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**COMMENT OF HILL COUNTRY CLASS III, LLC D/B/A SILENCER SHOP  
TO NOTICE OF PROPOSED REVISION TO 27 C.F.R. PART 479  
(DOCKET NO. ATF 41P)**

**ENTITLED:**

**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**

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Respectfully submitted on behalf of Hill Country Class III, LLC d/b/a Silencer Shop by:

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Hill Country Class 3, LLC d/b/a/ Silencer Shop (“Silencer Shop”) files this comment in opposition to the Notice Number 41P entitled “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<sup>1</sup>” (RIN: 1140-AA43).

## **I. SILENCER SHOP’S INTEREST IN THE PROPOSED RULE**

Silencer Shop is a federal firearm licensee<sup>2</sup> (“FFL”) and a special occupational taxpayer (“SOT”). Silencer Shop sells silencers to law enforcement agencies, individual law enforcement officers, and individuals in all 39 states where silencers are legal. It maintains a public showroom in Austin, Texas and a large online store available at [www.silencershop.com](http://www.silencershop.com). Silencer Shop’s customers use their silencers for a broad array of applications, including use in their official duties as law enforcement officers, home and self-defense, hunting, teaching, recreational shooting, varmint eradication, and hobby collecting.

Dave Matheny founded Silencer Shop after discovering his son suffered from hearing impairment. He wanted to share his love of traditional hunting and shooting sports with his son, but needed to ensure his son’s hearing would not be further damaged. Mr. Matheny’s focus on

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<sup>1</sup> Although silencers, or suppressors, are not mentioned in the title to the proposed rulemaking, the proposed rule will actually have the greatest impact on the silencer industry. In reality, very few “machine guns” or “destructive devices” are transferred to or made by the general public. In fact, it is illegal for a member of the general public to possess any machine gun made after May 1986. 18 USC § 922(o). Most machine gun and destructive device transfers are to either law enforcement agencies or for export. See, e.g., CIS 1986 H521-13, House of Representatives Hearing: Armor Piercing Ammunition and the Criminal Misuse and Availability of Machine Guns and Silencers, Testimony of Stephen E. Higgins, Director, Bureau of Alcohol Tobacco and Firearms, May 17, 2, and June 27, 1984 (The Director of ATF states “a vast majority of the machineguns that are made in this country are later exported, and it is more than 90 percent of those guns that are [exported].”).

<sup>2</sup> There is technically no “license” specifically related to NFA items, other than destructive devices. In order to deal in, import, or manufacture NFA items one must first obtain a federal firearms license (FFL) which requires filling out a four-page application and paying a 3-year fee of \$200 for a standard dealer license, or \$150 for a manufacturer or importer license. See Application for Federal Firearms License, ATF Form 7 (5310.12) (May 2005). Those wishing to handle destructive devices pay \$3000. *Id.* After a licensee has an FFL, the licensee must then register as a special occupational taxpayer using a one-page form and pay a yearly tax of either \$500 or \$1000, depending on the size of the company. See Special Tax Registration and Return National Firearms Act (NFA), ATF Form 5630.7 (April 2007).



silencers as the most-effective, practical, and consistent way to protect his son's hearing led him to found Silencer Shop as a small, home-based business. Since that time, his family-managed business has grown to become the largest direct-to-consumer dealer of firearm silencers<sup>3</sup> in the country.

Mr. Matheny made the decision to start his business after first trying to buy a silencer for his son and discovering that most dealers sold silencers only as an afterthought and viewed silencers as a secondary component of their larger firearms businesses. There were very few dealers who stocked silencers and the few that did had a dismal, overpriced selection. Most dealers in Texas required a buyer to special order a silencer from out-of-state, substantially increasing the price and wait time to purchase the items.

Mr. Matheny saw this as an opportunity to start a silencer-focused business and founded Silencer Shop on the principals of customer service excellence, selection, competitive-pricing, and simplifying the silencer ownership process. Mr. Matheny used his computer programming background to create a complex software program that streamlined the silencer transfer process and soon Mr. Matheny's business grew from \$19,000.00 per month in sales to over

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<sup>3</sup> Federal law defines a "silencer" as "any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts ... intended for use in assembling or fabricating a firearm silencer" 18 USC § 921. While the term silencer the term used in the statute, it is a bit of a misnomer, the term "suppressor" is more accurate and is widely used in the industry, as silencers generally do not completely "silence" weapons. For instance in one study the average unsuppressed sound levels for the 9mm pistol at military standard recording distance (1m to the left of the muzzle) was 160.5 dB and 157.7 dB at the ear of the shooter. The average suppressed levels were 127.4 dB and 129.6 dB, respectively (difference of only 33.1 dB and 28.1 dB). *Comparison of Muzzle Suppression and Ear-Level Hearing Protection in Firearm Use*, Matthew Parker Branch, American Academy of Otolaryngology -- Head and Neck Surgery 2011 144: 950, originally published online 24 February 2011, available at <http://oto.sagepub.com/content/144/6/950>. See also Wall Street Journal, Joe Palazzolo, *Silencers Loophole Targeted for Closure*, Oct. 3, 2013, available at: <http://online.wsj.com/news/articles/SB10001424052702303492504579111243276511128> ("An AR-15, the most popular semiautomatic rifle by sales, fitted with a top-of-the-line silencer still registers 129 decibels when it is fired, he said. According to the American Speech-Language-Hearing Association, that's about as loud as a jackhammer.").



\$1,000,000.00 per month.<sup>4</sup> Silencer Shop, alone, paid approximately \$1,552,000.00 in transfer taxes to the federal government during the twelve-month period between November 1, 2012 and November 1, 2013.

Approximately ninety percent (90%) of Silencer Shop's customers purchase silencers using trusts, corporations or other legal entities. Silencer Shop estimates that eighty percent (80%) of its customers purchase silencers using trusts and ten percent (10%) use corporations, LLC's or other legal entities. One of the primary obstructions to silencer ownership is the existing CLEO certification that is required for individual applications. This requirement creates an inconsistent and often entirely-prohibitive bureaucratic obstacle for his customers to purchase silencers as individuals, not because the CLEOs deny the applications based on merit but because they entirely refuse to process the applications, regardless whether the applicant is qualified. Consequently, many of Silencer Shop's customers have followed the recommendations of local chief law enforcement officials, including the Sheriff of St. John's County, Florida and Lafayette Parish, Louisiana, that they apply to purchase silencers using a trust or other legal entity in order to avoid the certification requirement and to take advantage of the other benefits<sup>5</sup> of using an entity structure.<sup>6</sup> (See **Attachment C.**)

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<sup>4</sup> Wall Street Journal, Palazzolo *supra*.

<sup>5</sup> One particular advantage to using an entity structure is to avoid potential and unpredictable liability under the doctrine of constructive possession. *See, e.g., United States v. Fambro*, 526 F.3d 836, 839 (5<sup>th</sup> Cir. 2008) (noting that the doctrine of constructive possession is a fact-specific inquiry); *United States v. Booker*, 436 F.3d 238, 242 (D.C. Cir. 2006) (stating that certain vague and ill-defined factors, such as "a gesture implying control" or "evasive conduct," might trigger the doctrine when coupled with proximity to the firearm).

<sup>6</sup> Facebook profile of St. Johns County Sheriff's Office, available at [https://www.facebook.com/permalink.php?id=115008325189585&story\\_fbid=461014333922314](https://www.facebook.com/permalink.php?id=115008325189585&story_fbid=461014333922314) (last visited Nov. 3, 2013), attached hereto as "Attachment C;" *see also* Public Comment Doc. ID ATF-2013-0001-0982 (attaching email from Lafayette Parish City Police Department stating that Chief Jim Craft "has decided not to sign off on any paperwork" and suggesting that the applicant "seek other means to secure the weapon").



The proposed expansion of the CLEO certification requirement, particularly when combined with the broad and unwieldy new definition for a “responsible person,” will have a devastating effect on Silencer Shop’s thriving business. In an article written about Silencer Shop, The Wall Street Journal recently reported that this proposed regulation “could stifle sales of silencers—one of the fastest-growing segments of the gun industry—and, thereby, Mr. Matheny’s business.”<sup>7</sup> Silencer Shop therefore requests ATF to consider the proposed alternatives presented in this Comment: (i) replace the CLEO certification requirement with a CLEO notification requirement; (ii) exempt applications for the transfer or making of silencers from the certification requirement; and/or (iii) provide a clear and reasonably-limited “responsible person” definition that allows the entity-applicant to identify a single representative with responsibility to oversee the management and policy of the entity with regard to its possession of the firearm(s).

## **II. REGISTERED NFA ITEMS ARE ALMOST NEVER USED IN THE COMMISSION OF CRIMES.**

ATF proposes its regulatory revision under the noble banner of crime prevention. Yet, studies have shown, and ATF has in fact acknowledged, that legally owned NFA items are almost never used in commission of crimes. Indeed, the previous Director of ATF testified before Congress that legally registered NFA weapons “are held by collectors and others; only rarely do they figure in violent crime.”<sup>8</sup> The Director testified that, based on ATF’s experience, “it is highly unusual—and in fact, it is very, very rare that [a crime] would [involve] a registered machinegun or registered silencer.”<sup>9</sup> Similarly, Professor Gary Kleck, one of the top researchers

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<sup>7</sup> Wall Street Journal, Palazzolo *supra*.

<sup>8</sup> CIS 1986 H521-13, House of Representatives Hearing, *supra*.

<sup>9</sup> *Id.* (emphasis added).





in the field of criminal use of firearms, has concluded that “policies focusing on machine guns [and other special gun types] . . . address weapons that are only very rarely used by criminals.”<sup>10</sup> Likewise, the National Rifle Association has concluded that the proposed rule would have “zero impact on public safety” and encouraged ATF to look for “effective measures that truly target the criminal perpetrators who commit crimes.”<sup>11</sup>

It seems highly unlikely that a criminal planning to commit a crime with an NFA item would want to deal with the bureaucracy, cost, delay, and scrutiny that comes with legally obtaining a registered NFA item.<sup>12</sup> Congressman Shaw discussed this very point in congressional hearings with the Director of ATF, concluding that “someone who has a felony record would probably stay shy of you fellows [ATF] anyway, wouldn't they? . . . And go the illegal channels rather than the legal channels.”<sup>13</sup> This is especially true with silencers, which can be easily made from household items,<sup>14</sup> and machine guns, which typically cost in excess of \$10,000-\$20,000 each when properly registered but are significantly cheaper on the black market.<sup>15</sup>

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<sup>10</sup> Gary Kleck, *Guns and Violence: A Summary of the Field* (1991), available at <http://www.catb.org/estr/guns/point-blank-summary.html>

<sup>11</sup> BATFE Solicits Comments on Poorly-Conceived NFA Transfer Proposal, NRA-ILA, October 11, 2013, available at <http://www.nraila.org/news-issues/articles/2013/10/batfe-solicits-comments-on-poorly-conceived-nfa-transfer-proposal.aspx>

<sup>12</sup> The NRA's statement regarding the proposed rule similarly concluded that the “idea that someone who wishes to obtain firearms for criminal purposes would pay for the creation of a trust, spend \$10,000 or more to obtain any of a dwindling number of machine guns already in the NFA registry and available for civilian transfer, pay a \$200 transfer tax on that firearm, register it with the federal government, and wait six or more months to take delivery is simply laughable.” *Obama Misses the Mark with Overbroad NFA Background Check Proposal*, NRA-ILA, September 6, 2013, available at <http://nraila.org/legislation/federal-legislation/2013/9/obama-misses-the-mark-with-overbroad-nfa-background-check-proposal.aspx>.

<sup>13</sup> CIS 1986 H521-13, House of Representatives Hearing, *supra*.

<sup>14</sup> Paul Clark, *The Criminal Use of Silencers*, *Western Criminology Review* 8(2), 44–57 (2007) (“Many common everyday objects such as pillows, towels and comforters can be draped over a gun barrel and function as a silencer.”).

<sup>15</sup> John Lott Jr., *The Truth about Obama's New Executive Orders Targeting Guns*, August 29, 2013, FoxNews.com, available at <http://www.foxnews.com/opinion/2013/08/29/truth-about-obama-new-executive-orders-targeting-guns/>



Although the legislative history is unclear, some scholars have posited that silencers were included within the purview of the NFA not for the purpose of preventing violent crimes but, rather, in order to address concerns about the poaching of animals for food during the Great Depression.<sup>16</sup> In more recent years, silencers are generally understood to be involved in such a minute percentage of crimes that neither ATF nor the FBI even tracks the information. The only real study of silencer crime comes from Dr. Paul Clark's paper published in the *Western Criminology Review* entitled *Criminal Use of Firearm Silencers*.<sup>17</sup> Dr. Clark's paper states, "[s]ilencers are a minor law enforcement problem. . . . [T]here are only 30 federal prosecutions involving silencers each year, and it is very unlikely that there are more than 200 state and federal prosecutions per year involving silencers."<sup>18</sup> Dr. Clark explained:

use of silencers in crime is rare. Even when silencers are possessed they are even less frequently used. Silencer use is not primarily connected to organized crime. . . . There is no evidence to suggest that criminals who possess silencers are more likely to be violent.<sup>19</sup>

The use of silencers in violent crime is even more rare. Dr. Clark notes that "more than 80 percent of federal silencer charges are for non-violent, victimless crimes" and most federal

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<sup>16</sup> Paul Clark, *The Criminal Use of Silencers*, *Western Criminology Review* 8(2), 44–57 (2007) (citing Paulson, Adam C. 1996. *Silencers: History and Performance, volume 1*. Boulder, CO: Paladin Press).

<sup>17</sup> Mr. Clark's article notes "[d]espite numerous laws on the books regarding both possession and use of silencers there has been virtually no attention focused on them by legal scholars. . . . Basic questions such as 'How often are silencers used in crime?' 'What sorts of crimes are committed with silencers?' 'Does possession of a silencer make discharge of a firearm more likely, and hence more dangerous?' have never been addressed."

<sup>18</sup> Clark, *supra*. "Out of 5,000 to 6,000 reported felony cases in California each year fewer than four involve silencers." It is safe to assume all of those were unregistered as silencers are prohibited in California.

<sup>19</sup> *Id.* Mr. Clark's paper also mentions practical problems with using silencers in the commission of crimes noting that silencers extend "the length of the overall weapon, as well as increasing the barrel diameter. The increased difficulty of concealment may make silencers less appealing to criminals than they might be otherwise."



prosecutions are for possession of an *unregistered* silencer. Thus, the use of legally registered silencers in crimes is virtually nonexistent.<sup>20</sup>

Machine gun crime is similarly rare. Here again, there are few sources that examine machine gun crime and even fewer sources differentiate between crimes committed with legal, registered machine guns and those committed with illegal machine guns.<sup>21</sup> Nonetheless, every available source shows that machine guns are very rarely used to commit crimes.<sup>22</sup> ATF, itself, has stated in a written response to Congress that “[r]egistered machineguns which are involved in crimes are so minimal so as not to be considered a law enforcement problem.”<sup>23</sup> The Director of ATF testified before Congress that he knew of fewer than 10 crimes of any kind committed with legal machine guns.<sup>24</sup> Other federal government publications show that machine guns are used in a similarly-low percentage of crimes. For instance, in a 1995 report, the Department of Justice stated that less than 0.1 percent of all guns traced to criminal activity fall within the category of “other” guns “including machine guns.”<sup>25</sup> Another source wrote that “legally registered machine guns only account for a miniscule number of deaths.”<sup>26</sup> Sources indicate there have only been two murders committed with legally-registered machine guns since 1934.<sup>27</sup> One of these

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<sup>20</sup> *Id.*

<sup>21</sup> Silencer Shop was unable to find any sources discussing crimes committed with short-barreled rifles, short-barreled shotguns, destructive devices, or weapons classified as “any other weapon.”

<sup>22</sup> It appears that even *unregistered* machine guns are rarely the instruments of criminals. Professor Kleck’s research shows that machine guns are so rarely recovered by law enforcement that do not even include them in their tabulations by type. Kleck, Gary, *Targeting Guns Firearms and Their Control*, pp. 108-09.

<sup>23</sup> CIS 1986 H521-13, House of Representatives Hearing, *supra*

<sup>24</sup> Kleck, Gary, *Targeting Guns Firearms and Their Control*, pp. 108-09. The director also indicated that some of these 10 crimes could include technical violations of firearms laws, such as moving the items across state-lines without permission. *Id.*

<sup>25</sup> Marianne W. Zawitz, Bureau of Justice Statistics Selected Findings, *Firearms, Crime, and Criminal Justice: Guns Used in Crime* (July 1995) available at <http://www.bjs.gov/content/pub/pdf/GUIC.PDF>,

<sup>26</sup> Fully Automatic Guns in the US are Highly Regulated, and Regulation Works, Daily Kos, Dec. 17, 2012 (available at <http://www.dailykos.com/story/2012/12/17/1171047/-There-are-240-000-fully-automatic-guns-in-the-US-and-only-2-deaths-in-80-years>)

<sup>27</sup> *Id.*



murders was conducted by a law enforcement officer who killed an individual whom he apparently suspected of selling illegal drugs.<sup>28</sup> The other murder involved an Ohio doctor and there are questions in that case about whether a machine gun was actually used and if it was legally registered to the assailant. In both cases, given the professions of the shooters, there is no indication that a CLEO certification or other background check would have prevented them from acquiring the weapons or otherwise had any effect on the outcomes.<sup>29</sup>

### **III. THE PROPOSED CLEO CERTIFICATION REQUIREMENT PRESENTS AN UNNECESSARY, UNWORKABLE, AND UNCONSTITUTIONAL BURDEN ON BOTH NFA APPLICANTS AND STATE LAW ENFORCEMENT AGENCIES.**

Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives . . . .<sup>30</sup>

William J. Clinton, Executive Order 12866, Sept. 30, 1993.

#### **A. The certification requirement places an unnecessary and unreasonable burden on both applicants and state law enforcement agencies.**

*1. The antiquated certification process has been rendered redundant by modern investigation and record-searching technologies available to ATF through its coordination with the FBI.*

The regulations implementing the National Firearms Act (“NFA”), 26 U.S.C. § 5801 et seq., are promulgated by the Department of Justice under the general authority of the U.S. Attorney General<sup>31</sup> and published at 27 C.F.R. part 479. The NFA authorizes the Attorney General, who in turn has directed ATF,<sup>32</sup> to prescribe the format of applications to make or

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<sup>28</sup> *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994)

<sup>29</sup> The Ohio police offer actually underwent a background check and obtained a CLEO certification. That very issue is discussed at length in *Searcy*, supra.

<sup>30</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>31</sup> 28 U.S.C. § 599A.

<sup>32</sup> 28 C.F.R. § 0.130(a).



transfer “firearms,”<sup>33</sup> including the manner in which the transferee or maker, and the relevant firearm, are identified in the application.<sup>34</sup>

Pursuant to this authority to prescribe the manner in which the applicants and firearms are identified, ATF has promulgated forms and corresponding regulations that require applicants to obtain a certification from a chief law enforcement officer (a “CLEO”), which may be “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].”<sup>35</sup> Notably, the U.S. Attorney General was previously expressly included in this laundry list of acceptable officials, until the Attorney General’s office requested to be removed due to the burden of processing NFA applications.<sup>36</sup>

Since the adoption of the NFA in 1934, applications filed by trusts and various legal entities have been exempted from the CLEO certification requirement. ATF’s proposed revisions, however, now seek to expand the CLEO certification requirement to apply to these historically-exempt entities.<sup>37</sup> When combined with the expansive—and arguably boundless—new definition for “responsible persons,” the proposed regulatory revisions will drastically increase the number of certifications sought from state and local law enforcement officials.

This comment has already discussed the evidence, in the form of scientific studies, review of criminal records, statements from law enforcement authorities, and even congressional

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<sup>33</sup> The NFA defines the term “firearm” to include silencers, as well as machineguns, short-barreled rifles, and other weapons. 26 U.S.C. § 5845(a)(7) (referring to the definition of “silencer” found in 18 U.S.C. § 921).

<sup>34</sup> 26 U.S.C. §§ 5812(a) and 5822.

<sup>35</sup> 27 C.F.R. §§ 479.63 and 479.85.

<sup>36</sup> See Federal Register, October 15, 1985, 50 Fed.Reg. 41680.

<sup>37</sup> 27 C.F.R. §§ 479.63 and 479.85 (each requiring the applicant to obtain a CLEO certification only “[i]f the applicant is an individual, . . .”); *see also* ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55015 (Sept. 9, 2013).



testimony from the Director of ATF, indisputably showing that registered silencers and other NFA “firearms” are very rarely used in the commission of crimes. This, of course, remains true despite the fact that the number of applications by trusts and other legal entities, which do not require CLEO certifications, has increased dramatically over the last decade.<sup>38</sup> ATF nonetheless proposes to retain and, in fact, expand the antiquated CLEO certification requirement purportedly to “ensure that background checks for NFA firearms are as complete as possible.”<sup>39</sup>

As explained by ATF in its Notice of Proposed Rulemaking, the CLEO certification requirement was implemented in 1934 when local law enforcement officials were “generally better situated than federal officials” to determine whether the making or transfer of the firearm at issue would violate state or local law.<sup>40</sup> At that time, no national database similar to the currently-existing National Instant Criminal Background Check System (“NICS”) existed and, according to ATF, the CLEO certification was intended to ensure “the background of the individual was assessed by those in the best position to evaluate it.”<sup>41</sup>

These conditions, which initially provided a reasonable basis for the CLEO certification requirement, are no longer present. The creation of the National Crime Information Center (NCIC) database in January 1967 began the gradual evolution of technology that now allows ATF to directly assess the criminal background of the applicant and the applicable state and local law pertaining to the subject firearm.<sup>42</sup>

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<sup>38</sup> See ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55016 (Sept. 9, 2013); [Cite for current evidence that crimes have not increased over the last decade, with the increase in trust applications.]

<sup>39</sup> *Id.* at 55017.

<sup>40</sup> ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55017 (Sept. 9, 2013).

<sup>41</sup> ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55017 (Sept. 9, 2013).

<sup>42</sup> ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55017 (Sept. 9, 2013).



Since that time, the Criminal Justice Information Services (CJIS) Division of the FBI has created and now maintains multiple additional databases, including NICS and the Interstate Identification Index (III), which provide instant identification and background-check capabilities to federal agencies.<sup>43</sup> The FBI directly provides records both for persons arrested by federal agencies and for persons arrested by law enforcement agencies located in states not currently participating in III, while participating states furnish records from their files using the NLETS (International Justice and Public Safety Information Sharing Network, previously referred to as the National Law Enforcement Telecommunications System).<sup>44</sup> As explained by the FBI:

The FBI provides a host computer and telecommunication lines to a single point of contact in each of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and Canada, as well as federal criminal justice agencies. Those jurisdictions, in turn, operate their own computer systems, providing access to nearly all local criminal justice agencies and authorized non-criminal justice agencies nationwide.<sup>45</sup>

The FBI boasts that the use of NICS during firearm purchases will “ensure that each customer does not have a criminal record or isn’t otherwise ineligible to make a purchase” and that “[m]ore than 100 million such checks have been made in the last decade, leading to more than 700,000 denials.”<sup>46</sup>

ATF’s confidence in the NICS system is evidenced by the fact that ATF trusts NICS to analyze applications for the transfer of handguns, which, according to the U.S. Department of

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<sup>43</sup> Federal Bureau of Investigation website, Privacy Impact Assessment (PIA) for the Next Generation Identification (NGI) Interstate Photo System (IPS), June 9, 2008, available at <http://www.fbi.gov/foia/privacy-impact-assessments/interstate-photo-system> (last visited Nov. 3, 2013).

<sup>44</sup> *Id.*

<sup>45</sup> Federal Bureau of Investigation website, National Crime Information Center, available at <http://www.fbi.gov/about-us/cjis/ncic> (last visited Nov. 3, 2013).

<sup>46</sup> Federal Bureau of Investigation website, National Instant Criminal Background Check System, available at <http://www.fbi.gov/about-us/cjis/nics> (last visited Nov. 3, 2013).



Justice, “are most often the type of firearm used in crime.”<sup>47</sup> During the interim stage of the Brady Act, before its permanent implementation, the Act applied only to handguns and required applicants to submit a “Brady form” to a state or local chief law enforcement officer.<sup>48</sup> Alternatively, the Act allowed the sale of a handgun to proceed based upon a state-level instant background check.<sup>49</sup> When the Brady Act was permanently implemented in 1998, however, the scope of the Act was broadened to encompass other types of firearms, as well as handguns, and the Act thereafter authorized ATF to rely upon NICS background checks, rather than notification to a chief law enforcement officer, for transfer approvals.<sup>50</sup> Since that time, ATF has expressly stated it will not accept state-level background checks, such as “instant checks” and “point of sale checks” in lieu of a NICS check for the sale of handguns.<sup>51</sup> Thus, while the Department of Justice recognizes that handguns are the most preferred firearm for criminals, ATF has determined that NICS checks provide sufficient protection to the public with regard to the sale of these most-dangerous guns.

It is particularly notable that Congress and ATF made this determination and opted to remove local CLEOs from the background check system for handgun sales after having relied upon CLEO review for nearly five years under the interim Brady Act provisions.<sup>52</sup> This represented a conscious rejection of CLEO involvement. Of course, the CLEO provisions in the

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<sup>47</sup> Marianne W. Zawitz, U.S. Dep’t of Justice, Bureau of Justice Statistics, Firearms, Crime and Criminal Justice: Guns Used in Crime, July 1995, NCJ-148201.

<sup>48</sup> Implementation of the Brady Law, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (Sept. 1999), available at <http://www.hsdl.org/?view&did=1625> (last visited Nov. 3, 2013).

<sup>49</sup> Pub. L. 103-159, as amended, Pub. L. 103-322, 103 Stat. 2074.

<sup>50</sup> 18 U.S.C. § 921 et seq.

<sup>51</sup> Federal Firearms Regulations Reference Guide (2005), p. 194-195, available on ATF website located at <http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf> (last visited on Nov. 3, 2013).

<sup>52</sup> The interim Brady Act was enacted on November 30, 1993 and went into effect on February 28, 1994. The permanent provisions of the Brady Act went into effect on November 30, 1998. Implementation of the Brady Law, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (Sept. 1999), available at <http://www.hsdl.org/?view&did=1625> (last visited Nov. 3, 2013).





interim Brady Act were ultimately held unconstitutional by the U.S. Supreme Court’s ruling in *Printz v. United States*. 521 U.S. 898 (1997). Nonetheless, ATF could have attempted to promulgate regulations requiring “voluntary” CLEO certification for handgun sales, as it has promulgated—and now proposes to expand—for NFA transfers. Regardless of the reasons ATF chose not to do so, it is evident that ATF considered the NICS checks to provide ample security against unlawful possession of handguns.<sup>53</sup>

In its Notice of Proposed Rulemaking, ATF acknowledges the efficacy of the NICS procedure when used in combination with the Interstate Identification Index and other databases, but nonetheless reports that “the available information is not comprehensive in all cases.”<sup>54</sup> Thus, ATF supports its proposed expansion of the CLEO certification for NFA applications<sup>55</sup> by explaining that “[f]or a variety of reasons, it is still the case that local law enforcement may have access to more complete records.”<sup>56</sup> While it is likely a truism that any comprehensive federal database “may” not perfectly capture every local record at every time, the CLEO certification requirement does not address this point and was not designed to do so. This is evidenced by the fact that the express list of acceptable CLEOs in ATF’s implementing regulations previously included the Attorney General of the United States and the U.S. Marshals, officials who are hardly characterizeable as “local” and who presumably have no better access to information than

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<sup>53</sup> NICS is also utilized to approve transfers involving semi-automatic rifles capable of accepting high capacity magazines such as the AK-47 and AR-15.

<sup>54</sup> Notice of Proposed Rulemaking, at 55017.

<sup>55</sup> Throughout this Comment, references to “NFA applications” and similar phrases refer to both applications to make NFA firearms pursuant to 27 C.F.R. § 479.62 and ATF Form 1, as applications to transfer pursuant to 27 C.F.R. § 479.84 and ATF Form 4, and applications to transfer pursuant to 27 C.F.R. §§ 479.90 and 479.91 and Form 5. Similarly, statements and arguments made in this Comment pertaining to the requirements for applications to transfer set forth in 27 C.F.R. §§ 479.84 and 479.85 are generally applicable to the corresponding, identical requirements to make a firearm found in 27 C.F.R. §§ 479.62 and 479.63. Throughout this Comment, the authors have often referred to one set of regulations without referring to the corresponding, identical portions of the other, in the interest of brevity.

<sup>56</sup> *Id.*



ATF. The stated need for local involvement is difficult to understand in light of ATF's history of accepting certifications from these top-level, federal officials. The Attorney General and Marshals were removed from the laundry list of approved CLEOs at their own request and based on their statement that they would no longer agree to process requests; there was no indication at the time that ATF no longer considered them to be acceptable or appropriate for certification of NFA applications. Even now, there is no reason to believe ATF would not continue to accept a certification from the U.S. Attorney General or U.S. Marshals service, as ATF has recently confirmed that the Director will accept federal judges with authority to oversee felony jury trials.<sup>57</sup>

State and local participation with, and contribution to, the NICS system has increased dramatically in recent years. For example, a February 2013 publication by the Department of Justice's Bureau of Justice Statistics examined the number of prohibited person records submitted to the NICS index in 2010 and found that the total size of the index grew 13% as a whole in 2010 and the state-contributed portion grew an astounding 21.5% in that single year.<sup>58</sup> The lack of a current need for local CLEO certifications in light of the efficiency and comprehensive coverage afforded by the modern NICS index is further evidenced by the fact that ATF recently published preliminary abstracts of its expected changes to the implementing regulation in which it proposed to "eliminate the requirement for a certification signed by the

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<sup>57</sup> Federal Firearms Regulations Reference Guide, published by the Bureau of Alcohol, Tobacco, Firearms and Explosives, available at <http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf> (last visited Nov. 3, 2013).

<sup>58</sup> Ronald J. Frandsen, Dave Naglich, Gene A. Lauver, and Allina D. Lee, *Background Checks for Firearm Transfers, 2010 – Statistical Tables*, published by the U.S. Department of Justice, Bureau of Justice Statistics (Feb. 2013), available at <http://bjs.gov/content/pub/pdf/bcft10st.pdf> (last visited Dec. 5, 2013).



CLEO” for all applications.<sup>59</sup> In these abstracts, ATF forecasted its intent to replace the certification requirement with a notice requirement, requiring only that “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.”<sup>60</sup>

In light of advances in technology and the increase in state and local participation in federal programs such as NICS, NLETS, and III, any benefit achieved by tasking local and state-level law enforcement departments has been greatly reduced and does not justify the increased burden on these departments from such redundant background investigation. This common sentiment among local law enforcement officials was echoed by the Police Legal Advisor for the Irving, Texas Police Department, who recently wrote to the authors of this comment, stating:

We do work with local and regional ATF officials and we may be able to start the process of getting their rules and forms changed. Frankly, ATF officials know as much about you as we do and they have equal access to criminal history databases. It doesn’t make sense for them to bring local law enforcement officials into this process.”<sup>61</sup>

(See **Attachment A.**)

2. *CLEO certifications are not required to obtain, among other things, a federal firearms license, a license to operate a nuclear reactor, or a license to manufacture cocaine.*

Tellingly, CLEO certifications are not required for those seeking a license to deal-in, manufacture, or import NFA items. In this regard, ATF’s insistence that the CLEO certification is necessary for responsible persons merely wishing to purchase an NFA item is nonsensical.

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<sup>59</sup> Background Checks for Principal Officers of Corporations, Trusts, and Other Legal Entities With Respect to the Making or Transferring of a National Firearms Act Firearm, Abstract of Rule, Website of Office of Information and Regulatory Affairs available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43> (last visited December 5, 2013).

<sup>60</sup> *Id.*

<sup>61</sup> Correspondence from Les Moore of the Irving Police Department to Christopher Bass, dated July 23, 2012, attached as “Attachment A” hereto.



ATF has long relied on the FBI's background check system to conduct background checks for responsible persons of federal firearms licensees.<sup>62</sup> Why would this system that has long been sufficient to grant the nearly 65,000<sup>63</sup> licenses to deal in, import, and manufacture all forms of firearms, including NFA items, suddenly not be sufficient to an entity merely wishing to purchase a silencer? ATF requires an FFL applicant to submit a copy of his application to the CLEO officer, but requires no affirmative action on the part of the CLEO, and gives no veto power (much less a pocket veto power) to the CLEO.<sup>64</sup> For years, ATF believed a similar notification was sufficient for NFA purchases, even for individual purchasers, and published abstracts reflecting its proposal to eliminate the CLEO certification requirement for NFA applications.<sup>65</sup> However, ATF has offered no plausible explanation for its 180-degree reversal in position on this point, particularly in light of its continued application of a notice-only requirement for those seeking to acquire a license to deal in NFA firearms. It defies logic that a manufacturer such as Colt could obtain a license to manufacture thousands of machineguns, destructive devices, and other NFA items without procuring a single CLEO certification, while

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<sup>62</sup> How to Become a Federal Firearms Licensee (FFL), ATF, available at <http://www.atf.gov/firearms/how-to/become-an-ffl.html> (“The FFLC will review the fingerprint cards you submitted for clarity and, as required by law, will then conduct an electronic background check on all the ‘responsible persons’ you have identified on your application.”)

<sup>63</sup> This was the number of FFL holders in the US not including C&R (Type 03) Holders. Firearms Commerce in the United States Annual Statistical Update 2012, ATF, available at <http://www.atf.gov/files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf>.

<sup>64</sup> Application for Federal Firearms License, ATF Form 7 (5310.12) (May 2005) (the note in the application addressed to the CLEO states “This form provides notification of a person's intent to apply for a Federal firearms license. It requires no action on your part. However, should you have information that may disqualify the person from obtaining a Federal firearms license, please contact [ATF].”).

<sup>65</sup> ATF's published abstracts of this rule from 2011 and 2012 indicated that ATF would be eliminating the CLEO certification in favor of CLEO notification on all applications. See DOJ/ATF Rule Abstract, RIN: 1140-AA43 (2012), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>; DOJ/ATF Rule Abstract, RIN: 1140-AA43 (Fall 2011), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>.



an entity wishing to purchase even a single Colt short-barreled rifle must obtain a CLEO certification for each “responsible person.”

The NFA’s CLEO requirement must be put in perspective. While a federal application to operate a nuclear reactor is blindingly voluminous, covering topics ranging from reactor security to environmental impact, the 10,000-plus-page application does not require a single CLEO certification.<sup>66</sup> The federal application to handle, distribute, or manufacture substances such as cocaine, heroin, and MDMA under the Controlled Substances Act requires no CLEO certification.<sup>67</sup> The USDA license to breed, own, and exhibit dangerous wild animals such as lions and tigers likewise contains no CLEO certification requirement.<sup>68</sup> While some believe it is an oversimplification to state that “guns don’t kill people,” nuclear meltdowns, cocaine, and wild tigers clearly do kill people. Criminal history and mental stability are undeniably-relevant factors for consideration of applications to participate in such dangerous and highly-regulated activities. Yet, the responsible agencies have been able to analyze and regulate such applications—even within the all-encompassing context of a 10,000-page application to operate a nuclear reactor—without resorting to certifications from local or state chief law enforcement officials.

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<sup>66</sup> Combined License Application Documents for Bell Bend Nuclear Power Plant Application (2013), U.S. Nuclear Regulatory Commission (NRC), available at <http://www.nrc.gov/reactors/new-reactors/col/bell-bend/documents.html#application>.

<sup>67</sup> Application for Registration Under the Controlled Substances Act, Form DEA-225 (April 2012).

<sup>68</sup> 7 U.S.C. 54; *see also* Licensing and Registration Under The Animal Welfare Act, USDA-APHIS, available at [http://www.aphis.usda.gov/animal\\_welfare/downloads/aw/awlicreg.pdf](http://www.aphis.usda.gov/animal_welfare/downloads/aw/awlicreg.pdf).



3. *The obligation to process certifications, if accepted by the chief law enforcement officers, would place a significant burden on local and state law enforcement agencies.*

In order to provide the certification now proposed by ATF, the state official must necessarily accept the following burdens: (i) the official must analyze the fingerprints and photograph of each individual applicant or responsible person identified in the application and devise a means by which the official may become “satisfied” that the fingerprints and photograph are those of the applicant; (ii) the official must research criminal, medical, and other state and local records available and make a determination as to the relevance of each record under applicable state and local law; and (iii) the official must render judgment as to whether the making or transfer of the firearm would place the applicant in violation of state or local law. The research, analysis, and administration required to adequately process such requests for certification place an undeniable burden on the state official and, undoubtedly, upon his or her law enforcement department. Tellingly, U.S. Attorney Atlee Wampler, expressly refused to accept the duty to process such certification requests,<sup>69</sup> explaining that the office of the United States Attorney lacked the resources necessary to conduct a proper investigation of firearm transferees.<sup>70</sup>

Also, as noted by the Court in *Printz*, the burden to the State does not end upon completion of the certification process, as “it will likely be the CLEO, not some federal official,

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<sup>69</sup> The original regulations promulgated by the Secretary in 1934 included the U.S. Attorney and U.S. Marshal in the laundry list of approved chief law enforcement officers. However, references to these—or any—federal officials were removed in 1985 based on statements from these officials that they would no longer process any requests for certification and requested to be removed from the express list of officials identified in the regulation. *See* 50 F.R. 41681 (Oct. 15, 1985) (“The Executive Office for United States Attorneys and the United States Marshals Service advised ATF that they would no longer execute the law enforcement certification and requested the reference to United States Attorneys and United States Marshals be deleted . . .”). Although they are no longer included in the laundry list, it is unclear whether the Director would still accept their certifications, or certification by other federal officials. Notably, certification by federal judges are routinely still accepted.

<sup>70</sup> *See Steele v. Nat’l Firearms Act Branch*, 755 F.2d 1410, 1413 (11th Cir. 1985).



who will be blamed for any error.” *Id.* at 930. Moreover, the burden to the States that would result from ATF’s proposed expansion of the certification requirement is certain to be an exponential increase over the current burden faced by state officials under the existing regulation. By way of example, Silencer Shop estimates that it processed approximately 4,000 transfer applications in the last year, in Texas alone, on behalf of trusts and other legal entities, for which no CLEO certification is currently required, but which would require involvement of local officials under the proposed regulation. The proposed regulation—if it is to function properly—would significantly increase existing burdens to state law enforcement officials in furtherance of a federal statute.

Local law enforcement agencies simply do not have the resources to dedicate to the task of signing off on the forms. As an example, the Sheriff’s Department in St. John’s County, Florida recently stopped signing forms altogether because of the resources required to handle the growing number of individual applications, and instead recommended that his constituents consider using a trust to make their applications.<sup>71</sup> Placing the certification responsibility on local law enforcement seems unnecessary when ATF already has an entire branch dedicated to weapons falling under the National Firearms Act.<sup>72</sup> If the proposed rule is implemented, local agencies would be inundated with requests and will have to make the difficult decision of either

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<sup>71</sup> Sheldon Gardner, *Want to Buy a Silencer, Sawed-off Shotgun or Explosives? Sheriff Will No Longer Help*, *The St. Augustine Record* (July 14, 2012); *see also* “Attachment C;” *See also* Public Comment Doc. ID ATF-2013-0001-0982 (attaching email from Lafayette Parish City Police Department stating that Chief Jim Craft “has decided not to sign off on any paperwork” and suggesting that the applicant “seek other means to secure the weapon”).

<sup>72</sup> BATFE, National Firearms Act Branch, <http://www.atf.gov/firearms/nfa/index.html>.



diverting limited law enforcement resources<sup>73</sup> away from preventing and investigating crimes or simply adopting a policy of refusing to consider NFA applications.<sup>74</sup>

The proposed revision to the CLEO certification will not reduce the significant burdens that have forced many law enforcement officials to adopt the policy of simply refusing to consider any NFA applications.<sup>75</sup> The Orlando Police Department recently responded to questions regarding the proposed amendments to the certification would change the department's policy of refusing to consider any applications. The department responded that it would not change their policy and stated it was the department's "position that the local law enforcement chief executive officer should not be involved in, or liable for, individual firearms transfers."<sup>76</sup>

(See **Attachment B**.)

4. *ATF's proposed rulemaking fails to account for the unreasonable and inconsistent burdens it would place upon legitimate users of NFA items.*

In its notice of proposed rulemaking, ATF fails to evaluate the legitimate and lawful uses of NFA items. Although the benefits of silencers are discussed at length below, other ATF items have a multitude of legal and practical uses. The proposed rule will severely hamper the ability of entities to gain access to NFA items for these purposes.

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<sup>73</sup> An application might even require the time of the actual chief of police or sheriff himself. It is difficult to believe that the Chief of Police of Los Angeles, California or the Sheriff of Dallas County, Texas, for instance, would have the time, or desire, to be consulted every time an entity within their jurisdiction of millions of people wanted to purchase an NFA item.

<sup>74</sup> See Gardener, *supra*.

<sup>75</sup> The concern over liability associated with the portion of the certification ATF proposes to eliminate, relating to the applicant's lawful use of the firearm, is likely unfounded. See, e.g., *Searcy v. City of Dayton*, 38 F.3d 282 (6<sup>th</sup> Cir.) (dismissing plaintiff's negligence claim against CLEO, who certified application of subordinate police officer who later used NFA firearm to commit crime, because there was no causation between the certification of the application and the commission of the crime).

<sup>76</sup> Correspondence from Lee Ann Freeman of the Orlando Police Department to Earnest Myers, dated October 22, 2013, available at: <http://www.guntrustlawyer.com/Orlando-police-letter.pdf>, attached hereto as "Attachment B."





NFA items such as short barreled rifles, short barreled shotguns and machine guns, are routinely used in military and law enforcement training conducted by private companies. For instance, one of the most respected firearms training schools in the country, Gunsite Academy in Arizona, offers Urban Combat and Foreign Weapons training courses that include the use of privately-owned machine guns.<sup>77</sup> Both classes are available to federal law enforcement under a GSA contract.<sup>78</sup> NFA weapons are the weapons used by military and law enforcement on a daily basis,<sup>79</sup> and private schools providing combat, skills, or armorer courses for military and law enforcement must incorporate training with weapons that will be used by the operator in the field.<sup>80</sup>

NFA firearms are also used for competitive shooting. The federal government has long recognized the importance of competitive shooting and even chartered a program “to conduct competitions in the use of firearms and to award trophies . . . .”<sup>81</sup> The number of competitive shooters has grown exponentially in recent years, with some calling action shooting one of America’s fastest growing sports.<sup>82</sup> The NRA sanctions over 11,000 shooting tournaments and sponsors over 50 national championships each year.<sup>83</sup> In many of these sports, short-barreled

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<sup>77</sup> <http://www.gunsite.com/main/course-offerings/specialty-classes/urban-combat/>;  
<http://www.gunsite.com/main/course-offerings/specialty-classes/foreign-weapons/>.

<sup>78</sup> <http://www.gunsite.com/main/course-offerings/gsa-contract-courses/>.

<sup>79</sup> The Colt M-4 Carbine is the standard issue rifle for the US Army. Colt, Colt M4 Carbine, available at <http://www.colt.com/ColtMilitary/Products/ColtM4Carbine.aspx>. It is a machine gun, but also has a barrel length of 14.5 inches, so even if it were semi-automatic it would still be regulated under the NFA as a short-barreled rifle. *Id.* This gun, or the semi-automatic version is also commonly used by law enforcement. *Id.*, see also Colt, Agencies that Carry Colt Firearms, available at <http://www.colt.com/ColtLawEnforcement/AgenciesthatCarry.aspx>.

<sup>80</sup> In discussing the HK MP5 machine gun and other NFA items used in the Urban Combat training class, Gunsite Academy states “[a]ll of these weapons can be found worldwide, and a basic understanding of the common small arms of the opposition is essential to survival.”

<sup>81</sup> Civilian Marksmanship Program, About Us, available at [http://www.thecmp.org/Comm/About\\_Us.htm](http://www.thecmp.org/Comm/About_Us.htm) (*citing* 36 USC 40701-40733).

<sup>82</sup> Adams, Chad, 3-Gun Competition 101: An Introduction to America’s Fastest Growing Shooting Sport, Gun Digest, October 11, 2012.

<sup>83</sup> NRA Competitive Shooters Programs, <http://compete.nra.org/>.



weapons are useful because their compact nature helps with the ease of navigating tight areas. Likewise, many competitions require use of NFA items to participate.<sup>84</sup>

Not surprisingly, private security companies utilize NFA items for many of the same reasons they are favored by law enforcement.<sup>85</sup> Their usefulness in compact areas has long made them a favorite of the armored car industry. Many other security companies use them in the US and abroad for their usefulness in tactical and combat situations.<sup>86</sup>

Among many other legitimate uses for NFA firearms, many individuals wish to obtain NFA items for purposes of hobby collection and to preserve their historical value.<sup>87</sup> This has long been recognized by ATF as one of the most common reasons for ownership of silencers and other NFA items.<sup>88</sup> Indeed, ATF has ruled that thousands of NFA items, including certain silencers<sup>89</sup> and machine guns,<sup>90</sup> have a “special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons.” These items are included on ATF’s Curio and Relic List.<sup>91</sup> In this regard, ATF states that some NFA firearms are “primarily collector’s items and are not likely to be used as

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<sup>84</sup> See, e.g., K.C.R Open and Closed Bolt Subgun Competition, <http://www.knobbcreekrange.com/pdf/subgun.pdf> (machine gun required).

<sup>85</sup> The US Army states “[t]he M4 enables a soldier operating in close quarters to engage targets at extended range with accurate, lethal fire.” US Army Fact Files: M-4 Carbine, available at <http://www.army.mil/factfiles/equipment/individual/m4.html>.

<sup>86</sup> “By 2008, the US Department of Defense employed 155,826 private contractors in Iraq.” Dunigan, Molly, A lesson from Iraq war: How to outsource war to private contractors, *The Christian Science Monitor* (March 19, 2013).

<sup>87</sup> Clark, Paul, *supra*. (Discussing legitimate uses of silencers, the author writes “[o]ther people simply collect exotic weapons, and many people seem to make them for the same reason people build model airplanes and ships in bottles.”)

<sup>88</sup> CIS 1986 H521-13, House of Representatives Hearing, *supra*.

<sup>89</sup> See, e.g., Standard, USA model HD, .22 lr cal. pistols, originally equipped with silencers for issue to the OSS and other military agencies, S/N range 109110-153890. ATF Publication 5300.11, *Firearms Curio and Relic List* (Dec. 2007) p. 48.

<sup>90</sup> *Id.* pp. 46-51 (listing hundreds of machine guns).

<sup>91</sup> ATF Publication 5300.11, *Firearms Curio and Relic List* (Dec. 2007) Section V.



weapons and, therefore, are excluded from the provisions of the National Firearms Act.”<sup>92</sup> The NRA’s National Firearms Museum houses 21 historically significant machine guns and a collection of other notable NFA firearms.<sup>93</sup> The recent auction of a Thompson machine gun once owned by Bonny Parker and Clyde Barrow, for \$130,000.00, evidences the collectability of certain NFA firearms.<sup>94</sup> Because ATF has ruled that many of these items have solely historical/collector value, ATF should consider the toll the proposed rule may have on the ability to transfer these important pieces of history.

**B. The certification requirement is unlawful and vulnerable to civil challenge pursuant to the Administrative Procedure Act.**

Under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, final agency action is subject to judicial review. 5 U.S.C. § 704. The reviewing court is required to “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law.” 5 U.S.C. § 706(2). Based on the current rulemaking record and the content of the proposed rule, the proposed rule is unlawful and subject to being set aside upon judicial review.

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<sup>92</sup> *Id.* Section III.

<sup>93</sup> NRA National Firearms Museum, <http://www.nramuseum.org/>.

<sup>94</sup> \$210K for Bonnie & Clyde Tommy Gun, Shotgun, CBS News (Jan. 21, 2012), available at [http://www.cbsnews.com/8301-201\\_162-57363375/\\$210k-for-bonnie-clyde-tommy-gun-shotgun/](http://www.cbsnews.com/8301-201_162-57363375/$210k-for-bonnie-clyde-tommy-gun-shotgun/); Another example is the Colt M16 machine gun used in the movie Scarface for the “say hello to my little friend” scene, which recently sold for \$25,000. *Say Hello to His \$25,000 'Little Friend' - Scarface's Gun Stars at Auction*, Paul Fraser Collectables, available at <http://www.paulfrasercollectibles.com/section.asp?catid=202&dclid=4379>.



1. *The Proposed Rule Is Arbitrary and Capricious*

Agency action is arbitrary and capricious if “the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.”<sup>95</sup> Put another way, agency action is generally considered arbitrary and capricious “where the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret.”<sup>96</sup> “Because the arbitrary and capricious standard focuses on the rationality of an agency’s decision-making process rather than on the rationality of the actual decision, it is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”<sup>97</sup>

The proposed rule is arbitrary and capricious for a number of reasons. First, ATF entirely failed to consider an important aspect of the problem—principally, whether there really is a problem at all. In addition to the fact that NFA items are almost never used in the commission of crimes, *see* Section II *supra*, ATF’s notice of proposed rulemaking fails to include *any* data or estimate regarding the number of “prohibited persons” who allegedly have access to an NFA firearm through a trust or other legal entity, and instead relies entirely on a small number of factually-incomplete anecdotes. ATF supports its proposed revision in large part by its determination “that the number of Forms 1, 4, and 5 involving legal entities that are not Federal firearms licensees increased from approximately 840 in 2000 to 12,600 in 2009 and to 40,700 in

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<sup>95</sup> *New Mexico ex rel. Richardson v. Bureau of Lang Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

<sup>96</sup> *Nw. Coalition for Alternatives to Pesticides v. U.S. Envtl. Prot. Agency*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008).

<sup>97</sup> *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (quoting in part *Motor Vehicle Mfrs. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983)).



2012.”<sup>98</sup> Initially, it should be questioned whether an increase in regulatory compliance is a proper basis for revising a regulation. Furthermore, despite ATF’s determination that over 40,000 applications were submitted on behalf of legal entities in 2012, alone, ATF only identified a small handful of instances where a prohibited person *potentially* had—or *almost* had—access to an NFA firearm through a legal entity.

ATF’s anecdotal and hypothetical examples do not establish that there is a real problem that the proposed rule is designed to remedy. ATF asserts that “under current regulations, prohibited persons can circumvent the statutory prohibitions and receive and possess firearms.”<sup>99</sup> Yet, they may not *legally* receive or *legally* possess NFA firearms. Under existing law, it is already illegal for a “prohibited person” to possess any firearm, including an NFA firearm. 18 U.S.C. § 922(g). And, under existing law, it is already illegal for “any person,” which would include an officer or trustee of a legal entity, to permit possession of any firearm by another person knowing, or with reasonable cause to believe, that such other person is a “prohibited person.” 18 U.S.C. § 922(d). ATF’s justification for the proposed rule therefore necessarily relies on the assumption that individuals will violate at least two existing criminal laws, each punishable by massive fines and felony-level incarceration, to achieve their unlawful objective, yet might be deterred by an additional regulatory restriction. In this regard, ATF reaches the fantastical conclusion that an individual seeking to illegally possess an NFA item is more likely to: (i) educate himself regarding the NFA and ATF’s implementing regulations, (ii) draft (or retain legal counsel to draft) sophisticated trust or corporate formation documents, (iii) submit identifying information to the very federal agency charged with policing the possession laws he

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<sup>98</sup> ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55020 & Table A.

<sup>99</sup> *Id.*

seeks to violate, (iv) pay the \$200 tax, (v) complete the necessary NFA and other forms, and (vi) wait at least 6-12 months while ATF scrutinizes his bad-faith documentation, all in furtherance of the nefarious goal of committing one or more federal felonies, than that same criminally-minded individual is to acquire the item on the black market for less money and no wait time (or simply to make the item himself from readily-available parts and instructions).<sup>100</sup> Given that ATF has no evidence that “prohibited persons” are actually using trusts or legal entities to acquire NFA firearms, the proposed rule is designed to remedy a non-existing issue.

ATF’s proposed rule is also arbitrary and capricious because it proposes an unnecessary burden that has been rendered superfluous by the modern NICS system and other federal databases. The rulemaking record demonstrates that the CLEO certification for individual applicants is both antiquated and inconsistent. ATF recognizes that when the CLEO certification was implemented in 1934, there were no “readily accessible national automated databases” and ATF relied on the local CLEO to investigate the background of the applicant because the local CLEOs were “generally better situated than federal officials.”<sup>101</sup> Now, however, “ATF conducts its own background checks of individuals applying to make and receive NFA firearms” using a variety of electronic databases and indexes.<sup>102</sup> It is an antiquated concept that a local or state chief law enforcement officer is likely to know the applicant or have specialized knowledge regarding the applicant that is otherwise unavailable to ATF. The Police Legal Advisor for the Irving, Texas Police Department stated it succinctly in recent correspondence: “[f]rankly, ATF officials know as much about you as we do and they have equal access to criminal history

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<sup>100</sup> This farcical proposition was acknowledged by the director of ATF in hearings before congress. CIS 1986 H521-13, House of Representatives Hearing, *supra*.

<sup>101</sup> ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55017.

<sup>102</sup> *Id.*



databases. It doesn't make sense for them to bring local law enforcement officials into this process."<sup>103</sup> (See Attachment A.)

The CLEO requirement is arbitrary and capricious both on its face and as it is applied. Agencies tasked with enforcing the NFA and the CLEO certification requirement in the implementing regulations<sup>104</sup> have made efforts to describe the certification process as entirely voluntary for state and local officials.<sup>105</sup> In this regard, it is certainly true that there is no mandatory requirement for state officials to "make a reasonable effort" to process applications, as was previously required by the interim Brady Act.<sup>106</sup> Consequently, state and local chief law enforcement officers are free to refuse to participate in the certification process for innumerable reasons, including lack of departmental resources or personal preference. ATF's automatic rejection of uncertified applications therefore amounts to a categorical denial of access based on factors entirely unrelated to the applicant's qualification or the stated purpose of the NFA and its implementing regulations.

In addition to being facially arbitrary, the certification requirement is arbitrary and capricious as it is actually applied by state officials. Numerous publications report examples of chief law enforcement officers who categorically refuse to sign any NFA certification due to departmental policy, political opinion, or other personal preference.<sup>107</sup> The public comment

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<sup>103</sup> Correspondence from Les Moore of the Irving Police Department to Christopher Bass, dated July 23, 2012, attached as "Attachment A" hereto.

<sup>104</sup> The Department of the Treasury was initially charged with enforcing the NFA and promulgating its implementing regulations, though this responsibility has since been transferred to the Department of Justice and ATF.

<sup>105</sup> See, e.g., *Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002) (in which the Secretary for the Department of the Treasury argued that the CLEO certification requirement under the NFA's implementing regulations did not violate the anti-commandeering doctrine under the Tenth Amendment because the process was entirely voluntary).

<sup>106</sup> 18 U.S.C. § 922(s)(2).

<sup>107</sup> See, e.g., Dane Schiller, Sheriff to Consider Machine Gun Permits on Case by Case Basis, *Houston Chronicle* (June 17, 2013), available at <http://blog.chron.com/narcoconfidential/2013/06/sheriff-to-consider-machine-gun->



record is also replete with such examples.<sup>108</sup> ATF, itself, admits that it has received statements from CLEOs who categorically refuse to sign an NFA certification.<sup>109</sup> The arbitrary actions of these officials have already resulted in litigation<sup>110</sup> and the D.C. Circuit Court of Appeals has suggested the regulations might be susceptible to an “as-applied challenge.”<sup>111</sup>

2. *The proposed regulation violates constitutional rights protected by the Tenth and Second Amendments.*

The CLEO certification requirement violates the Tenth Amendment because it constitutes a commandeering of state resources in furtherance of a federal regulation. Characterization of the process as “voluntary” for state officials ignores the coercive effect of the regulations upon state officials and further ignores the fact that the regulations cease to function if state officials refuse to participate. State officials in essence have no choice but to participate in the process, because a refusal to sign amounts to a denial.<sup>112</sup> To the extent state officials exercise their option to refuse to participate, the certification requirement results in the automatic denial of applications under 27 C.F.R. §§ 479.63 and 479.85, thus effectively banning numerous broad

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permits-on-case-by-case-basis-if-he-is-ever-asked-to-sign-one/ (describing the Harris County Texas Sheriff’s policy that he will not execute the current CLEO certificate unless an applicant meets subjective conditions over and above those imposed by state law); Michael Buffer, Sheriff Refuses to Sign Machine Gun Forms, Citizen’s Voice (April 29, 2013) (Luzerne County, Pennsylvania Sheriff “would rather lose his job than sign the form.”)

<sup>108</sup> See, e.g., Comment ID ATF-2013-0001-1076 (individual with military and law enforcement background refused CLEO certification by local sheriff due to sheriff’s personal/political opinions; other CLEOs will not even respond to request); ATF-2013-0001-1496 (attaching letters from Harris County, Texas and City of Houston, Texas Police Department refusing to consider CLEO certification); ATF-2013-0001-0993 (Lafayette Parish, Louisiana sheriff (by email) and police department both arbitrarily refuse CLEO certification); ATF-2013-00001-1837 (personal knowledge that CLEOs in Henrico and Chesterfield Counties, Virginia, categorically refuse CLEO certifications); ATF-2013-0001-0982 (email from Lafayette Parish City Police Department stating that Chief Jim Craft “has decided not to sign off on any paperwork” and suggesting that the applicant “seek other means to secure the weapon”).

<sup>109</sup> ATF’s Notice of Proposed Rulemaking, 78 Fed. Reg. 55014 at 55017.

<sup>110</sup> See *Lomont v. O’Neill*, 285 F.3d 9 (D.C. Cir. 2002) (Arlington, Virginia CLEO alleged to have required applicant to submit to search of residence; Anchorage, Alaska CLEO alleged to only sign certifications for friends); *Westfall v. Miller*, 77 F.3d 868 (5th Cir. 1996) (CLEOs in Plano, Texas area refuse certification).

<sup>111</sup> *Lomont*, 285 F.3d at 365-366.

<sup>112</sup> Tellingly, the CLEO certificate does not have a choice for a CLEO to deny the application, only to sign.





categories of firearms in violation of the Second Amendment as interpreted by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Consequently, the proposed regulations are unlawful and are subject to being set aside upon judicial review.

- (i.) The proposed CLEO certification requirement constitutes an unconstitutional commandeering of state resources in violation of the Tenth Amendment.

The National Firearms Act, itself, contains no CLEO certification requirement. In fact, Congress considered but ultimately rejected inclusion of such a requirement based in part on objections that it would place an impermissible burden on the States.<sup>113</sup> In Senate Judiciary Committee Report No. 90-1097, Senators Dirksen, Hruska, Thurmond, and Burdick objected to the proposed CLEO certification requirement, by stating:

First, it must be questioned whether or not the federal government can constitutionally impose a state or local official to perform an affirmative act, such as the execution of a sworn statement. Yet this is what the provision apparently requires. In response, it may be argued that there is no burden to act imposed on the law enforcement official, but that the burden is placed only on dealers and purchasers who must obtain the statements. This may be technically correct, but the practical effect is to place a burden on the local police. However, the provision is strongly objectionable, since there is no requirement that an officer act upon the request for the required statement, nor is there any appeal procedure even if he does respond.<sup>114</sup>

Though the proposed CLEO certification requirement, at that time, would only have applied to destructive devices, the Senators presciently observed:

Even more objectionable is the imposition of the requirement of prior approval by a law enforcement officer before a firearm of any kind could be obtained. Although this provision applies only to

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<sup>113</sup> Compare The Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 197 (1968), enacted 18 U.S.C. § 924(b)(4) with the Gun Control Act, P.L. 90-618, 82 Stat. \*7 1213 (1968).

<sup>114</sup> Senate Report No. 1097, 1968 U.S.C.C.A.N. 2112 at 2294 (1968).



destructive devices, it could be a precedent for further legislation in the future which would have more general application.<sup>115</sup>

The previously-proposed CLEO certification requirement was ultimately rejected and, instead, Congress delegated to the Secretary, and later the U.S. Attorney General, the duty to approve applications to make or transfer NFA firearms.<sup>116</sup> Consequently, there is no statutory basis for the Attorney General to delegate that authority to state or local law enforcement officials and the legislative history clearly shows the intent of Congress to avoid such delegation.

The Attorney General's delegation of this determination to state officials forces one of two possible outcomes: (i) the state official accepts the duty to analyze the propriety of the application and takes on the accompanying costs and burdens without any compensation from the federal government, or (ii) the state official refuses to accept the duty and ATF automatically rejects the application without regard to whether the making or transfer would place the applicant in violation of law. That the system can only properly function under the first of the two possible outcomes places ATF's regulation in serious jeopardy of violating the policy rationale, if not the express ruling, of the Supreme Court's opinion in *Printz v. United States*, 521 U.S. 898, 903 (1997), which prohibited conscription of state officials in furtherance of a federal regulatory program.

In *Printz*, the Supreme Court found the interim Brady Act's CLEO certification requirement to be unconstitutional under Tenth Amendment analysis, because the certification required local and state officials to receive applications and make "reasonable efforts" to

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<sup>115</sup> *Id.*

<sup>116</sup> *See* 26 U.S.C. §§ 5812 and 5822.

determine if the sales would be lawful.<sup>117</sup> The Court held that such a provision constituted an improper commandeering of state resources in furtherance of the execution of federal laws because the requirement contravened two important doctrines manifested by the structure of the U.S. Constitution: (i) the doctrine of federalism and state sovereignty, and (ii) the separation of powers among the three branches of the federal government. The Brady Act’s CLEO certification requirement violated the basic principles of federalism and state sovereignty because it conscripted the services of state officials to serve federal interests without compensation. Justice Scalia explained, “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no costs to itself—the police officers of the 50 States.”<sup>118</sup>

The certification requirement also violated the doctrine of separation of powers between the three branches of the federal government because it represented an attempt by the legislative branch to delegate the responsibilities of the President and the federal executive branch to state law enforcement officers, thus allowing Congress to “act as effectively without the President as with him, by simply requiring state officers to execute its laws.”<sup>119</sup> While the federal Constitution bestows the office of the Presidency with the authority and duty to “take Care that the Laws be faithfully executed,” the Brady Act’s certification requirement “effectively

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<sup>117</sup> *Printz*, 521 U.S. at 903-904 (noting that CLEOs were not required to take any action to approve or deny the applications after making their “reasonable efforts” but that CLEOs were required to provide an explanation of the basis for the denial if they did prevent the sale and were required to destroy any records of the transaction if they did not determine the sale would be in violation of the law).

<sup>118</sup> *Printz*, 521 U.S. at 922.

<sup>119</sup> *Id.*



transfer[red] this responsibility to thousands of CLEOs in the 50 States, who [were] left to implement the program without meaningful Presidential control.”<sup>120</sup>

Perhaps due to the Constitutional concerns associated with the interim Brady Act’s certification requirement, ATF’s proposed regulation contains no similar mandate that local and state officials make reasonable or, in fact, *any* efforts at all in conjunction with the proposed certification procedure. This, however, is merely a failure to expressly state what is inherently-obvious: any meaningful involvement of state and local officials, to serve any purpose or goal enunciated in ATF’s notice of proposed rulemaking, must necessarily involve (at least) reasonable efforts.

ATF cannot circumvent the Supreme Court’s holding in *Printz* by offering the possibility that the state official may refuse to accept the duty of processing the certification requests, in which case ATF will automatically reject the uncertified application without regard to whether the applicant would be in violation of the law. To the extent this possible outcome is offered as a means of distinguishing the proposed ATF regulations from the provisions of the Brady Act at issue in *Printz*, it can readily be seen that the solution is worse than the problem. ATF’s rejection of applications based solely on the lack of certification unquestionably defeats the purpose of the NFA as a tax statute and unapologetically ignores the duties conferred upon the Attorney General by Congress. As discussed below, this wholly unsatisfactory proposal offers a violation of the Second Amendment to avoid a violation of the Tenth.

While one federal circuit court of appeals has upheld the constitutionality of the existing<sup>121</sup> certification requirements in ATF’s regulations implementing the NFA, *see Lomont v.*

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<sup>120</sup> Art. II, § 3; *Printz*, 521 U.S. at 922.

*O’neill*,<sup>122</sup> the U.S. Supreme Court has not considered the current requirement and even the D.C. Circuit court stated in *Lomont* that the existing regulation might be susceptible to a challenge that the certification provision is arbitrary and capricious as applied by local officials (an “as-applied” challenged as opposed to a facial challenge).<sup>123</sup> Thus, to the extent state officials voluntarily refuse to participate in the program, their refusal may trigger other constitutional concerns. Constitutional attacks have been lodged in other circuits, but the courts have not yet addressed the matter on the merits due to issues of standing.<sup>124</sup> Notably, however, these issues of standing are likely to be resolved if the proposed regulation is implemented because more state and local CLEOs will inevitably adopt a policy of outright refusal to consider NFA applications as the number of certification requests and the corresponding departmental burdens increase under the new regulations.

Moreover, the proposed regulations are materially distinguishable from the regulations at issue in *Lomont* because they would eliminate any alternative means to obtain an NFA item without a CLEO certification. In addition to drastically increasing the burden on local and state law enforcement, this change would alter the nature of the political and other pressures placed upon local and state CLEOs to “voluntarily” take on the burdens of the certification process. State and local officials would be forced to choose between accepting the burdens or depriving

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<sup>121</sup> The Court actually examined the previous codification of the CLEO certification at 27 C.F.R. §§ 179.63 and 179.85, however, the language examined is materially-identical to the certification requirement currently found in 27 C.F.R. part 479.

<sup>122</sup> 285 F.3d 9 (D.C. Cir. 2002).

<sup>123</sup> *Id.* at 17-18.

<sup>124</sup> *See, e.g., Westfall v. Miller*, 77 F.3d 868 (5th Cir. 1996); *Steele v. Nat’l Firearms Act Branch*, 755 F.2d 1410 (11th Cir. 1985). The courts in these cases have not yet reached the merits of the plaintiffs’ claims because the courts first found the plaintiffs lacked standing due to the fact that they failed to request a certification from every possible CLEO within their jurisdiction. In *Steele*, however, the court noted that “[t]he agency [ATF], of course, cannot defeat appellant’s standing by unreasonably expanding the list of qualified individuals under the portion of the regulation that allows ‘other such persons whose certificate may in a particular case be acceptable . . .’ to sign the form.” *Steele*, 755 F.2d at 1415 n.3.



citizens in their jurisdiction of any means to lawfully acquire NFA items. In this regard, the political coercion faced by state officials would be significantly stronger under the proposed regulation than it was for the officials under the provision at issue in *Printz*. Under the interim Brady Act, the state official's inaction resulted in approval of the application<sup>125</sup> while, under the proposed regulations, inaction of state officials would result in the automatic denial of NFA applications and the total nullification of the NFA with regard to applicants in that jurisdiction. In this regard, inaction by state officials is tantamount to a negative action.

In order to provide lawful access to NFA items to citizens within their jurisdiction, and in order to ensure citizens in their jurisdiction stand on equal footing with citizens in other jurisdictions, local and state officials must take on significant burdens and thereby adopt for themselves a role reserved to the federal executive branch under the Constitution. If enacted, ATF's new regulation would represent a legislative annexation of executive authority by conscripting state officials to enforce a federal statute without the control or guidance of the President. In this way, the profoundly coercive effect of the proposed regulation would offend the policy considerations at issue in *Printz* and constitute a commandeering of state resources in violation of the 10th Amendment.

- (ii.) ATF's automatic rejection of uncertified applications, pursuant to 27 C.F.R. 479.63 and 479.85, violates the Second Amendment.

To argue the certification requirement does not violate the Tenth Amendment under *Printz* because, state officials may refuse the obligation, is to engage in deceptive sleight-of-hand that swaps one constitutional violation for another. To the extent state officials exercise their option to refuse to participate, applicants under proposed 27 C.F.R. 479.63 and 479.85 will not

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<sup>125</sup> *Printz*, 521 U.S. at 905.

be able to comply with ATF's regulations and there will be no legal way for individuals to acquire or make any of the broad scope of items falling under the NFA's definition of "firearm."

In *District of Columbia v. Heller*, the U.S. Supreme Court held that the right to bear arms under the Second Amendment is a personal right, held by the individual distinct from his or her participation in militia or military service.<sup>126</sup> In *Heller* the Court found unconstitutional a Washington D.C. ordinance restricting the use of handguns because it amounted to a prohibition of an entire class of "arms" used by law abiding citizens for self- and home-defense.<sup>127</sup> To the extent state officials refuse to participate in the certification process, ATF's policy of automatically rejecting uncertified NFA applications will amount to a de facto ban on a very large class—in fact many large classes—of arms, namely, all types of "firearms" subject to NFA registration.<sup>128</sup> Pursuant to 26 U.S.C. § 5845, this includes eight separate classes of arms with numerous sub-classes and sub-categories. It is unlikely that such a sweeping and broadly-categorical de facto ban of all "firearms" covered by the NFA could pass constitutional scrutiny.

The *Heller* court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms."<sup>129</sup> This is particularly true with regard to silencers, which are encompassed within the NFA's definition of "firearm" at § 5845(a)(7). ATF reported that, as of March 2012, Americans owned 360,534 registered silencers.<sup>130</sup> This number has likely increased significantly since ATF's 2012 presentation, because the "silencer industry is the

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<sup>126</sup> 554 U.S. 570, 595 (2008).

<sup>127</sup> *Id.* at 628-29.

<sup>128</sup> As of 2012, ATF reports there are 3,184,804 legally owned NFA items in the United States. Firearms Commerce in the United States Annual Statistical Update 2012, ATF, available at <http://www.atf.gov/files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf>.

<sup>129</sup> *Heller*, 554 U.S. at 582 (emphasis added).

<sup>130</sup> Firearms Commerce in the United States, Annual Statistical Update 2012, available at <http://www.atf.gov/files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf> (last visited on November 3, 2013).



highest-growth niche of the firearms industry . . . the industry has seen 400 to 500 percent growth” since 2008.<sup>131</sup> Indeed, one silencer manufacturer reported that they alone expected to sell over 110,000 silencers in the United States in 2012.<sup>132</sup>

As evidenced above, registered silencers are used almost exclusively by law-abiding citizens. In *Heller*, the Supreme Court noted the detriment to self-defense created by the trigger lock and disassembly requirements in the D.C. ordinance at issue.<sup>133</sup> Just as individuals are unlikely to be able to make use of a disassembled or locked firearm for purposes of emergency self-defense in their home, so too are individuals unlikely to be able to dawn adequate hearing protection before using their firearm in such an emergency. In this same regard, firearm owners are likely to be weary of using in- or over-the-ear hearing protection in such emergency situations because it reduces their ability to hear intruders and to communicate with their family members. Failure to utilize hearing protection when firing a handgun in such an emergency, however, can cause permanent hearing damage to the individual and the individual’s family, as well as temporarily deafening the individual and family during a period when the ability to hear and communicate may be critical to survival. Additionally, silencers reduce the occurrence of muzzle-flash, which can temporarily blind the individual using the firearm, leaving the individual defenseless at a potentially perilous moment.

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<sup>131</sup> Stephanie Mencimer, Gunmakers and the NRA Bet Big on Silencers. What Could Go Wrong?, Mother Jones (March 19, 2013), available at <http://www.motherjones.com/politics/2013/03/guns-nra-national-rifle-association-wants-states-legalize-silencers-suppressors>.

<sup>132</sup> *Id.*

<sup>133</sup> *Heller*, 554 U.S. at 630.





Because silencers are highly useful for the purpose of self-defense in the home, and over 300,000 are possessed and used law-abiding citizens,<sup>134</sup> their de facto ban would contravene the purpose and policy enunciated in the *Heller* opinion.

### 3. *The Proposed Rule Unlawfully Exceeds ATF's Statutory Authority*

Agency action is not inherent; administrative authority must be derived from a delegation of lawmaking power from Congress to the agency:

If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances. To that end the Constitution requires that Congress' delegation of lawmaking power to an agency must be "specific and detailed." Congress must "clearly delineate the general policy" an agency is to achieve and must specify the "boundaries of the delegated authority." Congress must lay down by legislative act an intelligible principle," and the agency must follow it.<sup>135</sup>

Agency action that exceeds the agency's delegated authority is a nullity, is unlawful, and must be set aside under the Administrative Procedures Act.<sup>136</sup>

ATF cites to 26 U.S.C. §§ 5812 and 5822 as the statutory authority for the proposed rule.<sup>137</sup> Section 5812 provides:

A firearm shall not be transferred unless

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

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<sup>134</sup> Notably, silencers remain widely used despite the significant burdens associated with applying for transfer of a silencer, either as an individual or entity, the \$200 NFA tax added to the purchase price, and the long delays in processing of transfer applications. Silencers, and other NFA firearms, would undoubtedly be even more widely used for home protection by law-abiding citizens but for the existing regulatory obstacles.

<sup>135</sup> *FCC v. Fox Television Stations*, 556 U.S. 502, 535 (2009) (Kennedy, J., concurring opinion) (internal citations to *Mistretta v. United States*, 488 U.S. 361 (1989) omitted).

<sup>136</sup> *See, e.g., Dixon v. United States*, 381 U.S. 68, 74 (1965); 5 U.S.C. § 706(2)(C).

<sup>137</sup> ATF also cites 26 U.S.C. § 7805, but that section is a mere gap-filling catch all otherwise restricted by the specific delegations contained in §§ 5812, 5822.



- (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form;
- (3) the transferee **is identified** in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph;
- (4) the transferor of the firearm **is identified** in the application form in such manner as the Secretary may by regulations prescribe;
- (5) the firearm **is identified** in the application form in such manner as the Secretary may by regulations prescribe; and
- (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

26 U.S.C. § 5812(a) (emphasis added).<sup>138</sup> The Congressional policy delegated to ATF in Section 5812 is to *identify* the transferee, transferor, and the firearm. ATF is authorized to prescribe the form of the application, but the Congressionally-specified purpose is identification. While subsection (6) states the application must show the Secretary has approved the transfer and registration, the statute conspicuously does not authorize the agency to prescribe forms pertaining to whether the transfer would place the transferee in violation of the law.

Within Sections 5812 and 5822, there is no authority for ATF to impose a CLEO certification requirement. ATF nonetheless proposes to expand the CLEO certification in a manner unrelated to identification of the transferee, transferor, or the firearm. Furthermore, sections 5811 and 5821 provide that the Attorney General “shall” levy and collect a tax on each

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<sup>138</sup> 26 U.S.C. § 5822 provides substantively similar language in the context of an application to make an NFA firearm. Discussion here will concern Section 5812, but is equally applicable to Section 5822.



firearm made or transferred.<sup>139</sup> Under ATF’s proposed regulation, the refusal of state officials to certify an application automatically results in the failure to collect or levy a tax. To argue that, in such event, no firearm was in fact made or transferred, and thus no taxable event occurred, is to engage in circular logic that ignores the statutory purposes stated on the face of the NFA: to create a national registry and to collect taxes.<sup>140</sup> The proposed regulations not only frustrate congressional policy and contradict the underlying statutory language, but clearly create an incentive for individuals seeking to acquire firearms to do so through channels that avoid registration and taxation entirely.

4. *ATF has failed to observe required procedure in adopting the proposed regulations.*

ATF’s rulemaking process is not in compliance with the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, collectively codified at 5 U.S.C. §§ 601-612. Under these acts, “[w]hen promulgating a rule, an agency must perform an analysis of the impact of the rule on small businesses, or certify, with support, that the regulation will not have a significant economic impact on them.”<sup>141</sup> The regulatory flexibility analysis must “describe the impact of the proposed rule on small entities” and, among other things, must contain “a description of the reasons why action by the agency is being considered,” “a succinct statement of the objectives of, and legal basis for, the proposed rule,” “a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply,” and “identification, to the extent practicable, of all relevant Federal rules which may duplicate,

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<sup>139</sup> 26 U.S.C. §§ 5811 and 5821.

<sup>140</sup> See *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (“On its face it is only a taxing measure . . .”).

<sup>141</sup> *Nat’l Mining Assoc. v. Mine Safety and Health Admin.*, 512 F.3d 696, 701 (D.C. Cir. 2008).



overlap or conflict with the proposed rule.”<sup>142</sup> The analysis must also include discussion of alternatives to the proposed rule. While an agency head may certify that the rule will not “have a significant economic impact on a substantial number of small entities,” such certification must be supported by “a statement providing the factual basis for such certification.”<sup>143</sup>

Here, ATF certified that the rule will not affect a significant number of small entities, but the factual statement provided does not support that certification. ATF claims the “proposed rule will primarily affect legal entities that are seeking to make or acquire NFA firearms and are not making or acquiring them as a qualified Federal firearms licensee,” and concludes that the proposed regulations only increase costs by \$11,963,087.00. This is an extremely conservative number that does not take into account many of the actual costs. However, even assuming this number were accurate, ATF only considered one-third of the equation. The proposed rule will affect three groups: the manufacturers (makers), the distributors/sellers (transferors), and the purchasers (transferees). ATF's certification statement only considered the transferees and the estimated additional costs of complying. But ATF's certification statement ignores the proposed rule's significant effect on both manufacturers and distributors/sellers. By extending the automatic-rejection protocol to the vast majority of NFA applications, ATF's proposed expansion of the CLEO requirement to legal entities will inevitably and significantly reduce the number of legal sales of NFA firearms to law-abiding citizens. It is beyond question that the general refusal of state and local officials to participate in the certification process is a major reason legal-entity transfers became so numerous. Because many fewer transfers will occur under the proposed rule, manufacturers and distributors/sellers—many of whom qualify as small

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<sup>142</sup> See 5 U.S.C. § 603(a), (b).

<sup>143</sup> 5 U.S.C. § 605(b).

business and small entities under the SBA and RFA—will be significantly affected and may very well be put out of business, entirely. Jobs will be lost. ATF provides no accounting of the extent to which many small entity manufacturers or seller/distributors would be adversely impacted by the proposed rule. Such an analysis is clearly inadequate under 5 U.S.C. § 603.

**C. Silencer Shop’s First Proposed Alternative: The certification requirement should be replaced with a notification requirement.**

ATF must consider viable alternatives under the SBA and RFA, as well as Executive Order 12866.<sup>144</sup> Silencer shop proposes that ATF eliminate the CLEO certification requirement for all making and transfer applications and require, in its place, that applicants utilizing Form 1, 4, or 5 provide a notification to one of their local chief law enforcement officers. This form of notice requirement has been determined to constitute an appropriate tool for review of handgun applications and ATF’s previously-published abstracts of the proposed rulemaking clearly indicated ATF’s prior intent to replace the certification requirement with a notification standard. A notice requirement will achieve the benefit of voluntary involvement from state and local officials, while avoiding the commandeering and arbitrary-denial issues created by an expanded certification requirement.

**D. Silencer Shop’s Second Proposed Alternative: Applications to make or transfer silencers should be exempted from the certification requirement.**

In the event ATF determines to retain the CLEO certification requirements at 27 C.F.R. §§ 479.63 and 479.85, Silencer Shop proposes, as a second alternative, that applications to make or transfer silencers be exempted from the certification requirement. Given the overwhelming value of silencers, and their almost non-existent use in crimes, ATF should exempt silencers from the certification requirement.

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<sup>144</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).



1. *Gunfire unquestionably presents significant risks of permanent hearing loss, both immediately and cumulatively over time.*

Exposure to high sound levels from firearm operation is universally recognized to cause noise-induced hearing loss.<sup>145</sup> A 2011 publication from the American Academy of Otolaryngology found that “[r]ecreational use of firearms is a significant cause of noise and related ear injury in America” and noted that hearing protection during recreational firearm use “represents one of the largest neglected areas of advocacy for prevention of ear injury.”<sup>146</sup> Exposure to noise greater than 140 dB can permanently damage hearing<sup>147</sup> and almost all firearms, including even the relatively small .22-caliber rifle, produce noise above 140 dB.<sup>148</sup> Larger caliber firearms produce sounds over 175 dB.<sup>149</sup> According to researchers for the Centers for Disease Control and Prevention (CDC):

Noise produced by impulsive noise, such as gunfire, has sufficient intensity to permanently damage unprotected ears in a very short period of time; damage can occur in minutes rather than the days or years typical of industrial noise exposure.<sup>150</sup>

In particular, persons with hearing damaged by firearm operation tend to have high-frequency permanent hearing loss, causing the person to have difficulty hearing the speech

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<sup>145</sup> Matti E. Ylikoski, MD and Jukka S. Ylikoski, MD, *Hearing loss and handicap of professional soldiers exposed to gunfire noise*, Scandinavian Journal of Work, Environment & Health (1994), Scand J Work Environ Health 1994, 20:93-100; *see also*, Matthew Parker Branch, MD, *Comparison of Muzzle Suppression and Ear-Level Hearing Protection in Firearm Use*, Otolaryngology -- Head and Neck Surgery, available at <http://oto.sagepub.com/content/144/6/950> (last visited Nov. 3, 2013).

<sup>146</sup> Branch, *supra*.

<sup>147</sup> *Recreational Firearm Noise Exposure*, Audiology Information Series, Michael Stewart (2011), available at: <http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/>; *see also Noise Induced Hearing Loss*, American Hearing Research Foundation, available at <http://American-hearing.org/disorders/noise-induced-hearing-loss/>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Lilia Chen, MS, CIH and Scott E. Brueck, MS, CIH, *Noise and Lead Exposures at an Outdoor Firing Range – California*, CDC Workplace Safety and Health, Health Hazard Evaluation Report (Sept. 2011) available at <http://www.cdc.gov/niosh/hhe/reports/pdfs/2011-0069-3140.pdf> (last visited Nov. 3, 2013), p. 6.



sounds “s,” “th,” or “v” and other high-pitched sounds.<sup>151</sup> People with high-frequency hearing loss often state they can hear what is said but that it is not clear and it may seem like others are mumbling.”<sup>152</sup>

Hearing loss caused by firearms is illustrated by statistics showing the great number of army veterans with hearing loss caused by firearm use. One study found that Veterans were 30% more likely to have significant hearing loss than nonveterans after adjusting for age and current occupation.<sup>153</sup> Veterans who served in the United States or overseas during September 2001 to March 2010, the era of overseas contingency operations, were four times more likely than nonveterans to have significant hearing loss.<sup>154</sup>

2. *Silencers are the only truly-effective means to prevent hearing damage from gunfire.*

Researchers with the Centers for Disease Control and Prevention (CDC) concluded that noise levels experienced by operators of common firearms used for self-defense and hunting<sup>155</sup> exceeded the recommended exposure limits established by the National Institute for Occupational Safety and Health (NIOSH), even when using standard over-the-ear hearing protection ( earmuffs).<sup>156</sup> The researchers also noted that the equipment used to record sound levels, including noise dosimeter microphones and electronic circuitry, “do not adequately capture peak noise levels above the maximum range of the instrument and ‘clip’ noise levels at

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Severe hearing Impairment Among Military Veterans—United States, 2010, CDC Morbidity and Mortality Weekly Report ( July 2011).

<sup>154</sup> *Id.*

<sup>155</sup> Tested firearms included 12-gauge shotguns, .30-06 rifles, and .45-70 rifles.

<sup>156</sup> Lilia Chen, MS, CIH and Scott E. Brueck, MS, CIH, Noise and Lead Exposures at an Outdoor Firing Range – California, CDC Workplace Safety and Health, Health Hazard Evaluation Report (Sept. 2011) available at <http://www.cdc.gov/niosh/hhe/reports/pdfs/2011-0069-3140.pdf> (last visited Nov. 3, 2013), at p. 3.



approximately 145 dB.”<sup>157</sup> Consequently, the CDC researchers warned that the reported measurements should be “considered to underrepresent noise exposure and hearing loss risk from gunfire noise.”<sup>158</sup> Disturbingly, NIOSH also determined that manufacturers often overstate the noise reduction capabilities of their in- or over-the-ear hearing protection products and stated:

NIOSH recommends adjusting the hearing protectors’ ratings by subtracting 25% from the manufacturer’s labeled NRR [noise reduction rating] for earmuffs and subtracting 50% from the manufacturer’s labeled NRR for formable earplugs.<sup>159</sup>

Researchers for the American Academy of Otolaryngology similarly concluded:

Far from being a panacea, ear-level protection rarely, if ever, confers the level of protection or noise reduction ratio (NRR) advertised. NRRs are determined using laboratory tests in continuous noise (not impulse sounds such as gunfire) and are not useful for determining the actual level of protection achieved by a given individual in a particular environment. . . . [R]eview of 20 published studies demonstrated far worse performance than the corrected NRR suggests: the laboratory NRRs consistently overestimated the real-world NRRs by 140% to 2,000%.<sup>160</sup>

In its studies, the CDC employed octave band analysis to determine the dominant noise frequencies experienced by an operator of a firearm.<sup>161</sup> After analyzing the results, the CDC researchers concluded:

One of the primary sources of noise generated during gunfire is the muzzle blast during firing, which generates high noise across the mid to high frequency range. **The only potentially effective noise control method to reduce students’ or instructors’ noise exposure from gunfire is through the use of noise suppressors that can be attached to the end of the gun barrel.**<sup>162</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at p. 6.

<sup>160</sup> Branch, *supra*.

<sup>161</sup> *Id.* at p. 4.

<sup>162</sup> *Id.* at pp. 4-5 (emphasis added).





The CDC's conclusions have been confirmed by additional studies, showing that modern muzzle-level suppression does a vastly better job of protecting a person's ears while shooting for several reasons. Researchers for the American Academy of Otolaryngology—Head and Neck Surgery found that silencers offer greater than 50% better noise reduction than ear-level protection.<sup>163</sup>

While it is clear that muzzle-level suppression provided by firearm silencers has critical advantages over properly-used noise suppression at the ear level (earmuffs and ear plugs), the advantages become significantly magnified when one considers that ear-level noise suppression is often used improperly, inconsistently, or not at all. According to researchers at the University of Michigan, consistency of hearing protection use with recreational firearms is “dismal.”<sup>164</sup> For example, only about fifty-percent of shooters wear hearing protection all the time when target practicing.<sup>165</sup> Hunters are even less likely to wear hearing protection because the hearing protection can prevent them from hearing approaching game or other noises including nearby hunters.<sup>166</sup> CDC researchers have noted that “proper insertion of hearing protection is critically important to ensure proper noise attenuation. NIOSH has previously identified poor insertion of formable hearing protection into the ear canals.”<sup>167</sup>

Certain types of guns and ammunition are so loud during operation that ear-level protection simply does not reduce the sound enough.<sup>168</sup> For ear-level protection to work

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<sup>163</sup> *Comparison of Muzzle Suppression and Ear-Level Hearing Protection in Firearm Use*, Matthew Parker Branch, American Academy of Otolaryngology -- Head and Neck Surgery 2011 144: 950, originally published online 24 February 2011, available at <http://oto.sagepub.com/content/144/6/950>.

<sup>164</sup> Nondahl DM, Cruickshanks KJ, Wiley TL, *Recreational firearm use and hearing loss*, Arch Fam Med. 2000;9:352-357.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Lilia Chen, MS, CIH and Scott E. Brueck, MS, CIH, *supra*, at p. 6.

<sup>168</sup> *Id.*



properly, a shooter must make sure the protection he is using is adequate to protect against the type of gun, caliber ammunition, and location that the firearm is being used. For instance, certain guns, larger ammunition, and enclosed shooting environments are all factors that can increase the noise and reduce the effectiveness of ear-level protection. Most shooters will not have enough information to determine whether the type of earplugs or earmuffs utilized will provide adequate protection, particularly in light of the gross error margins in advertised NRR ratings.

Unlike ear-level protection, silencers are relatively easy to use in a consistent, repeatable fashion.<sup>169</sup> Once the silencer has been placed on the gun, no further adjustment is required. Ear-level protection has many practical limitations including poor fit, migration of device due to activity or seat, incorrect use, pain, heat, and loss of communication.<sup>170</sup> Ear-level protection requires a shooter to always be sure that the earplugs and earmuffs are in their proper place. Any movement of the earplugs or earmuffs during use can reduce or eliminate the provided protection. In addition to the above-stated benefits, silencers improve the overall safety of gun use and confer additional safety benefits for both the shooter and bystanders. In this regard, silencers facilitate interpersonal conversation, allowing users to hear commands from range officers or communicate with family members in an emergency, and provide situation awareness of sounds not afforded by ear-level devices.<sup>171</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; Branch, *supra*.

3. *Silencers have important, legitimate uses and are becoming increasingly popular for use in hunting and for hearing protection.*

Television crime dramas and Hollywood thrillers have depicted silencers solely as a tool of murderers and professional hit men. As discussed in detail above, that depiction is grounded purely in fiction, as registered silencers are almost never used in criminal activity. Indeed, federal agencies, state legislatures, and courts recognize there are legitimate safety, sporting, and other purposes for silencers.<sup>172</sup>

Silencers are critical to preventing hearing loss during operation of firearms and are used for numerous lawful and practical purposes, including target practice, competitive shooting, tactical and other firearm training, training of first-time shooters, hunting, varmint control and eradication, home defense, and reduction of sound pollution in populated areas.<sup>173</sup> The use of a silencer can dramatically improve the safety, enjoyment, and effectiveness of each of these activities.

Competitive shooters often train daily, and silencers allow them to shoot without being concerned about potential hearing damage. Although shooters have the option of using ear-level hearing protection instead, studies have shown that silencers offer greater than 50% better noise reduction than ear-level protection.<sup>174</sup> Additionally, some firearms used by competitive shooters are too loud for ear-level protection to adequately protect them.<sup>175</sup> Ear-level protection also requires the user to always have the protection correctly in place, and any inadvertent movement

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<sup>172</sup> See e.g., *U.S. v. Stump*, 1997 U.S. App. LEXIS 842 (4th Cir. 1997); Map showing Silencer Legality & Ownership, available at <http://americansilencerassociation.com/education/> (39 states allow for the civilian use of silencers and 31 states allow the use of silencers in at least some form of hunting.).

<sup>173</sup> Paul Clark, *The Criminal Use of Silencers*, *Western Criminology Review* 8(2), 47 (2007).

<sup>174</sup> *Comparison of Muzzle Suppression and Ear-Level Hearing Protection in Firearm Use*, Matthew Parker Branch, *American Academy of Otolaryngology -- Head and Neck Surgery* 2011 144: 950, originally published online 24 February 2011, available at <http://oto.sagepub.com/content/144/6/950>.

<sup>175</sup> See *id.* at p. 951.



can completely remove its benefit. Further, routine shooting can lead to degradation of hearing *even when the shooter routinely uses dual ear-level protection* (such as using both ear plugs and earmuffs).<sup>176</sup> Competitive shooters also use silencers because they assist in improving accuracy and reducing fatigue.<sup>177</sup> For instance, adding a silencer to certain types of rifles can reduce recoil by up to 75%.<sup>178</sup> Use of a silencer also allows competitive shooters to set up a shooting range in a basement or similar location without making noise that disturbs neighbors.<sup>179</sup>

In addition to competitive shooters, people taking any type of firearms, marksmen, tactical, or concealed handgun training can benefit from the use of a silencer because it allows them to receive verbal instructions from the instructor. Using a silencer facilitates communication and situational awareness, including improved awareness of the locations of individuals in proximity to the shooter, which substantially improves safety when operating a firearm in a training environment.<sup>180</sup> First-time shooters or inexperienced shooters can greatly benefit from the use of a silencer, both because silencers allow the shooter to communicate more easily with instructors and because one of the most common problems for new shooters is decreased accuracy caused by flinching in anticipation of firearm discharge and recoil.<sup>181</sup> By containing the explosion at the muzzle, reducing recoil, and decreasing muzzle flip, silencers dramatically increase accuracy and safety, especially among new and inexperienced shooters.<sup>182</sup>

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<sup>176</sup> See *id.* at 952, citing WU CC, Young YH. Ten-year longitudinal study of the effect of impulse noise exposure from gunshot on inner ear function. *Int J Audiol.* 2009; 48:655-660.

<sup>177</sup> The Benefits of Using a Silencer, Jim Dickson, published online 18 April 2011, available at: <http://www.gunworld.com/buyers-guides/accessories/the-benefits-of-using-a-silencer/>

<sup>178</sup> *Id.*

<sup>179</sup> Paul Clark, The Criminal Use of Silencers, *Western Criminology Review* 8(2), 47 (2007).

<sup>180</sup> *Comparison of Muzzle Suppression and Ear-Level Hearing Protection in Firearm Use*, Matthew Parker Branch, *American Academy of Otolaryngology -- Head and Neck Surgery* 2011 144: 952, originally published online 24 February 2011, available at <http://oto.sagepub.com/content/144/6/950>.

<sup>181</sup> See <http://americansilencerassociation.com/education/>

<sup>182</sup> See <http://americansilencerassociation.com/education/>



Silencers are also popular tools for home and self-defense. First, silencers are optimal for use in self-defense because of their obvious noise reduction. If a firearm were necessary in the defense of one's home, using a firearm in an enclosed area will cause a deafening report, and could cause disorientation and permanent hearing loss for both the shooter and other family members in the proximity. Additionally, firing a gun in a small enclosed space like a residential home creates a muzzle flash that is detrimental to a person's ability to see in a near dark room and maintain situational awareness.<sup>183</sup> A muzzle flash also immediately discloses the location of the shooter to home intruders. Maintaining situational awareness, as well as clear auditory and visual senses, is necessary to insure that any shots are fired away from family members during an emergency situation.

Silencers are also an important tool for hunters. Currently, 39 states permit silencer ownership and the majority of states allow silencers to be used in various forms of hunting.<sup>184</sup> There are several benefits to hunting with suppressed firearms. Listening to your surroundings is a key component of both the strategy and enjoyment of hunting and, as a result, hunters quite often refrain from using ear-level hearing protection despite the serious risks of noise induced hearing loss. In addition, silencers make firearms more accurate, and allow for quicker and more accurate follow-up shots if necessary, which increases the chance for a clean, humane shot.<sup>185</sup> Public support for the use of Silencers while hunting is equally high. For instance, in 2012 Texas opened a proposal to allow the use of silencers when hunting game animals to public comment and the regulations coordinator for Texas Parks and Wildlife, said he had "received

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<sup>183</sup> [http://silencernews.com/silencers-for-home-defense/#disqus\\_thread](http://silencernews.com/silencers-for-home-defense/#disqus_thread)

<sup>184</sup> See <http://americansilencerassociation.com/education/>

<sup>185</sup> Silencerco Education: Benefits, available at <http://www.silencerco.com/?section=Education&page=Benefits>.



more than 3,000 public comments, and there [was] no end in sight. . . I would say that 95 percent of those are in favor of the rule change.”<sup>186</sup> The Texas rule was later approved.

Similarly, silencers are an important tool in varmint control and eradication. According to Smithsonian Magazine, “[w]ild hogs are among the most destructive invasive species in the United States today.”<sup>187</sup> “Two million to six million of the animals are wreaking havoc in at least 39 states and four Canadian provinces; half are in Texas, where they do some \$400 million in damages annually.”<sup>188</sup> The L.A. Times reports that the use of silencers is essential to the control of wild hogs because it allows a shooter “to kill more than one hog, since the sound of their rifles wouldn't scare off the remaining pack.”<sup>189</sup> Some credit silencers with completely changing the face of the hog hunting.<sup>190</sup> For similar reasons, silencers are also commonly used in the control of other varmints including coyotes, foxes, gophers and prairie dogs.<sup>191</sup>

Silencers also allow hunters and shooters to reduce noise caused by their guns and avoid creating sound pollution which may disturb others nearby. According to the National Rifle Association, noise complaints are occurring more frequently against shooting ranges, informal shooting areas and hunting lands throughout the country.<sup>192</sup> Increased use of suppressors may help to eliminate many of these complaints.<sup>193</sup> For instance, in the United Kingdom, it is

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<sup>186</sup> Mark Leggett, Silencer proposal draws strong support, Statesman online (March 7, 2012), available at <http://www.statesman.com/news/lifestyles/recreation/silencer-proposal-draws-strong-support/nRk4z/>.

<sup>187</sup> John Morthland. A Plague of Pigs in Texas, Smithsonian Magazine (January 2011).

<sup>188</sup> *Id.*

<sup>189</sup> Shhh, Nice Piggy: Georgia Considers Silencers for Hog Hunting, LA Times (January 26, 2012); *see also* Brian McCombie, Tactical Pig Hunting and Suppressors: A Match Made in Hog Heaven!, SHWAT (February 3, 2012) (“I engaged three [hogs] before they scattered! You could never do that un-suppressed.”).

<sup>190</sup> *Id.*

<sup>191</sup> Kevin Knappek, Bills would legalize silencers for hunting, Montana State News (February 10, 2013); Chad Love, Kansas Legislature Approves Silencer Hunting Bill, Field and Stream Magazine (March 29, 2011) (prairie dogs).

<sup>192</sup> Craig Nyhus, Lawfully owned silencers approved for Texas hunting, Lone-Star Outdoor News (March 30, 2012).

<sup>193</sup> *Id.*



common for hunting leases to require a provision that the hunter use a silencer so that he or she does not disturb the peace.<sup>194</sup> Silencers are similarly used by police, groundskeepers, janitors, and private security to shoot rabid animals or rats inside buildings or in locations where gun shots would cause alarm.<sup>195</sup>

Silencers have many practical uses that outweigh any alleged reason for increased restriction. This point is shown by the fact that several European governments choose not to regulate silencers at all. “In some European countries, firearm silencers are legal and not regulated in any way—both in countries with widespread gun ownership, such as France, and countries where firearms themselves are strictly regulated, such as Sweden.”<sup>196</sup>

4. *Such an exemption would be consistent with ATF’s and Congress’s long history of relaxed regulatory and statutory requirements governing silencers compared to other NFA firearms.*

When completing a Form 4 application, ATF requires a Transferee’s Certification be signed under penalty of perjury stating:

I, [name of transferee], have reasonable necessity to possess the machinegun, short-barreled rifle, short-barreled shotgun, or destructive device described on this application for the following reason(s) [reasons] and my possession of the device or weapon would be consistent with public safety (18 U.S.C. 922(b) (4) and 27 CFR 479.93).<sup>197</sup>

This certification is not required for silencers,<sup>198</sup> and stems from the requirement laid out in the NFA statute which also noticeably omits silencers from its list of covered items.<sup>199</sup> Likewise,

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<sup>194</sup> The Benefits of Using a Silencer, Jim Dickson, originally published online 18 April 2011, available at <http://www.gunworld.com/buyers-guides/accessories/the-benefits-of-using-a-silencer/>

<sup>195</sup> Paul Clark, The Criminal Use of Silencers, *Western Criminology Review* 8(2), 47 (2007).

<sup>196</sup> Paul Clark, The Criminal Use of Silencers, *Western Criminology Review* 8(2), 45 (2007) (citing Paulson, Adam C. 1996. *Silencers: History and Performance, volume 1*. Boulder, CO; Paladin Press.).

<sup>197</sup> ATF Form 4 (5320.4), revised March 2006. AOW’s are also excluded from this requirement.

<sup>198</sup> Similarly the instructions in the form clarify that the certification is only required if the “firearm to be transferred is a machinegun, short-barreled rifle, short-barreled shotgun, or destructive device;” *Id.*



ATF requires a written “request and prior authorization from ATF to transport interstate or in foreign commerce any destructive device, machinegun, short-barreled rifle, or short-barreled shotgun.”<sup>200</sup> Again, silencers are excluded from this requirement.<sup>201</sup> The currently-existing exemption of silencers from various statutory and regulatory requirements applicable to other types of firearms reflects the general understanding that silencers pose a reduced risk and should not be subject to the same level of restrictive regulation.

#### **IV. APPLICATION OF THE PROPOSED “RESPONSIBLE PERSON” DEFINITION AND DOCUMENTARY REQUIREMENTS WILL HAVE UNINTENDED AND UNREASONABLY-BURDENSOME CONSEQUENCES**

##### **A. The proposed definition of “Responsible Person” is ambiguous, unreasonably burdensome, and would involve ATF in complicated, state-specific matters pertaining to trust law and corporate governance.**

The integration of the proposed “responsible person” definition<sup>202</sup> and related regulations will unreasonably increase the burden placed upon NFA applicants, particularly when combined with the proposed expansion of the CLEO certification requirement. This burden will, in turn, critically impact—potentially to a fatal degree—the economic viability of the NFA sales industry and family-owned companies such as Silencer Shop. The application of the proposed provisions connected to the definition require each “responsible person” to undergo a background check, obtain and submit fingerprints and passport photos, and also obtain a CLEO certification.

The multiple obligations placed upon “responsible persons” may prove to be commercially impractical, and thus prohibitive, for larger corporations wishing to acquire NFA

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<sup>199</sup> 18 USC 922(b)(4).

<sup>200</sup> Application to Transport Interstate or to Temporarily Export Certain National Firearms Act (NFA) Firearms (ATF Form 5320.20), revised October 2003.

<sup>201</sup> “Authorization is not required for the transportation of silencers...” When Permission is Required to Move NFA Firearms, FFL Newsletter (Mar. 2013) Vol. 2; *see also* 18 USC § 922(a)(4); 27 CFR 478.28.

<sup>202</sup> ATF actually proposes multiple “responsible person” definitions, with application of different definitions for the various types of entities that may file an NFA application.





items. For example, the proposed rule provides the following non-exclusive definition for “responsible person” with regard to companies:

any individual, including any member, officer, director, board member, owner, shareholder, or manager, who possesses, directly or indirectly, the power or authority under any contract, agreement, article, certificate, bylaw, or instrument, or under state law, to direct the management and policies of the company to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the company.

With regard to a trust, ATF proposes an even broader definition that is not limited to individuals who direct the management and policies of the entity. These broad and all-encompassing definitions offer little clarity regarding who should be included and are so ambiguous that they could be read to include almost all persons associated with an entity or trust. Companies wishing to ensure compliance with the regulations will therefore be compelled to consider a remarkably broad spectrum of directors, officers, managers, employees, contractors, agents, and representatives who might conceivably possess even indirect authority to “direct the management” of any of the laundry list of actions in which the company might engage with regard to the firearm, including simple “possession,” “shipping,” or “transport” of the firearm. If the company is to acquire an NFA item, then each and every individual “associated” with the company who might conceivably fall within this catch-all definition will be required to obtain and submit passport photos and fingerprints, and will be required solicit a certification from a local or state chief law enforcement officer.

ATF’s use of the word “indirectly” in both definitions is particularly troublesome because of the word’s broadly-sweeping and highly-subjective nature. The word “indirectly” is not defined in the proposed rule, however the most fitting definition found in Webster’s Dictionary



is “not direct, as deviating from a direct line or course: roundabout.”<sup>203</sup> Thus, the rule may be interpreted to mean that anyone associated with an entity, in nearly any capacity, could be said to be involved in the management or policies of the company “indirectly” or in some “roundabout” manner.<sup>204</sup> In this regard, a non-employee of a large corporation might be responsible for directing a team of movers during the company’s move between offices. If he is advised of company policy pertaining to storage or transport of boxes, some of which contain properly secured NFA items, would that individual be considered to have (indirect) authority to manage the company’s policy for transporting firearms—perhaps simply by enforcing the company’s policy against tossing the boxes instead of handling them with care? This is an extreme example, but an easily-foreseeable one. Innumerable permutations of similar questions pertaining to who is or may become a “responsible person” under the proposed regulations will undoubtedly lead to unforeseen traps and unpredictable potential liability for companies wishing to legally own an NFA item.

As applied to trusts, the inclusion of the word “indirectly” in the definition of “responsible person” seems even more out-of-place. One might fairly question how an individual “indirectly” possess the power or authority to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm. Given this broad definition, and the obvious criminal consequences of non-compliance, entities and trusts would have no choice but to err on the side of over-inclusion. This would place a tremendous burden on both the entity and ATF.<sup>205</sup> Such a rule could result in hundreds, or perhaps even thousands, of “responsible persons” for a single

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<sup>203</sup> "Indirect." Merriam-Webster.com. Merriam-Webster, n.d. Web. 2 Dec. 2013, available at <http://www.merriam-webster.com/dictionary/indirect>.

<sup>204</sup> This broad definition could also lead to overzealous prosecutions, as it is unclear and highly subjective who ATF intends to include within the definition.

<sup>205</sup> It is also worth noting that it would be impossible for ATF to police this in any meaningful way.



entity. For instance, a large armored car company might have hundreds of managers spread across the county. Requiring each of those managers to submit passport photos, fingerprints, and obtain a CLEO signoff is unrealistic and would be simply unworkable for both the applicant and ATF. In 2004, Dunbar Armored, Inc., an armored car company headquartered in Baltimore, Maryland, employed over 4,000 employees and operated in 38 states.<sup>206</sup> Loomis Fargo & Co. and Brinks, Inc. employed even more personnel that year, nationwide.<sup>207</sup>

ATF also offers no explanation for the variation between the definition of “responsible person” to be utilized with regard to trusts and the definition that would be applicable to other entities. For non-trust entities, the responsible persons are those who “*direct the management and policies*” of the entity, while, for a trust, ATF would employ a much broader definition capturing any person who possesses “the power or authority . . . to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust.” Thus, entities may (perhaps) only be required to disclose management-level employees,<sup>208</sup> while a trust would have to disclose all persons who might have any contact with the firearms, regardless of their level of contact or role with regard to the trust. This is made even more complex when one considers that trusts often have other entities, such as corporations or nationally-chartered banks, as trustees. This “layering of entities” will certainly cause considerable confusion regarding which definition of responsible person to use and who to include, and could drastically impact nationally-chartered banks and insurance companies who

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<sup>206</sup> Armored Car Industry Has Treasured History, available at [http://articles.baltimoresun.com/2004-04-22/business/0404220262\\_1\\_dunbar-armored-armored-car-car-industry](http://articles.baltimoresun.com/2004-04-22/business/0404220262_1_dunbar-armored-armored-car-car-industry) (last visited Nov. 3, 2013).

<sup>207</sup> *Id.*

<sup>208</sup> Although as discussed above, it is unclear given the inclusion of the work “indirect.”



often provide trustee services.<sup>209</sup> At a minimum, ATF should use the “direct the management or policies” language for trusts, which in almost all cases would include only the settlor or grantor of the trust.

Moreover, such a broad definition of “responsible person” would needlessly interject ATF and the Department of Justice into company employment decisions, corporate governance, and trust administration. In this regard, a corporation that wanted to own an NFA item would be precluded from selecting an officer or manager who lives in an area where the CLEO will not certify NFA applications. A state court might be limited to selecting a trustee for a trust who lives in an area where CLEO certification is attainable. An LLC might be forced to limit its management to a very limited number of people, solely to retain a small number of potential “responsible persons” under the proposed regulation. ATF should resist rule-making that would substantively and materially impact business decisions that are best left to the entities or grantors of a trust.

Given ATF’s overly-broad definition and complete lack of guidance, the following scenarios will almost certainly present themselves if the rule is implemented:

- Corporation B is a large corporation with branches in every state, thousands of employees, and hundreds of managers spread across the country. Would each of these managers be required to be listed as a responsible person?
- Corporation C has a manager who works at the corporate headquarters in Nevada, but lives in California. The corporation wishes to purchase a silencer, but the CLEOs in the California manager’s home jurisdiction will not certify the corporation’s application because silencers are illegal in California (but not Nevada, where the corporation will keep the item). Would this preclude the corporation from making the purchase?

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<sup>209</sup> See, e.g., Wells Fargo, Trustee Services, <https://www.wellsfargo.com/theprivatebank/oursolutions/trustsolutions/trustee-services>; Citi Private Bank, Trust Services, [https://www.privatebank.citibank.com/our\\_services/individuals\\_families/wealth\\_advisory/trust.htm](https://www.privatebank.citibank.com/our_services/individuals_families/wealth_advisory/trust.htm); USAA, Trust Services. [https://www.usaa.com/inet/pages/financial\\_planning\\_trust\\_services?akredirect=true](https://www.usaa.com/inet/pages/financial_planning_trust_services?akredirect=true).



- Would individual shareholders of a publicly-held corporation be included in the list of responsible persons if they have the authority to vote on or direct company policies at the company's annual meetings?
- LLC A is a large company with a sizable mail room which sends and receives shipments. Would the LLC's mail room manager have to be listed as a responsible person? What about the assistant mailroom manager? Shift managers? Individual mailroom employees?
- Trust A has a corporate National Bank listed as a trustee (a common occurrence for trusts). Which definition of responsible person would ATF expect to apply to the application, the corporate definition or the broader trust definition?
- The beneficiary of Trust B is a minor who could possess the weapons once he turned 18. Would he need to be included as a responsible person? If so, would his minority prohibit the trust from purchasing?
- A Grantor of a trust is a prohibited person but wishes to own an NFA item for investment purposes. The Grantor generally controls the management of the trust but the trustee holds possession of the NFA item.<sup>210</sup> Would this trust be prohibited from owning this item?

ATF's proposed rules seem especially arbitrary and unnecessary as they relate to trusts when one considers that the proposed hurdles would make it more difficult, time consuming, and burdensome to buy an NFA firearm than to obtain a federal license to deal in, import, or even manufacture NFA items.<sup>211</sup> Under the proposed rule, a company like Colt that manufactures thousands of machine guns, destructive devices, and other NFA items would have *fewer* obligations and obstacles than a family wishing to purchase one silencer through a trust, in order to prevent hearing loss. In this regard, the scope of the definition for "responsible person" ATF proposes to apply to the transfer of an NFA firearm to a trust is considerably more sweeping than

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<sup>210</sup> This situation has been addressed in several cases and the courts have allowed these trusts to own the firearms. *See, e.g., United States v. Zaleski*, 686 F.3d 90 (1<sup>st</sup> Cir. 2012); *United States v. Miller*, 588 F.3d 418 (7<sup>th</sup> Cir. 2009); *Cooper v. City of Greenwood*, 904 F.2d 302 (5<sup>th</sup> Cir. 1990).

<sup>211</sup> *See* Application for Federal Firearms License, ATF Form 7 (5310.12) (May 2005); Special Tax Registration and Return National Firearms Act (NFA), ATF Form 5630.7 (April 2007).



the corresponding definition in the license application to deal in, manufacture, or import firearms, including NFA items. The proposed rule defines “responsible person” to include anyone who is authorized to “to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the entity,” regardless of whether the person actually exercises this authority.<sup>212</sup> ATF more narrowly defines a “responsible person” in the FFL application as “anyone having the power to direct the management, policies, and practices of the business as it pertains to firearms.”<sup>213</sup> Thus, an FFL applicant is not required to list as a “responsible person” every employee who might conceivably come in contact with a firearm. However, a trust that is merely purchasing an item, would apparently be required to include in the application every conceivable person who might ever “directly or indirectly” come in contact with the firearm, or who might even be authorized to do so, without regard to the level of control or actual contact with the firearm. An FFL is not even required to do any kind of background check on employees who directly handle, shoot, or transfer firearms.<sup>214</sup> This remains true despite the fact that ATF recently wrote about the “importance of conscientiousness and trustworthiness” for FFL employees and the “high level of responsibility placed upon persons who are in a position to transfer firearms.”<sup>215</sup>

Presumably, ATF chose to utilize the narrower definition of “responsible person” in FFL applications because a broader definition such as proposed in the new rule would be devastating to federal firearm licensees and would be completely unworkable in real-world scenarios. In the

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<sup>212</sup> Proposed Rule, *supra*.

<sup>213</sup> Application for Federal Firearms License, ATF Form 7 (5310.12) (May 2005).

<sup>214</sup> ATF recently recognized this in its Newsletter recommending, *but not requiring*, that FFL’s institute an employee screening process. *Best Practices, Employee Screening*, FFL Newsletter: Federal Firearms Licensee Information Service, September 2013 (Volume 1).

<sup>215</sup> *Id.*



modern economy, entities have large numbers of employees,<sup>216</sup> high employee turnover, a diverse workforce,<sup>217</sup> and employees with differing levels of responsibility,<sup>218</sup> and it would be patently unreasonable to require every person who directly or indirectly comes into contact with a firearm to be included in the application as a responsible person. The same real-world problems would present themselves for trusts and entities who merely own NFA items.<sup>219</sup> The narrow definition of “responsible person” has been adequate for trusts and entities seeking an FFL for decades. Why should an entity merely seeking to own an item be held to a different, more burdensome, standard?

**B. The proposed entity documentation requirements would contribute to the unreasonable burden placed upon entity-applicants by requiring disclosure of information that has historically been treated as confidential.**

The proposed amended version of 27 CFR §479.63 states that “where the applicant is a partnership, company, association, trust, or corporation” the applicant will be required to attach to the application: “Documentation evidencing the existence and validity of the entity, which includes, without limitation, complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures[.]”

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<sup>216</sup> For instance, one Wal-Mart location might have hundreds of employees who would fall within the proposed definition of “responsible person.”

<sup>217</sup> For instance, many people join the workforce before they turn 18. How would ATF handle a situation where a mailroom clerk was under 18?

<sup>218</sup> For instance, should a mailroom clerk who does nothing more than put postage on a box even need to be included as a “responsible person?” Under the proposed rule it is clear that mailroom clerk *would* be required to be included.

<sup>219</sup> For instance, armored car companies are not FFL’s but have traditionally owned many NFA items. Wells Fargo is well known for its use of short-barreled shotguns in its armored car service. Those companies might have hundreds or even thousands of employees who would be considered “responsible persons” under the proposed rule. See also Form 4467 registering a machine gun to Lairmore Armored Car Service, Inc., available at [http://auctionbymayo.com/auc\\_files.php?pfid=39851](http://auctionbymayo.com/auc_files.php?pfid=39851).



ATF’s notice of proposed rulemaking does not discuss or consider that many of these types of documents have traditionally been protected as private and confidential. Nor does it account for the fact that such disclosure will endanger the privacy and security of the entities and their individual members, beneficiaries, trustees, and shareholders. For instance, ATF would request a trust to produce its unredacted declaration of trust even though that document is often statutorily-protected and contains information regarding the trust’s assets and beneficiaries that parties wish to keep confidential. In fact, many states make it illegal to require the production of the declaration of trust. The Uniform Trust Code (“UTC”) is designed to “protect the privacy of a trust instrument by discouraging requests from persons other than the beneficiaries for complete copies of the instrument in order to verify a trustee’s authority.”<sup>220</sup> Thirty-four (34) states have either adopted this provision of the UTC or have otherwise adopted laws protecting a Trust’s right to keep trust documents confidential.<sup>221</sup> For instance, in Texas, a trustee who is dealing with a third party may choose to forgo providing the party with a copy of the trust instrument—which may reveal private and confidential information about the trust—and instead

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<sup>220</sup> Unif. Trust Code § 1013 cmt. (amended 2005).

<sup>221</sup> See UTC Section 1013; Alabama (UTC) – Code § 19-3B-1013; Alaska – Stat. § 13.36079; Arizona (UTC) – Rev. Stat. Ann. § 14-11013; Arkansas (UTC) – Code Ann. § 28-73-1013; California – Prob. Code § 18100.5; Delaware – Code Ann. tit. 12, § 3591; District of Columbia – Code Ann. § 19-1310.13; Florida – Stat. Ann. § 736.1017; Idaho – Code § 68-114; Indiana – Code § 30-4-4-5; Iowa – Code § 633A.4604; Kansas – Stat. Ann. § 58a-1013; Maine – Rev. Stat. Ann. tit. 18-B, § 1013; Massachusetts – MA GL ch. 184, § 35 (for real estate); Michigan – Comp. Laws § 565.432 (for real estate); Minnesota – 501B.56; Mississippi – Code Ann. § 91-9-7 (for real estate); Missouri – Rev. Stat. Ann. § 456.10-1013; Nebraska (UTC) – Rev. Stat. § 30-38, 102; New Hampshire (UTC) – Rev. Stat. Ann. § 564-B:10-1013; New Mexico (UTC) – Stat. Ann. § 46A-10-1013; North Carolina (UTC) – Gen. Stat. § 36C-10-1013; North Dakota (UTC) – Cent. Code § 59-18-13; Ohio – Rev. Code § 5810.13; Oregon (UTC) – Rev. Stat. § 130.856; Pennsylvania (UTC) – 20 Pa.C.S.A. § 7790.3; South Carolina (UTC) – Code Ann. § 62-7-1013; South Dakota – Codified Laws §§55-4-42 to 55-4-47; Tennessee (UTC) – Code Ann. § 35-15-1013; Texas – Prop. Code Ann. § 114.086; Utah (UTC) – Code Ann. § 75-7-1013; Vermont – 27 V.S.A. § 352 (for real estate); Virginia (UTC) – Code Ann. § 55-550.13; and Wyoming (UTC) – Stat. § 4-10-1014





provide only a short certification of trust that identifies certain key information about the trust authenticated by one of the trustees.<sup>222</sup>

In many of the states with these provisions, including Texas, civil liability attaches to any party who requires documentation above and beyond the certificate of trust whenever such requirement is made in bad faith.<sup>223</sup> For instance in Texas, any person who demands that a trust provide the trust instrument itself in addition to the certification of trust may be liable for damages if the court determines that the person did not act in good faith in making the demand.<sup>224</sup>

Similarly, many corporate formation documents are also treated with strict confidentiality and privacy and are not even filed with the state as a part of the formation process. For instance, in Delaware, to form a limited liability company, the only document that is required to be filed with the state is the Certificate of Formation requires very little information to be made public—just the name of the LLC, address of the registered office, and name and address of the registered agent.<sup>225</sup> Requiring a Delaware LLC to provide ATF with additional formation documents above and beyond the Certificate of Formation—such as the operating agreement or bylaws would require the LLC to provide much more confidential information than is even required to form the LLC in the first place. It is unreasonable that ATF would need information to verify the existence of the corporation that was not even required by the state to create the LLC in the first place.

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<sup>222</sup> See Tex. Code § 114.086 (a).

<sup>223</sup> See, e.g., Tex. Code § 114.086 (a) and California Prob. Code § 18100.5 (creating potential for civil liability for a third party's failure to accept the certification of trust in lieu of other trust documents).

<sup>224</sup> See, e.g., Tex. Prop. Code § 114.086 (i).

<sup>225</sup> See Delaware Code Section 18-201(a).



The amendment also appears to overlook the great diversity of the types of documents which it is requesting. The provision requires, *without limitation*, production of documents evidencing the existence and validity of partnerships, companies, associations, trust, and corporations. However, each of these types of documents is governed by complex and specific rules regarding formation and continuation, which vary in all of the 50 states.<sup>226</sup> In order for ATF to effectively examine each entity's documents, ATF will need to have on-staff attorneys who understand the legal complexities of corporate law, partnership law, and other business associations law, as well as trust law, for each of the 50 states. If ATF is not planning to create staff positions to accommodate this detailed level of examination of documentation then why would ATF find it worthwhile to request such documentation? For instance, it would be more efficient and prudent to allow trusts to submit certificates of trust as allowed under the trust law of many states, as discussed above.

Further, not only are these documents complex, state-specific, and diverse in purpose, but they can also be quite lengthy. ATF's estimate that the trust documents it receives only average two responsible persons per trust and only fifteen pages in length demonstrates that ATF did not adequately examine sufficient documents associated with sophisticated estate plans or complicated trusts. Trust instruments, and entity formation documents can range from a few pages to hundreds of pages including their schedules, exhibits, and attachments—all of which would be required to be filed with ATF. It is highly unlikely that ATF would have the time or expertise to examine hundreds or perhaps thousands of pages of trust or entity documents.

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<sup>226</sup> The public comment of David M. Goldman, ID No. ATF-2013-0001-1899, provides an excellent summary of the great diversity between various types of trusts. Mr. Goldman's comment further addresses the myriad number of roles an individual may fill with regard to a trust, and the disparate levels of authority to manage the trust and/or possess trust assets associated with the respective roles.



Without a pressing need to require submission of these documents, the additional submission requirement will prove to be inefficient and wasteful.

**C. Silencer Shop’s Proposed Alternative: A more practical and clear definition for “Responsible Person.”**

Silencer Shop proposes a more realistic and workable definition for “responsible person,” rather than the broad and ambiguous definition found in the proposed rule. Silencer Shop proposes:

**§ 479.11**

**Meaning of terms.**

\* \* \*

**Responsible person.** The person designated by a trust, partnership, association, company (including a Limited Liability Company (LLC)), or corporation, or the management thereof, as the person who has primary responsibility for the management and policies of the entity as they relate to firearms owned by that entity.

This definition would allow the entity to determine, for itself, the identity of the person with the most direct management of the company-owned firearms. This definition also eliminates the confusion that is created by the proposed rule’s ambiguous use of the word “indirectly” and the overly-inclusive laundry list of titles. This definition still accomplishes ATF’s goal of having a natural person designated as being responsible for the management of the entity’s firearms, while avoiding the ambiguity found in the proposed rule. It also has an added benefit of providing ATF with a single point of contact should they have a question or concern related to a firearm or transfer.

Similarly, this would greatly reduce the burden for both ATF and applicants. Having a single “responsible person” would require only one background check and less paperwork in



general, which would be a benefit for both ATF and the FBI, who conduct those checks. This rule would mean less time spent on unnecessary paperwork for the entities and would save both time and money because only one set of fingerprints, passport photographs, and CLEO certification would be required, should ATF decide to implement those components to the application process.

Should ATF determine this would not be adequate to prevent access by prohibited persons, ATF could add additional language to the transferee's certificate, similar to that already found in Forms 1, 4, and 5, to ensure that the responsible person understands that it is unlawful to make the firearms available to prohibited persons. ATF could then simply add a definition of prohibited person consistent with 18 U.S.C. § 922(g) in the "Definitions" section of the application. The language we propose, if ATF deems this process necessary, is underlined below:

I, \_\_\_\_\_, have a reasonable necessity to possess the machinegun, short-barreled rifle, short-barreled shotgun, or destructive device described on this application for the following reason(s) and my possession of the device or weapon would be consistent with public safety (18 U.S.C. 922(b) (4) and 27 CFR 478.98). I also certify that I will not make the machinegun, short-barreled rifle, short-barreled shotgun, or destructive device described on this application available to any prohibited person under any federal or state law. (18 U.S.C. 922(g)).

UNDER PENALTIES OF PERJURY, I declare that I have examined this application and the documents submitted in support thereof, and to the best of my knowledge and belief it is true, correct and complete.

**D. Silencer Shop's Response to Proposed Subsection G, Entitled "Miscellaneous."**

ATF also invited opinions and recommendations to Subsection G of the proposed rule entitled "Miscellaneous." This subsection proposes an on-going, permanent requirement that "new responsible persons submit Form 5320.23 within 30 days" of a change in the entity's responsible persons. This proposed change is unnecessary, completely unworkable, and would lead to chaos within entities.

First, ATF lacks the authority to place this on-going obligation on entities that are mere transferees.<sup>227</sup> ATF's only authority to require designation of "responsible persons" derives from its authority to identify applicants. However, once the transfer has occurred, the identity of the transferee is established and the on-going obligation is not required by the NFA statute.

Second, this requirement would be completely unworkable and would be overly burdensome. Modern companies face high employee turnover, shifting management responsibilities and rolls, temporary management changes,<sup>228</sup> and overlaps in manager authority. All of these would make it very difficult for an entity to determine who actually is a "responsible person" and submit the required documents with the required information. Additionally many small entities simply do not have the administrative staff to handle such a large and never-ending task.

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<sup>227</sup> Although ATF places a similar requirement on FFL holders, they lack the authority here because the transferees generally are not holders of a federal license and do not deal in firearms.

<sup>228</sup> Such as if a manager is on maternity leave or military leave.



Lastly, this requirement would cause considerable confusion, particularly when a potential new responsible person would be unable to obtain a CLEO signoff.<sup>229</sup> Would the entity and its managers then face the serious criminal penalties of the NFA? Would the entity have to forfeit all of its firearms? Would the potential responsible person have to be fired (or not hired)? Would each responsible person have to submit a form 5320.23 once or would they have to submit a new form each time a new NFA firearm is transferred to the entity? When does the 30-day period start—what if one of the managers is unable to complete the form because illness?

A continuing obligation would magnify the burdens already discussed with regard to the CLEO certification requirement and the “responsible person” definition, particularly because an entity will likely have less control over changes in its managerial structure than it would have over its determination of whether and when to acquire or make a new NFA firearm. Certainly, changes in personnel and managerial structure are overwhelmingly dictated by non-firearm related factors and should not be impacted by complications relating to ensuring compliance with an on-going designation obligation under the implementing regulations. For these reasons, ATF should decline to implement any rule that would place an on-going burden on entities to notify ATF of changes to “responsible persons.”

## **V. SUPPORT FOR OTHER PORTIONS OF THE PROPOSED RULE**

Silencer Shop supports ATF’s proposed rule changes related to the elimination of the Certification of Citizenship, Form 5330.20, and incorporation of the information in that Form into the Forms 1, 4, and 5.

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<sup>229</sup> For instance, if the corporate headquarters for a company was in Mississippi, where NFA items are legal, but the manager telecommuted from Illinois, where NFA items are prohibited. It is highly unlikely any CLEO would sign for the Illinois managers given the items are illegal in Illinois.

Silencer Shop also supports ATF's proposed rule changes related to estates and transfers after the death of owners. However, Silencer Shop recommends expanding these regulations to cover all involuntary transfers, not just those transfers involving the death of the owner. Those instances would include transfers at the dissolution of a corporation or other entity, transfers done as part of liquidation in bankruptcy, forced transfers during divorce proceedings, and transfers to the beneficiary of a trust at the death of the grantor. ATF should take steps to make the transfer process in these situations as painless as possible by offering a toll-free number and e-mail address where a person with authority can request guidance on the process. Silencer Shop suggests eliminating the transfer tax for all involuntary transfers, even if the transfers are not to a lawful heir or beneficiary. Silencer Shop suggests adding "a sworn statement, affidavit, or declaration signed under penalty of perjury" to the list of documents that are acceptable to prove authority to dispose of property. A copy of the obituary published in a newspaper of record should also be listed as an acceptable alternative to a certificate of death. Silencer Shop also suggests elimination of the CLEO certification requirement when the transfer is involuntary, even if the transfer is to an individual.

## **VI. CONCLUSION**

As stated by a previous director of ATF, it is "very, very rare" for registered machineguns or silencers to be involved in violent crime. It appears, therefore, that registered NFA items are not a danger to the American people and ATF should focus on encouraging compliance with the legal registration process. ATF's proposed changes to the implementing regulations found at 27 C.F.R. part 479, however, create unreasonable and inconsistent obstacles to registration that will instead prevent lawful ownership and materially injure many small

businesses throughout the country. The proposed changes will also create overwhelming burdens on state and local officials, who will be forced to choose between accepting onerous and costly duties in furtherance of facilitating a federal regulatory scheme, or denying law-abiding citizens their constitutional right to lawfully acquire NFA firearms.

ATF's proposed expansion of the CLEO certification requirement will expose the revised regulations to renewed challenge under the APA, by exacerbating existing statutory and constitutional concerns. The new regulations exceed the promulgating agency's statutory authority and present the unappealing alternative of either violating the Tenth Amendment or depriving citizens of their Second Amendment rights through automatic and arbitrary rejection of NFA applications. The burdens created by the certification process are compounded by ATF's proposed application of multiple vague and unbounded definitions for "responsible persons," which will leave companies and settlors of trusts perplexed and unable to determine how to structure their management without violating ATF's implementing regulations. Silencer Shop urges ATF to re-consider its previously proposed strategy of replacing the CLEO certification requirement with a notification requirement, which would provide a reasonable mechanism by which state officials could voluntarily participate in the application process.

Silencer Shop is particularly concerned with the impact the proposed regulations will have on numerous small businesses within the NFA firearm industry, including Silencer Shop's own family-operated business. ATF has not conducted the necessary and statutorily-required cost/benefit analysis to support its proposed rulemaking. Moreover, Silencer Shop is concerned that the proposed revisions will stifle the growing use of silencers by law-abiding citizens to protect against noise-induced hearing loss. While other countries have embraced the hearing-



saving devices, and while over half the states now allow the use of silencers for hunting, the proposed rule would force the United States to take a backward step in protecting against hearing loss from hunting and recreational firearm use.

For these reasons, Silencer Shop respectfully joins the six-thousand-plus individuals and entities that have already filed public comments in opposition to ATF's Notice of Proposed Rulemaking, and specifically requests ATF to consider the proposed alternatives presented in this Comment: (i) replace the CLEO certification requirement with a CLEO notification requirement; (ii) exempt applications for the transfer or making of silencers from the certification requirement; and/or (iii) provide a clear and reasonably-limited "responsible person" definition that allows the entity-applicant to identify a single representative with responsibility to oversee the management and policy of the entity with regard to its possession of the firearm(s).



# ATTACHMENT A

From: Les Moore <[REDACTED]@cityofirving.org>  
Date: Mon, Jul 23, 2012 at 1:02 PM  
Subject: RE: Firearms Collector Question  
To: Christopher Bass <[REDACTED]@gmail.com>

Mr. Bass:

I have spoken with the Chief about your request and he will not sign the certification for you. In view of the facts that he has no knowledge pertaining to the declarations contained within the certification section, and high profile events in Aurora last week, he believes it would be imprudent to sign a document that would facilitate the acquisition of any restricted firearm. You are probably aware that this document can also be signed by the Sheriff, the District Attorney or the Chief of the "State Police".

It's probably not a good time for me to ask a favor of you, but I would appreciate it if you would let me know whether any of these other officials are willing to sign the ATF Form 4. We do work with local and regional ATF officials and we may be able to start the process of getting their rules and forms changed. Frankly, ATF officials know as much about you as we do and they have equal access to criminal history databases. It doesn't make sense for them to bring local law enforcement officials in to this process.

Les Moore

[972-721-\[REDACTED\]](tel:972-721-[REDACTED])

**From:** Christopher Bass [mailto:[REDACTED]@gmail.com]  
**Sent:** Wednesday, July 18, 2012 1:21 PM  
**To:** Les Moore  
**Subject:** Re: Firearms Collector Question

Mr. Moore

Thanks for your email. It is a single-shot .410 with a short barrel but no stock. It will just be added to my collection, I doubt I will even ever shoot it.

Chris

The Bass Firm, PLLC

On Wed, Jul 18, 2012 at 11:52 AM, Les Moore <[REDACTED]@cityofirving.org> wrote:

Mr. Bass,

I am Les Moore, Police Legal Advisor for the Irving Police Department (and Chief of Police). Can you advise more specifically what the "any other firearm" is, and for what purpose you will use it? My number is [972-721-\[REDACTED\]](tel:972-721-[REDACTED]).

Thanks

Les Moore



# **ATTACHMENT B**

**From:** Lee Ann Freeman [mailto: [REDACTED]@cityoforlando.net]  
**Sent:** Tuesday, October 22, 2013 2:25 PM  
**To:** Ernest Myers; Paul Rooney  
**Cc:** Natasha Williams; Jody Litchford; Christine Gigicos  
**Subject:** ATF Form 4 approvals by Chief law enforcement officer

Dear Mr. Myers:

Orlando Police Chief Rooney is out of town on agency business; he asked me to respond on his behalf to your inquiry about proposed changes to the ATF Form 4.

Your communique suggests that ATF believes the language change will make local chiefs and sheriffs more inclined to sign the Form 4.

The current language requires the chief law enforcement officer to certify that he or she has no information indicating that the person to whom the firearm will be transferred will use the firearm for anything other than a lawful purpose.

The proposed change would have the chief law enforcement officer instead certify that:

- (1) the prints and photo provided with the form belong to the person responsible; and
- (2) the chief law enforcement officer has no information to indicate that receipt or possession of the subject firearm violates state or local law.

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.

Sincerely,

--

Lee Ann Freeman  
Police Legal Advisor  
Orlando Police Department  
P.O. Box 913  
Orlando, Florida 32802-0913  
407.246. [REDACTED]  
407.246. [REDACTED] Telefax  
[REDACTED]@cityoforlando.net



# ATTACHMENT C



**St. Johns County Sheriff's Office**

Government Organization · 9,889 Likes



The National Firearms Act (NFA) of 1936 has been the primary source of federal regulation for "class 3" weapons such as automatic firearms, silencers, short-barreled shotguns and explosives. While owning a firearm is a fundamental right for a United States citizen and is recognized by the 2nd Amendment of the United States Constitution, the Sheriff will only participate in the application process when a St. Johns County resident is applying for ownership of an automatic weapon. While the Sheriff has participated in this process in the past, he will no longer consider an application for silencers, short-barreled shotguns, explosives, etc.

Alternatively, a citizen may create what is commonly referred to as a "NFA Gun Trust" where the possession of prohibited NFA weapons (class 3) may be obtained. Although this is a legal instrument which must be properly drafted to be valid, there is no requirement for the Sheriff to participate in the application process. While the Sheriff's Office cannot offer or provide any advice on creating such a trust, I would invite you to utilize the many associations and/or lawyers that specialize in 2nd Amendment issues.

July 11, 2012

Like Comment Share

2 Shares

9 people like this.

- 

**Scott Brown** Does the NFA offer guidance on what components of the Act the Sheriff can pick and chose from?  
July 11, 2012 at 9:58am via mobile · Like
- 

**Scott Brown** pick...  
July 11, 2012 at 9:59am via mobile · Like · 1
- 

**St. Johns County Sheriff's Office** No sir, the Sheriff is bound to the Constitution.  
July 11, 2012 at 10:05am · Like
- 

**Ronald Rutkiewicz** no offense to the sheriff ....but all the cleo (chief law enforcement officer) requirement is for is to confirm that the requesting party is not a felon or a person involved in criminal activity ....what part of the process does the sheriff take exception to .....

July 11, 2012 at 11:13am · Like · 3
- 

**Donnie Ray** I'm disappointed to hear that, I'd like to hear an explanation for this change especially since the office of Sheriff is an elected position.  
July 11, 2012 at 11:17am via mobile · Like · 2
- 

**St. Johns County Sheriff's Office** The Sheriff's Office will remain involved in the application process for automatic weapons. However, we will not be involved in the process for suppressors, short-barreled shotguns, and/or explosives. If you have questions about this matter, please feel free to contact our General Counsel, Matt Cline at 904-810-6603.  
July 11, 2012 at 12:16pm · Like
- 

**Scott Brown** Consult 27 CFR 479.63 and 479.85. "...as provided...certifications from other officials are appropriate...including Judges, state attorney generals...". My question is, why the change of compliance with the obligation of the tenants of the NFA?  
July 11, 2012 at 1:38pm via mobile · Like · 2
- 

**St. Johns County Sheriff's Office** Sir, again we ask that you direct your questions to our General Counsel. This forum does not allow for the lengthy explanation required to answer your questions. It is a multi-faceted issue.  
July 11, 2012 at 1:43pm via mobile · Like
- 

**Charles D Bingham** I can find no mention of this on the sjso.org website. Do you plan on an official press release?

It should be interesting which Sheriffs send back the NRA questionnaire and how they answer. It's going to be fundamental to who I vote for in the next ... [See More](#)

 **NRA goes after Florida sheriffs candidates with survey**  
[www.palmbeachpost.com](http://www.palmbeachpost.com)

It isn't often that Florida sheriffs back down from a fight. But the National Rifle Association isn't any ordinary combatant.

July 11, 2012 at 5:58pm · Like · 2
- 

**St. Johns County Sheriff's Office** This is the forum we chose to release this information. Again, you may direct further questions to our General Counsel.  
July 11, 2012 at 6:03pm via mobile · Like
- 

**Scott Whigham** Interesting stance.

FYI, the National Firearms Act was passed in 1934, not 1936.  
July 11, 2012 at 9:49pm · Like · 2
- 

**Steve Reilly** If I was still running for sheriff if pinellas county I would have filled out the survey  
July 11, 2012 at 10:42pm via mobile · Like · 2
- 

**Steve Reilly** In\*  
July 11, 2012 at 10:42pm via mobile · Like · 2

Search



**David Goldman** The Sheriff is recommending using NFA Gun Trust. There are many advantages to this and once you look at it, you will probably decide he is doing you a favor. <http://www.guntrustlawyer.com>



**NFA Gun Trust Lawyer Blog :: Published by Florida Gun Trust Lawyer David Goldman**  
[www.guntrustlawyer.com](http://www.guntrustlawyer.com)

A legal blog that covers National Firearms Act gun trust law, news and events de... [See More](#)

July 15, 2012 at 11:48am · Like · 5



**Terry Power** ^^ good advice. Less hassles also.  
July 15, 2012 at 1:00pm · Like



**Patrick McDonough** I'm sure all the Class 3 dealers that are small business owners in St. Johns County really appreciate the new stance of the sheriff.  
July 16, 2012 at 11:56am · Like



**Matt Bender** Shame on the Sheriff for refusing to answer the question and hiding behind the G.C. of the S.O.  
July 16, 2012 at 10:01pm · Like



**Steve Reilly** Sounds to me this Sheriff is a pure politician he does not need to hold this office... He is not holding up his oath of office  
July 17, 2012 at 8:05am via mobile · Like



**David Goldman** The number of requests for Silencers has significantly increased over the past year. As there are many benefits to using a Gun Trust <http://www.guntrustlawyer.com/> you should look at his full comments where they recommend using a NFA Gun Trust. There is even a new low cost Gun Trust available at <http://www.guntrust.com/> Knowing the advantages of using a Gun Trust one would have to be silly to use the CLEO sign off for individual ownership.



**NFA Gun Trust Lawyer Blog :: Published by Florida Gun Trust Lawyer David Goldman**  
[www.guntrustlawyer.com](http://www.guntrustlawyer.com)

A legal blog that covers National Firearms Act gun trust law, news and events de... [See More](#)

July 17, 2012 at 1:18pm · Like · 1



**St. Johns County Sheriff's Office** Mr. Schmelz, we can confirm the phone call occurred, it became heated, but we are unaware of the contents of the conversation.  
July 20, 2012 at 2:59pm · Like



**Matt Bender** which means the Sheriff said just what scott said....  
July 20, 2012 at 6:00pm · Like

Write a comment...