a significant hurdle for individuals and other entities seeking to exercise their Second Amendment rights.
- More importantly, it seems to us that it will be impossible for a CLEO to certify that each responsible person's fingerprints belong to the correct person without taking a second set of fingerprints in person. This puts law enforcement officers in the position of dedicating significant time and resources to verification during a time of tight budgets. The increase in the number of

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trusts over recent years is partially due to CLEOs refusing to review applications from individuals. The proposed rule would result in a de facto ban on transferring a firearm under the NFA.

- Rather than relying on local law enforcement, we urge the ATF to internally determine whether the transfer of an NFA item complies with state law. ATF already tracks state and local firearms laws, and verifies whether a trust complies with state law.
- Shifting to a notification process from a certification process will provide local law enforcement officials with an opportunity to object to a transfer, without requiring the CLEO to use scarce time and resources. This could work similar to a Form 7 process.

While we support a background check for one trustee or responsible person for legal entities in the manner proposed by the notice, we believe that the proposal goes far beyond ATF's statutory authority, as well as, what is necessary to protect public safety. In light of the fact that since 1934 there have been virtually no crimes committed with registered NFA items, and that the ATF could identify only one instance of a potentially concerning application, there is no justification for penalizing law-abiding trusts, corporations, other entities and certifying CLEOs by increasing the regulatory burden. The absence of sound justification is confirmed by the lack of a quantified benefit in the NPRM.

Further, the NPRM portrays trusts as nefarious methods employed to skirt the current regulations. In fact, these methods have been legal since 1934. These legal entities serve many legitimate purposes, such as when more than one member of a family may use a NFA firearm. To this end, trusts include safeguards against potential misuse of NFA items. For example, the establishing instruments prohibit any responsible person from possessing NFA firearms owned by the trust if that person becomes disqualified.

The proposed regulations may also actually conflict with the long-standing legal precedent that a prohibited person may retain *ownership* of an NFA firearm by serving as the settlor of a trust, without the right to *possess* the firearm.² Instead of demonstrating a need to overturn this precedent, the examples described in the NPRM actually show that the current NFA trust process safeguards work effectively.

We appreciate this opportunity to address submit our industry's perspective and welcome any questions or comments you may have.

Sincerely yours,



Lawrence G. Keane

² See, United States v. Zaleski, 686 F.3d 90 (1st Cir. 2012).