

This final rule was signed by the Attorney General on January 4, 2016. It is effective 180 days after date of publication in the Federal Register. The final rule published in the Federal Register may differ slightly from this version as a result of Federal Register formatting.

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## **DEPARTMENT OF JUSTICE**

### **Bureau of Alcohol, Tobacco, Firearms, and Explosives**

#### **27 CFR Part 479**

**[Docket No. ATF 41F; AG Order No. 3608-2016]**

**RIN 1140-AA43**

### **Machineguns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Trust or Legal Entity With Respect to Making or Transferring a Firearm**

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regarding the making or transferring of a firearm under the National Firearms Act (NFA). This final rule defines the term “responsible person,” as used in reference to a trust, partnership, association, company, or corporation; requires responsible persons of such trusts or legal entities to complete a specified form and to submit photographs and fingerprints when the trust or legal entity files an application to make an NFA firearm or is listed as the transferee on an application to transfer an NFA firearm; requires that a copy of all applications to make or transfer a firearm, and the specified form for responsible persons, as applicable, be forwarded to the chief law enforcement officer (CLEO) of the locality in which the applicant/transferee or responsible person is located; and eliminates the requirement for a certification signed by the CLEO. These provisions provide a public safety benefit as they ensure that responsible persons undergo background checks. In addition, this final rule adds a

new section to ATF's regulations to address the possession and transfer of firearms registered to a decedent. The new section clarifies that the executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate may possess a firearm registered to a decedent during the term of probate without such possession being treated as a "transfer" under the NFA. It also specifies that the transfer of the firearm to any beneficiary of the estate may be made on a tax-exempt basis.

**DATES:** This rule is effective [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Brenda Raffath Friend, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE, Washington, DC 20226; telephone: (202) 648-7070.

**SUPPLEMENTARY INFORMATION:**

- I. Executive Summary
  - A. Purpose of the Regulatory Action
  - B. Summary of the Major Provisions of this Rule
  - C. Costs and Benefits
- II. Background
  - A. Application to Make a Firearm
  - B. Application for Transfer of a Firearm
  - C. Transfer Tax Exemption Available
- III. Notice of Proposed Rulemaking
  - A. Petition
  - B. Amendment of 27 CFR 479.11
  - C. Amendment of 27 CFR 479.62 and 479.63
  - D. Amendment of 27 CFR 479.84 and 479.85
  - E. Amendment of 27 CFR 479.90
  - F. Addition of 27 CFR 479.90a, Estates
  - G. Transfer of Unserviceable Firearm
  - H. Miscellaneous

- IV. Analysis of Comments and Department Responses for Proposed Rule ATF 41P
  - A. Comments Supporting the Rule
  - B. Comments Generally Opposing the Rule
  - C. Comments Addressing Specific Portions of the Rule
  - D. Comments on Proposed Rule’s Statutory and Executive Order Reviews
  - E. Comments on Costs and Benefits
  - F. Comments on Rulemaking Process
  - G. Comments on NFA Registration and Processing
  - H. Comments on Efficiencies and Priorities
  - I. New Responsible Persons and Form 5320.23
- V. Final Rule
- VI. Statutory and Executive Order Review
  - A. Executive Order 12866 and Executive Order 13563—Regulatory Review
  - B. Executive Order 13132
  - C. Executive Order 12988
  - D. Regulatory Flexibility Act
  - E. Small Business Regulatory Enforcement Fairness Act of 1996
  - F. Unfunded Mandates Reform Act of 1995
  - G. Paperwork Reduction Act

## **I. Executive Summary**

### *A. Purpose of the Regulatory Action*

The current regulations at 27 CFR 479.63 and 479.85, which require fingerprints, photographs, and a law enforcement certification for individual applicants to make or transfer National Firearms Act (NFA) firearms, do not apply to trusts or legal entities. On September 9, 2013, the Department of Justice (“the Department” or DOJ) published in the **Federal Register** a notice of proposed rulemaking titled “Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm,” 78 FR 55014 (ATF 41P). The proposed rulemaking amended the regulations in §§ 479.11, 479.62-479.63, 479.84-479.85, and 479.90. The proposed regulations responded to a petition for rulemaking, dated December 3, 2009, filed on behalf of the National Firearms Act Trade and Collectors Association (NFATCA). The petitioner requested that the Department amend §§ 479.63 and 479.85, as well as

corresponding Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Forms 1 and 4. 78 FR at 55016-55017. The proposed regulations were intended to conform the identification and background check requirements applicable to certain trusts and legal entities to those that apply to individuals.

The goal of this final rule is to ensure that the identification and background check requirements apply equally to individuals, trusts, and legal entities. To lessen potential compliance burdens for the public and law enforcement, DOJ has revised the final rule to eliminate the requirement for a certification signed by a chief law enforcement officer (CLEO) and instead require CLEO notification. DOJ has also clarified that the term “responsible person” for a trust or legal entity includes those persons who have the power and authority to direct the management and policies of the trust or legal entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or entity. In the case of a trust, those with the power or authority to direct the management and policies of the trust include any person who has the capability to exercise such power and possesses, directly or indirectly, the power or authority under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for or on behalf of the trust.

*B. Summary of the Major Provisions of this Rule*

With respect to trusts, partnerships, associations, companies, or corporations, this final rule defines the term “responsible person” as an individual in the organization that has the power and authority to direct the management and policies of the entity insofar as they pertain to firearms. This final rule requires that each responsible person complete a specified form and submit photographs and fingerprints when the trust or legal entity either files an application to make an NFA firearm, or is listed as the transferee on an application to transfer an NFA firearm.

The Department has also reassessed the need for CLEO certification and is implementing a new approach that focuses on notifying CLEOs. The final rule only requires that the applicant maker or transferee, including each responsible person for a trust or legal entity, provide a notice to the appropriate State or local official that an application is being submitted to ATF. An “appropriate State or local official” is the local chief of police, county sheriff, head of the State police, or State or local district attorney or prosecutor of the locality in which the applicant, transferee, or responsible person is located. In addition, this final rule requires responsible persons of a trust or legal entity to submit fingerprint cards and other identifying information to ATF and undergo a background check. It also adds a new section to ATF’s regulations to address the possession and transfer of firearms registered to a decedent. The new section clarifies that the executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate may possess a firearm registered to a decedent during the term of probate without such possession being treated as a “transfer” under the NFA. It also specifies that the transfer of the firearm to any beneficiary of the estate may be made on a tax-exempt basis.

### *C. Costs and Benefits*

This rule requires that trusts and legal entities (e.g., partnerships, companies, associations, and corporations) applying to make or receive an NFA firearm submit information for each of their responsible persons to ATF to allow ATF to verify that such persons are not prohibited from possessing or receiving firearms. ATF estimates a total additional cost of \$29.4 million annually for trusts and legal entities to gather, procure, and submit such information to ATF and for ATF to process the information and conduct background checks on responsible persons. These provisions have public safety benefits because they will enable ATF to better ensure that the approximately 231,658 responsible persons within trusts and legal entities—an

estimate based on the number of NFA applications processed by trusts or legal entities in calendar year 2014 multiplied by an average of two responsible persons per trust or legal entity—applying to make or receive NFA firearms each year are not prohibited from possessing or receiving such firearms.

This final rule also requires that all those who apply to make or receive an NFA firearm, as well as all responsible persons for each trust or legal entity applicant or transferee, notify their local CLEO that an application has been filed with ATF before the applicant or transferee is permitted to make or receive an NFA firearm. Current regulations require individuals, but not trusts or legal entities, to obtain CLEO certification before making or receiving an NFA firearm. ATF estimates that the total cost of the CLEO notification requirement will be approximately \$5.8 million annually (\$0.5 million for individuals; \$5.3 million for legal entities). The current cost of CLEO certification for individuals is approximately \$2.26 million annually. Consequently, the final rule’s estimated net cost increase is approximately \$3.6 million annually. This increase, however, primarily involves costs to responsible persons for trusts and legal entities that had not previously been required to register, and will be offset by cost savings to individuals. ATF estimates the change in the final rule to a notice requirement will save individuals approximately \$1.8 million annually. This rule is not an “economically significant” rulemaking under Executive Order 12866.

## **II. Background**

The Attorney General is responsible for enforcing the provisions of the NFA, 26 U.S.C. Chapter 53.<sup>1</sup> The Attorney General has delegated that responsibility to the Director of

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<sup>1</sup> Provisions of the NFA discussed below refer to the “Secretary” rather than the “Attorney General”; however, the relevant functions of the Secretary of the Treasury have been transferred to the Department of Justice, under the

ATF (Director), subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). ATF has promulgated regulations that implement the provisions of the NFA set forth in 27 CFR part 479, which contains procedural and substantive requirements relating to the importation, making, exportation, transfer, taxing, identification, registration of, and the dealing in machineguns, destructive devices, and certain other firearms.

*A. Application to Make a Firearm*

Section 5822 of the NFA, 26 U.S.C. 5822, provides that no person shall make a firearm unless the person has: (1) filed with the Attorney General a written application, in duplicate, to make and register the firearm; (2) paid any tax payable on the making and evidenced such payment by affixing the proper stamp to the original application form; (3) identified the firearm to be made in the application form in such manner as prescribed by regulation; (4) identified the applicant in the application form, in such manner as prescribed by regulation, except that, if such person is an individual, the identification must include the individual's fingerprints and photograph; and (5) obtained the approval of the Attorney General to make and register the firearm and shows such approval on the application form. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law. For purposes of title 26, United States Code, the term "person" means "an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. 7701(a)(1).

Regulations implementing section 5822 are set forth in 27 CFR part 479, subpart E. Section 479.62 provides, in pertinent part, that no person may make a firearm unless the person has filed with the Director a written application on ATF Form 1 (5320.1), *Application to Make*

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general authority of the Attorney General. 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1). For ease of reference, we will substitute "Attorney General" for "Secretary" when discussing these statutes.

*and Register a Firearm*, in duplicate, and has received the approval of the Director to make the firearm. Approval of the application will effectuate registration of the firearm to the applicant. The application must identify the firearm to be made by serial number and other specified markings and information. In addition, the applicant must be identified on the form by name and address and, if other than an individual (e.g., a trust or legal entity), by the name and address of the principal officer or authorized representative of the trust or legal entity, as well as the employer identification number of the trust or legal entity, if applicable. If an individual, the identification must also include certain information prescribed in § 479.63.

Section 479.63 states that if the applicant is an individual, such person must securely attach to each copy of the Form 1, in the space provided on the form, a 2 x 2-inch photograph of the applicant taken within 1 year prior to the date of the application. The regulation also provides that a completed Federal Bureau of Investigation (FBI) Form FD-258 (Fingerprint Card), containing the fingerprints of the applicant, must be submitted in duplicate with the application.

In addition, § 479.63 provides that the law enforcement certification located on Form 1 must be completed and signed by the local chief of police or county sheriff, the head of the State police, the State or local district attorney or prosecutor, or such other person whose certification may be acceptable to the Director. The certifying official must state, *inter alia*, that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of State or local law or that the maker will use the firearm for other than lawful purposes. The certifying official must have jurisdiction over the area within which the maker resides. The purpose of this requirement is to ensure that the official will have access to



criminal records concerning the maker, and knowledge of the State and local laws governing the transfer, receipt, and possession of the firearm by the maker.

Under the current regulations, the requirements for fingerprints, photographs, and law enforcement certification specified in § 479.63 are not applicable to an applicant who is not an individual, e.g., a trust or legal entity.

Section 479.64 sets forth the procedure for approval of an application to make a firearm. As specified, the Form 1 application must be forwarded, in duplicate, by the maker of the firearm to the Director, in accordance with the instructions on the form. If the application is approved, the Director will return the original to the maker of the firearm and retain the duplicate. Upon receipt of the approved application, the maker is authorized to make the firearm described therein. The maker of the firearm may not, under any circumstances, make the firearm until the application has been forwarded to the Director and has been approved and returned by the Director with the NFA stamp affixed. If the application is disapproved, the original Form 1 and the remittance submitted by the applicant for the purchase of the stamp will be returned to the applicant with the reason for disapproval stated on the form.

#### *B. Application for Transfer of a Firearm*

Section 5812(a) of the NFA, 26 U.S.C. 5812(a), which applies to applications to transfer a firearm, is substantively similar to NFA section 5822 (described above in section II.A of this final rule). Regulations implementing section 5812 are set forth in 27 CFR part 479, subpart F. In general, § 479.84 provides that no firearm may be transferred in the United States unless an application, ATF Form 4 (5320.4), *Application for Tax Paid Transfer and Registration of Firearm*, has been filed in duplicate with, and approved by, the Director. The Form 4 application must be filed by the transferor and must identify the firearm to be transferred by type, serial

number, and other specified markings and information. The application must identify the transferor by name and address and must include the transferor's Federal firearms license, if any, and special (occupational) tax stamp, if applicable. If the transferor is other than an individual, the title or status of the person executing the application must be provided. The application must identify the transferee by name and address and, if the transferee is an individual not qualified as a manufacturer, importer, or dealer under part 479, the person must be further identified in the manner prescribed in § 479.85.

Section 479.85 states that if the transferee is an individual, such person must securely attach to each copy of the Form 4, in the space provided on the form, a 2 x 2-inch photograph of the transferee taken within 1 year prior to the date of the application. The transferee must also attach to the application two properly completed FBI Forms FD-258 (Fingerprint Card). In addition, a certification by the local chief of police, county sheriff, head of the State police, State or local district attorney or prosecutor, or such other person whose certification may in a particular case be acceptable to the Director, must be completed on each copy of the Form 4. The certifying official must state, *inter alia*, that the certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes. The certifying official must have jurisdiction over the area within which the transferee resides. The purpose of this requirement is to ensure that the official will have access to criminal records concerning the transferee, and knowledge of the State and local laws governing the transfer, receipt, and possession of the firearm by the transferee.

Under the current regulations, the requirements for fingerprints, photographs, and law enforcement certification specified in § 479.85 do not apply to individuals qualified as a

manufacturer, importer, dealer, or Special (Occupational) Taxpayer (SOT) under part 479; nor do they apply to a transferee who is not an individual, e.g., a trust or legal entity.

*C. Transfer Tax Exemption Available*

Section 5852(e) of the NFA, 26 U.S.C. 5852(e), provides that an unserviceable firearm may be transferred as a curio or ornament without payment of the transfer tax imposed by section 5811, under such requirements as the Attorney General may by regulations prescribe.

Section 5853(a) of the NFA, 26 U.S.C. 5853(a), provides that a firearm may be transferred without the payment of the transfer tax imposed by section 5811 to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

Regulations implementing sections 5852(e) and 5853(a) are set forth in 27 CFR 479.90 and 479.91. These sections provide, in pertinent part, that the exemption from the transfer tax for the transfer of an unserviceable firearm as a curio or ornament or for a transfer to or from certain government entities may be obtained by the transferor of the firearm by filing with the Director an application, ATF Form 5 (5320.5), *Application for Tax Exempt Transfer and Registration of Firearm*, in duplicate. The application must: (1) show the name and address of the transferor and of the transferee; (2) identify the Federal firearms license and special (occupational) tax stamp, if any, of the transferor and of the transferee; (3) show the name and address of the manufacturer and the importer of the firearm, if known; (4) show the type, model, overall length (if applicable), length of barrel, caliber, gauge or size, serial number, and other marks of identification of the firearm; and (5) contain a statement by the transferor that the transferor is entitled to the exemption because either the transferor or the transferee is a governmental entity coming within the purview of § 479.90(a) or the firearm is unserviceable

and is being transferred as a curio or ornament. In the case of the transfer of a firearm by a governmental entity to a transferee who is an individual who is not qualified as a manufacturer, importer, dealer, or SOT under part 479, the transferee must be further identified in the manner prescribed in § 479.85.

### **III. Notice of Proposed Rulemaking**

On September 9, 2013, ATF published in the **Federal Register** a notice of proposed rulemaking (NPRM) titled “Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm,” 78 FR 55014 (ATF 41P), amending the regulations in §§ 479.11, 479.62–479.63; 479.84–479-85; and 479.90.

#### *A. Petition*

The proposed regulations were in response to a petition for rulemaking, dated December 3, 2009, filed on behalf of the National Firearms Act Trade and Collectors Association (NFATCA). The petitioner requested that the Department amend §§ 479.63 and 479.85, as well as corresponding ATF Forms 1 and 4. 78 FR at 55016-55017. The petition requested amendments as numbered and discussed below.

##### 1. Request to Amend §§ 479.63 and 479.85

The NFATCA expressed concern that persons who are prohibited by law from possessing or receiving firearms may acquire NFA firearms without undergoing a background check by establishing a trust or legal entity such as a corporation or partnership. It contended that the number of applications to acquire NFA firearms via a trust or corporation, partnership, and other legal entity had increased significantly over the years, increasing the potential for NFA firearms to be accessible to those prohibited by law from having them. Therefore, for cases in

which a trust, corporation, partnership, or other legal entity applies to make or receive an NFA firearm, the petitioner requested amendments to §§ 479.63 and 479.85 requiring photographs and fingerprint cards for individuals who are responsible for directing the management and policies of the entity so that a background check of those individuals may be conducted.

The proposed rule set forth ATF's finding that the number of Forms 1, 4, and 5 it received from legal entities that are neither individuals nor Federal Firearms Licensees (FFLs) increased from approximately 840 in 2000 to 12,600 in 2009 and to 40,700 in 2012, resulting in a substantial increase in the number of individuals who have access to NFA firearms but who have not undergone a background check in connection with obtaining that access. The proposed rule stated that the Department agreed with the concerns underlying petitioner's requests, and believed that responsible persons for a trust or legal entity should not be excluded from background checks and other requirements of the regulations that seek to ensure that prohibited persons do not gain access to NFA firearms. The proposed rule also discussed an application ATF had recently denied after recognizing that the trust name and firearm were the same as those on a prohibited individual's recently denied application. The proposed rule noted that the application might have been approved if the trust name had been different from that of the prior transferee or if the application had included a different firearm.

## 2. Request to Amend Certification of Citizenship

When filing an ATF Form 1, 4, or 5, the applicant also must submit ATF Form 5330.20, *Certification of Compliance with 18 U.S.C. 922(g)(5)(B)*. Under section 922(g)(5)(B) of the Gun Control Act, it is generally unlawful for an alien admitted to the United States under a nonimmigrant visa to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition that

has been shipped or transported in interstate or foreign commerce. Section 922(y)(2) provides for certain exceptions. If an alien who was admitted under a nonimmigrant visa falls within one of the specified exceptions, or has obtained a waiver from the Attorney General pursuant to 18 U.S.C. 922(y)(3), appropriate documentation must be provided on Form 5330.20.

The proposed rule accommodated the petitioner's request that the information required on Form 5330.20 be incorporated into the requirements of 27 CFR 479.63 and 479.85 and the corresponding forms. According to the petitioner, "[e]limination of the ATF Form 5330.20 by adding a citizenship statement to the transfer [and making] forms would reduce human effort for both the public and ATF while reducing funds expenditures for printing, copying, and handling the form."

The proposed rule stated that the Department supports the elimination of unnecessary forms and is committed to reducing the paperwork burden for individuals and businesses. Accordingly, the Department proposed amending 27 CFR 479.62 and 479.84 and the corresponding forms to incorporate information currently required in Form 5330.20.

### 3. Request to Revise Instructions on Forms 1, 4, and 5

The proposed rule also accommodated the petitioner's request that the instructions on applications to make or transfer a firearm be revised so that they are consistent with those on ATF Form 7 (5310.12), *Application for Federal Firearms License*. This request appeared to be referring to the Form 7 instruction regarding the submission of photographs and fingerprint cards for responsible persons (e.g., in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the legal entity, insofar as they pertain to firearms).

The proposed rule stated that the Department agreed that proposed changes to the regulations would require modifications to corresponding Forms 1, 4, and 5, including changes to the instructions on the forms, and proposed to go forward with those changes.

#### 4. Law Enforcement Certification

Finally, the proposed rule accepted in part petitioner's request that the law enforcement certification requirement be eliminated and that ATF "adopt a CLEO [chief law enforcement officer] process that will include a full NICS [National Instant Criminal Background Check System] check for principal officers of a trust or corporation receiving such firearms for the trust or corporation." The petitioner articulated several reasons in support of its request. In addition, the petitioner stated that "[s]ome CLEOs express a concern of perceived liability; that signing an NFA transfer application will link them to any inappropriate use of the firearm." See 78 FR at 55016-55017 for full discussion.

The Department agreed in principle with some of petitioner's assertions (for example, that ATF independently verifies whether receipt or possession of an NFA firearm would place the applicant or transferee in violation of State or local law). *Id.* However, ATF did not propose to eliminate the CLEO certification requirement. Rather, ATF proposed extending the CLEO certification requirement to responsible persons of a trust or legal entity, but also proposed amending the language of the certification to omit the requirement that the certifying official state that the certifying official has no information that the applicant or transferee will use the firearm for other than lawful purposes.

#### *B. Amendment of 27 CFR 479.11*

In addition to the issues raised in NFATCA's 2009 petition, the Department proposed amending 27 CFR 479.11 to add a definition for the term "responsible person." The proposed

term included specific definitions in the case of a trust, partnership, association, company (including a Limited Liability Company (LLC)), or corporation. Depending on the context, the proposed term included any individual, including any grantor, trustee, beneficiary, partner, member, officer, director, board member, owner, shareholder, or manager who possesses, directly or indirectly, the power or authority under any trust instrument, contract, agreement, article, certificate, bylaw, or instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or entity.

To ensure that responsible persons, as so defined, were subject to penalties under 26 U.S.C. 5871 for committing unlawful acts under the NFA (*see* 26 U.S.C. 5861) to the same extent as are the trusts or legal entities with which they are associated, the Department also proposed amending the definition of “person” in 27 CFR 479.11 to clarify that a “person” is a partnership, company, association, trust, or corporation, including each responsible person associated with such an entity; an estate; or an individual.

Although the definition of “person” in § 479.11 includes the word “estate,” ATF traditionally has treated estates differently from business entities. Therefore, the Department did not propose defining the term “responsible person” to include estates. The Department explained that estates are temporary legal entities created to dispose of property previously possessed by a decedent with the estate’s term typically defined by the law of the State in which the decedent resided, whereas partnerships, trusts, associations, companies, and corporations are formed for a specific purpose and remain in existence until action is taken to dissolve them. The Department further explained that, historically, ATF has treated the transfer of a registered NFA firearm held by an estate differently from other transfers under the NFA. ATF has allowed the executor—or other person authorized under State law to dispose of property in an estate—to convey firearms



registered to the decedent without being treated as a voluntary transfer under the NFA. ATF has also allowed such transfers to be made on a tax-exempt basis when an ATF Form 5 is submitted and approved in accordance with 27 CFR 479.90. When the transfer of the firearm is to persons who are not lawful heirs, however, the executor is required to file an ATF Form 4 and to pay any transfer tax in accordance with 27 CFR 479.84.

*C. Amendment of 27 CFR 479.62 and 479.63*

With respect to an application to make a firearm, the Department proposed several amendments to 27 CFR 479.62 (“Application to make”) and 479.63 (“Identification of applicant”).

Amendments to § 479.62 proposed to:

1. Provide that if the applicant is a partnership, company, association, trust, or corporation, all information on the Form 1 application must be furnished for each responsible person of the applicant;

2. Specify that if the applicant is a partnership, company, association, trust, or corporation, each responsible person must comply with the identification requirements prescribed in the proposed § 479.63(b); and

3. Require the applicant (including, if other than an individual, any responsible person), if an alien admitted under a nonimmigrant visa, to provide applicable documentation demonstrating that the applicant falls within an exception to 18 U.S.C. 922(g)(5)(B) or has obtained a waiver of that provision.

Amendments to § 479.63, where the applicant is an individual, proposed to maintain the CLEO certification but omit the requirement for a statement about the use of a firearm for other than lawful purposes. This section proposed to require, instead, that the certification state that

the official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the official has no information indicating that possession of the firearm by the maker would be in violation of State or local law.

The Department stated that the CLEO's certification that the CLEO "is satisfied that the fingerprints and photograph accompanying the application are those of the applicant," is an existing requirement for an individual applicant (*see* 27 CFR 479.63); however, this certification was not reflected on the current form. ATF proposed to modify the Form 1 to include this certification for individuals and include the same certification on Form 5320.23 for responsible persons within a trust or legal entity.

Additionally, amendments to § 479.63, where the applicant is a partnership, company, association, trust, or corporation, proposed to:

1. Provide that the applicant must be identified on the Form 1 application by the name and exact location of the place of business, including the name of the county in which the business is located or, in the case of a trust, the address where the firearm is located. In the case of two or more locations, the address shown must be the principal place of business (or principal office, in the case of a corporation) or, in the case of a trust, the principal address at which the firearm is located;

2. Require the applicant to attach to the application:

- Documentation evidencing the existence and validity of the entity, which includes complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust, with any trust schedules, attachments, exhibits, and enclosures; however, if the entity had an application approved as a maker or transferee within the preceding 24 months, and there had been no change to the

documentation previously provided, the entity may provide a certification that the information has not changed since the prior approval and must identify the application for which the documentation had been submitted by form number, serial number, and date approved;

- A completed ATF Form 5320.23 for each responsible person. Form 5320.23 would require certain identifying information for each responsible person, including each responsible person's full name, position, Social Security number (optional), home address, date and place of birth, and country of citizenship;
- In accordance with the instructions provided on Form 5320.23, a 2 x 2-inch photograph of each responsible person, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which must have been taken within 1 year prior to the date of the application;
- Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and
- In accordance with the instructions provided on Form 5320.23, a certification for each responsible person completed by 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 certification may in a particular case be acceptable to the Director. The certification for each responsible person must be completed by the CLEO who has jurisdiction over the area in which the responsible person resides. The certification must state that the official is satisfied that the fingerprints and photograph

accompanying the application are those of the responsible person and that the certifying official has no information indicating that possession of the firearm by the responsible person would be in violation of State or local law.

ATF also sought public comments regarding the feasibility of asking CLEOs to certify that they are satisfied that the photographs and fingerprints match those of the responsible person and whether changes were needed to this proposal.

*D. Amendment of 27 CFR 479.84 and 479.85*

With respect to an application to transfer a firearm, the Department proposed several amendments to 27 CFR 479.84 (“Application to transfer”) and 479.85 (“Identification of transferee”).

Amendments to § 479.84 proposed to provide that:

1. The Form 4 application, in duplicate, must be filed by the transferor. If the transferee is a partnership, company, association, trust, or corporation, all information on the Form 4 application must be furnished for each responsible person of the transferee; and
2. The type of firearm being transferred must be noted on the Form 4. If the firearm is other than one classified as “any other weapon,” the applicant must submit a remittance in the amount of \$200 with the application in accordance with the instructions on the form. If the firearm is classified as “any other weapon,” the applicant must submit a remittance in the amount of \$5.

Where the transferee is an individual, the proposed amendments to § 479.85 retained the certification requirement but eliminated the requirement for a CLEO statement about the use of a firearm for other than lawful purposes. In addition, the proposal required the certification to state that the official is satisfied that the fingerprints and photograph accompanying the

application are those of the applicant and that the certifying official has no information indicating that receipt or possession of the firearm by the transferee would be in violation of State or local law.

The Department stated that the CLEO's certification that the CLEO "is satisfied that the fingerprints and photograph accompanying the application are those of the applicant," if an individual applicant, is an existing requirement (*see* 27 CFR 479.85) but was not reflected on the current Forms 4 and 5. The Department proposed having ATF amend Forms 4 and 5 to include certification to that effect by the CLEO for individuals, and include the same certification on Form 5320.23 for responsible persons of a legal entity.

Amendments to § 479.85, where the transferee is a partnership, company, association, trust, or corporation, proposed to:

1. Provide that the transferee must be identified on the Form 4 application by the name and exact location of the place of business, including the name of the county in which the business is located or, in the case of a trust, the address where the firearm is to be located. In the case of two or more locations, the address shown must be the principal place of business (or principal office, in the case of a corporation) or, in the case of a trust, the principal address at which the firearm is to be located;

2. Require the transferee to attach to the application:

- Documentation evidencing the existence and validity of the entity, which includes complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust, with any trust schedules, attachments, exhibits, and enclosures; however, if the entity has had an application approved as a maker or transferee within the preceding 24 months, and there had been no change to

the documentation previously provided, including the responsible person information, the entity may provide a certification that the information has not changed since the prior approval and must identify the application for which the documentation had been submitted by form number, serial number, and date approved;

- A completed ATF Form 5320.23 for each responsible person. Form 5320.23 would require certain identifying information, including the responsible person's full name, position, Social Security number (optional), home address, date and place of birth, and country of citizenship;
- In accordance with the instructions provided on Form 5320.23, a 2 x 2-inch photograph of each responsible person, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which must have been taken within 1 year prior to the date of the application;
- Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them; and
- In accordance with the instructions provided on Form 5320.23, a certification for each responsible person completed by 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 certification may in a particular case be acceptable to the Director. The certification for each responsible person must be completed by the CLEO who has jurisdiction over the area in which the responsible person resides. The certification must state that the official is satisfied that the fingerprints and photograph

accompanying the application are those of the responsible person and that the certifying official has no information indicating that receipt or possession of the firearm by the responsible person would be in violation of State or local law.

ATF also sought public comments concerning the feasibility of asking CLEOs to certify that they are satisfied that the photographs and fingerprints match those of the responsible person, or whether changes were needed to this proposal.

*E. Amendment of 27 CFR 479.90*

Section 5853(a) of the NFA, 26 U.S.C. 5853(a), provides that a firearm may be transferred to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations, without the payment of the transfer tax. Regulations implementing section 5853(a) are set forth in 27 CFR 479.90. That section provides, in pertinent part, that the transfer tax exemption may be obtained by the transferor of the firearm by filing with the Director an application on ATF Form 5 (5320.5), *Application for Tax Exempt Transfer and Registration of Firearm*, in duplicate. The application must provide certain information, including the name and address of the transferor and the transferee. In the case of a transfer of a firearm by a governmental entity to a transferee who is an individual not qualified as a manufacturer, importer, or dealer under 27 CFR part 479, the transferee must be further identified in the manner prescribed in § 479.85.

The Department proposed amending § 479.90(b) to remove the word “natural.” Removing the word “natural” leaves the term “person,” which was defined in proposed § 479.11 to include a partnership, company, association, trust, or corporation (including each responsible person of such entity), an estate, or an individual. Under this proposal, each transferee (including all responsible persons) would be subject to the requirements prescribed in proposed

§ 479.85 when a governmental entity transfers a firearm to a partnership, company, association, trust, or corporation that is not qualified as a manufacturer, importer, dealer, or SOT under part 479.

*F. Addition of 27 CFR 479.90a, Estates*

The Department also proposed adding a new section to part 479 to address the possession and transfer of firearms registered to a decedent.<sup>2</sup> The proposed new section provided that the executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate (collectively “executor”) may lawfully possess the decedent’s NFA firearm during the term of probate without such possession being treated as a transfer from the decedent. The proposed section also sought to clarify that the executor may transfer firearms held by the estate on a tax-free basis when the transfer is to a beneficiary of the estate; however, when the transfer is to persons who are not lawful heirs, the executor must pay the appropriate transfer tax.

*G. Transfer of Unserviceable Firearm*

Section 479.91 provides that an unserviceable firearm, defined in § 479.11 as a firearm that is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition, may be transferred as a curio or ornament without payment of the transfer tax. This section also provides that the procedures set forth in § 479.90 must be followed for the transfer of an unserviceable firearm, with the exception that a statement must be entered on the application that the transferor is entitled to the exemption because the firearm is unserviceable and is being transferred as a curio or ornament. The Department proposed no

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<sup>2</sup> Although the NPRM proposed to add § 479.90a, *see* 78 FR at 55020, as a result of a clerical error, parts of the proposed rule styled the addition of the new section governing estates as a revision to § 479.90, *see, e.g., id.* at 55028-29. The Department believes it nonetheless clearly conveyed its intention to add a new section to 27 CFR part 479 and not replace § 479.90. Commenters did not appear to be confused by the mistake.



changes to this section. However, the Department noted that § 479.91 references the procedures in § 479.90, which in turn references § 479.85, thereby providing notice that changes to § 479.85 would apply to transfers governed by § 479.91.

#### *H. Miscellaneous*

In the proposed rule, ATF recognized that the composition of the responsible persons associated with a trust, partnership, association, company, or corporation may change over time. As a result, ATF stated that it was considering a requirement that new responsible persons submit Form 5320.23 within 30 days of such a change. ATF sought comments on this option and solicited recommendations for other approaches.

The comment period for the proposed rule closed on December 9, 2013.

#### **IV. Analysis of Comments and Department Responses for Proposed Rule ATF 41P**

In response to the proposed rule, ATF received over 9,500 comments. Comments were submitted by citizens; individuals associated with trusts, corporations, and other legal entities; individuals associated with estates; FFLs; SOTs; silencer manufacturers; nonprofit and other organizations; trade associations; lawyers; collectors; hunters; and others.

Several commenters supported the entire proposed rule, while the majority opposed the entire proposed rule. The majority of commenters also opposed the proposed expansion of the CLEO certification requirement and the new definition for a “responsible person” for a trust or legal entity. Some of the commenters who opposed the proposed expansion of the CLEO certification requirement and the new “responsible person” definition, however, supported other portions of the proposed rule. The commenters’ support and opposition, along with specific concerns and suggestions, are discussed below.

## *A. Comments Supporting the Rule*

### 1. General Support for the Entire Rule

#### **Comments Received**

More than a dozen commenters stated that they supported the proposed rule in its entirety. This support was based on a variety of reasons, including that: (1) the current regulations create a “loophole,” through which prohibited persons can use a trust to circumvent the background check and CLEO certification requirements; (2) the benefit of ensuring felons and others could no longer circumvent background checks by submitting applications as representatives of a corporation or trust outweighed the “small inconvenience” the proposed rule would involve; (3) the current system of background checks only for individuals is inadequate to do the job of keeping guns out of the wrong hands; and (4) identification of and background checks on responsible persons would increase accountability for firearms regulated under the NFA.

#### **Department Response**

The Department acknowledges the commenters’ support for the proposed rule, which generally focuses on the importance of conducting background checks, particularly for individuals acquiring NFA firearms. This rule will require all responsible persons to provide the necessary information, including fingerprints, to allow ATF to conduct background checks through the various criminal record databases. In addition, individuals, as well as any responsible person associated with a trust or legal entity, will be required to provide notification to the local CLEO of the intent of the individual, trust, or legal entity with which the responsible person is associated, to make or acquire the NFA firearm identified on the form. This notification will provide the CLEO an opportunity to conduct any inquiries required by State

law, and provide ATF with appropriate input regarding the lawfulness of the individual's or responsible person's acquisition or possession of a firearm.

Regarding the commenters who desired greater accountability for NFA weapons, the Department notes that the NFA requires inclusion of those weapons in the National Firearms Registration and Transfer Record (NFRTR), and that the NFRTR includes firearm identification information, as well as the name and address of the registrant. Moreover, by allowing for background checks on individuals who will possess and control firearms on behalf of trusts or legal entities, the rule will deter persons who are prohibited from possessing firearms from attempting to use such trusts or legal entities to unlawfully acquire firearms.

## 2. Particular Support for Portions of the Rule

### a. Comments Relative to Forms 5330.20, 1, 4, and 5

#### **Comments Received**

Two commenters stated that the proposal to incorporate the information currently required on ATF Form 5330.20 into Forms 1, 4, and 5 is beneficial, will reduce unnecessary paperwork, and increase efficiency. Another two commenters, including an FFL who is an SOT, supported the proposed changes eliminating the Form 5330.20 and incorporating the information from that form into Forms 1, 4, and 5. One of these commenters based his support on guidance provided by Executive Order 13610 of May 10, 2012 ("Identifying and Reducing Regulatory Burden"). Another commenter, a member of the NFATCA, stated that he supports the part of the proposed rule that would incorporate the certification of an applicant's status as a U.S. citizen, immigrant alien, or exempt nonimmigrant alien into Forms 1, 4, and 5, and eliminate the requirement to attach a separate certification of compliance. Another commenter stated that the elimination of the Form 5330.20 by adding a citizenship statement to the transfer

forms would reduce the “human effort” expended by both the public and ATF, and reduce the expenditure of public funds to print, copy, and handle that form.

### **Department Response**

The Department acknowledges the commenters’ support for incorporating the certificate of compliance required to obtain the exemption provided by 18 U.S.C. 922(g)(5)(B) into ATF Forms 1, 4, and 5. This change will reduce the burden on the applicant by reducing the number of forms the applicant must complete to acquire an NFA firearm. The change will also reduce the cost burden on the Department as the Form 5330.20 will no longer have to be printed and separately processed by ATF.

b. Addition of 27 CFR 479.90a, Estates

### **Comments Received**

Several commenters agreed with the addition of a new section in ATF’s regulations addressing firearm transfers by estates, and supported the provisions regarding when a transfer occurs, and when a transfer tax must be paid. These commenters supported the additions because they increase clarity and provide specific direction for transfers through estates.

Other commenters supported the proposed changes related to estates and transfers, but suggested that the proposed rule did not go far enough. One commenter recommended expanding regulations to cover all involuntary transfers, including transfers at the dissolution of a corporation or other entity, liquidation in bankruptcy, and forced transfers during divorce proceedings, not just those involving the death of the owner. Other commenters argued that although they supported the treatment of estates, the proposal ran afoul of the Department’s stated purpose to require the same identification and background checks of individuals and legal entities, and created a “fundamental internal inconsistency.” Similarly, another commenter

suggested that trusts should be treated the same as estates, and not subject to the same requirements as apply to individuals. That commenter further stated that § 479.90a should expressly address the role of attorneys, because issues may arise that require an attorney to take possession of a firearm to effectuate distribution to beneficiaries. This commenter also stated that a copy of the obituary in a recognized newspaper should be an acceptable alternative to the death certificate.

### **Department Response**

The Department acknowledges supporters' comments regarding the addition of § 479.90a to address the possession and transfer of firearms registered to a decedent. The addition of this section clarifies that an executor, administrator, personal representative, or others recognized under State law may possess the firearm during the term of probate, which is often a concern for individuals dealing with the NFA firearms as part of an estate. Additionally, the rule provides clarification as to when a transfer tax must be paid.

The Department does not agree that its positions with regard to estates should be expanded to include other types of involuntary transfers as part of this rulemaking. Other types of involuntary transfers were not addressed in the proposed rule. The Department has exercised its discretion to decline to expand the scope of the rulemaking to encompass involuntary transfers not addressed in the proposed rule. Should the Department determine that its position with regard to estates should be extended to other involuntary transfers, it will do so in a separate rulemaking.

Transfers of NFA firearms from an estate to a lawful heir are necessary because the deceased registrant can no longer possess the firearm. For this reason, ATF has long considered any transfer necessitated because of death to be involuntary and tax-free when the transfer is

made to a lawful heir as designated by the decedent or State law. However, when an NFA firearm is transferred from an estate to a person other than a lawful heir, it is considered a voluntary transfer because the decision has been made to transfer the firearm to a person who would not take possession as a matter of law. Such transfers cannot be considered involuntary and should not be exempt from the transfer tax. Other tax-exempt transfers—including those made by operation of law—may be effected by submitting Form 5. Instructions are provided on the form.

The Department disagrees that § 479.90a should expressly address the role of attorneys to effectuate distribution to beneficiaries. Clear rules are provided that establish who can make the necessary distributions and how those distributions should occur. The Department also disagrees with the assertion that a copy of an obituary in a “recognized newspaper” should be recognized as equivalent to a death certificate for purposes of the new section addressing estate transfers, as anyone can pay to have an obituary published in a newspaper. However, a death certificate is an official document issued by a government agency; a newspaper obituary has no equivalent guarantee of authenticity.

When an individual heir is named in a will, the executor of the estate would file a Form 5 to effect the transfer. The heir would be listed on the Form 5 as the transferee and an individual heir would be required to submit photographs and fingerprints and be subject to a background check. Similarly, if the trust expires upon the death of the grantor, then the trustee, as the administrator of the trust, would file Form 5 to transfer the firearm to the individual named as the beneficiary. Like the heir, the beneficiary would be required to submit photographs and fingerprints and be subject to a background check. Transfers to trusts and legal entities from estates will require that responsible persons at those trusts and legal entities identify themselves

in the same manner as they would in circumstances involving a taxable transfer. If there is no beneficiary or the beneficiary does not wish to possess the registered firearm, the trustee would dispose of the property to a person other than a trust beneficiary on an ATF Form 4. If, however, the trust remains a valid trust after the death of the grantor, the trustee would continue to administer the trust property according to the terms of the trust as there would be no transfer under the NFA.

c. Background Checks for Responsible Persons

**Comments Received**

Seventy-two commenters, including members of a trade organization, stated in a form letter that they agree that requiring fingerprint cards and photographs of all adult applicants or responsible persons of a trust or LLC acquiring NFA firearms would ensure that NFA firearms are not acquired by prohibited persons. These same commenters stated that they oppose any expansion of the CLEO requirement. Thirty-six other commenters stated in a form letter that by eliminating the CLEO signoff and narrowing the definition of responsible persons, ATF could still require fingerprints and background checks on the person primarily responsible for a legal entity application without exposing law-abiding citizens to what they consider to be the arbitrary and capricious CLEO signoff ban. Another commenter expressed the belief that the regulations need to be changed to expand the requirements for fingerprints and photographs, but only as to one responsible person, not every responsible person who is part of a trust or legal entity. A few other commenters stated that they did not oppose fingerprints, photographs or background checks of responsible persons, but are opposed to the expansion of the CLEO signoff. Several other commenters, including an owner of a company that manufactures firearms and firearms accessories, an FFL/SOT, and employees of an FFL/SOT company, stated that requiring

background checks for trust members is appropriate, but that ATF should remove the CLEO signature component. Another commenter stated that requiring background checks, fingerprints, and photographs for responsible persons “is sufficient” and makes more sense than the CLEO certification requirement that nullifies the right to acquire firearms for personal protection. Another commenter stated that he supports background checks, but is unequivocally opposed to the CLEO signoff requirement for any NFA transfer. Another commenter stated that the CLEO requirement is too time consuming and outdated, but it is reasonable for people associated with legal entities to be subject to the same fingerprint-based background checks that individuals go through before they can obtain some of the most dangerous weapons.

### **Department Response**

The Department acknowledges support regarding the requirement for responsible persons of trusts or legal entities to submit fingerprints and photographs and undergo background checks. The Department agrees that responsible persons of trusts or legal entities should be subject to the same requirements as individuals acquiring an NFA firearm.

The Department acknowledges comments regarding expansion of the CLEO certification requirement. The Department has changed the CLEO certification in the proposed rule to a CLEO notification requirement in the final rule for all transferees, whether individuals, trusts, or legal entities. *See discussion infra* in section IV.C.1. The Department also acknowledges comments regarding those who would be considered a responsible person for a trust or legal entity. The Department has changed the definition of responsible person to provide that responsible persons are generally those individuals in the organization who have the power and authority to direct the management and policies of the entity insofar as they pertain to firearms.



## *B. Comments Generally Opposing the Rule*

A few commenters disagreed with all proposed changes without providing any specifics. The majority of commenters who were opposed to the proposed rule provided specific reasons as discussed below.

### 1. Current Regulations Are Sufficient

#### **Comments Received**

Many commenters stated that there are already stringent Federal regulations in place for the firearms covered by the proposed rule; for example, prohibited persons who receive or possess an NFA firearm through a legal entity are already violating current laws. A few commenters stated that these existing laws work, as shown by ATF's examples in the proposed rule. A few commenters objected to any additional firearm regulations.

Many commenters stated that this rule only creates more "red tape" for lawful citizens. Another commenter believed that the "filings" for corporations, trusts, and legal entities already identify a legally responsible person, and, as a result, maintained that the burdens of the proposed rule outweighed its benefits. Another commenter argued that a corporation or a trust was not a person, and should not be treated as one.

#### **Department Response**

The Department acknowledges that there are existing Federal laws and regulations that pertain to NFA firearms and firearms more generally. Requiring background checks for responsible persons of trusts and legal entities helps to enforce those laws by keeping firearms out of the hands of persons who are prohibited from possessing them. The efficacy of background checks is evident in the statistics. The most recent statistics released by the Department of Justice, Bureau of Justice Statistics, reflect that through the end of December

2012, background checks run through the NICS by either the FBI or State point-of-contact agencies resulted in about 2.4 million denials. *See* Karberg, Frandsen & Durso, *Background Checks for Firearms Transfers, 2012—Statistical Tables*, at 1 (December 2014). And given that there is not an abundant number of NFA firearms readily accessible without going through the transfer process, background checks in this area should be expected to be highly effective in keeping NFA weapons out of the hands of those prohibited by law from possessing them.

In addition, requiring background checks for responsible persons of trusts and legal entities conforms the requirements applicable to those entities to those that apply to individuals. It also maintains consistency with the way ATF processes applications for Federal firearms licenses, where responsible persons for legal entities are subject to background checks. *See* 27 CFR 478.47(b)(2).

a. Allegations that the Proposed Changes Were Motivated by Politics

**Comments Received**

Many commenters stated their view that this rulemaking is motivated by politics and not driven by legitimate concerns. Some argued that the proposal was an executive “overreach,” represented an “end run” around Congress, and was beyond the scope of ATF’s regulatory authority. Some commenters expressed concern that the proposed regulation was intended to disarm law abiding citizens.

**Department Response**

The Department acknowledges that the regulation of firearms provokes strong feelings on all sides and that any form of firearm regulation is often a topic of substantial debate. The Department initiated this rulemaking after ATF received a petition from the NFATCA, a non-profit association. ATF agreed with the petitioner that by not requiring background checks for

trusts and legal entities, the existing regulations created the potential for abuse. The goal—as stated in both the proposed rule and here—is to ensure that the rules regarding NFA applications that apply to individuals apply equally to trusts and corporate entities. By ensuring background checks are run on certain persons who may have access to NFA weapons, the rule is intended to help enhance public safety. Put simply, this rule will not prevent a person who can lawfully possess firearms from receiving or possessing NFA firearms; it was designed to prevent persons who are prohibited from receiving or possessing firearms from obtaining them through the use of trusts or legal entities not currently subject to the same procedures applicable to individuals. The rule will not disarm law abiding citizens. However, it will help ensure that persons who are prohibited by law from possessing firearms are not able to acquire them.

The Department also does not agree that the rule is outside of ATF’s authority. ATF has regulated the circumstances under which NFA firearms are manufactured, transferred, and acquired for decades. This authority is based upon the authority to implement the law that Congress has both expressly and implicitly delegated to the Department. Specifically, the authority to implement the regulations requiring a CLEO certification have withstood challenge. *See Lomont v. O’Neill*, 285 F.3d 9 (D.C. Cir. 2002). The Court, in upholding the CLEO certification requirement, noted that sections 5812 and 5822 of the NFA give “the Secretary broad authority to promulgate regulations governing application forms, including regulations pertaining to the identification of the transferee, the transferor and the firearm,” and “broad authority over the form of applications for permission to make firearms.” *Id.* at 16. Similarly, in upholding ATF’s authority to make destructive device determinations, another court noted that Congress may lawfully leave “a certain degree of discretion to executive or judicial actors.” The court noted that ATF acted lawfully in implementing the statutory

definition, utilizing the authority delegated to it by Congress and the Secretary of the Treasury. *Demko v. United States*, 216 F.3d 1049, 1054 (Fed. Cir. 2000). Such authority was also recognized when, in construing the Gun Control Act (GCA), a court found that the Secretary of the Treasury was authorized to promulgate regulations to facilitate its enforcement. This responsibility was delegated within the Department of the Treasury to ATF. *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 (4th Cir. 1990).

b. Changes Are Not Necessary If Current Regulations Are Enforced

**Comments Received**

Many commenters stated that it is not necessary for the Department to add additional rules and that the current rules are sufficient to ensure NFA firearms are not acquired by unauthorized individuals. Many commenters felt that the proposed rule fails to address crime, and instead simply makes it more difficult for law-abiding citizens to legally obtain NFA registered firearms. Many commenters stated that someone who wishes to obtain a firearm for criminal purposes would not go through the NFA application process for a legal entity, a process that entails expense and efforts to register such firearms with the Federal Government.

One commenter noted that the proposed rule would alter the timing of the background check, and asserted that the timing would have a negative effect on safety. Currently, background checks are performed at the time the weapon is physically transferred; the proposed change would require the background check be performed at the beginning of the application process. This commenter stated that it currently takes transfer applications a year for approval, and with the proposed change, any arrests, convictions, or restraining orders that occur during this year would not be discovered and restricted persons could potentially obtain possession of

the NFA items. Several commenters questioned why it takes ATF months to approve NFA applications if it does not currently run checks on trusts and legal entities.

Many commenters stated that there is no “loophole” to close, arguing that nothing in the current system allows felons or otherwise prohibited persons to possess NFA items through trusts, corporations, or individually. Several commenters further added that their trust was constructed in a manner such that prohibited persons may not have a role in the trust. Other commenters noted existing requirements that the person picking up the NFA item must still fill out ATF Form 4473, *Firearms Transaction Record*, and pass the required NICS background checks at the point of sale before taking possession. Other commenters noted generally that it is already illegal to let unauthorized persons be in possession of firearms and NFA items. Others stated specifically that an individual who takes possession (i.e., the responsible person), is prohibited by State and Federal law from transferring or making that weapon available to anyone with a firearm restriction. In addition, a few commenters stated that there is not an “underground black-market conspiracy” or “underworld entity” circumventing NFA gun laws by using trusts. Several commenters stated that trusts are used by law-abiding citizens to prevent unintentional illegal transfers; people creating an NFA trust are not trying to game or cheat the system or pass through a loophole.

Many commenters noted that ATF’s three examples provided in the proposed rule fail to illustrate that there is a problem to be solved (i.e., that a prohibited person ever gained actual possession of an NFA firearm by virtue of an association with a legal entity, much less committed a crime with that weapon). Those same commenters also observed that these three examples just as strongly argue that prohibitions and safeguards, under current law, are entirely sufficient. A few of these commenters asked ATF for access to the details of the three situations

and stated that without such access, there are many unanswered questions and no evidence of any problem that existing law does not address.

Many commenters requested ATF to leave the current regulations in place. Instead of proposing new rules and regulations, many commenters asked ATF to enforce the rules, laws, and penalties already on the books, and noted the small number of prosecutions resulting from NICS denials. A few of these commenters also requested that ATF give longer sentences and harsher penalties to those who break the rules. Another commenter noted that the current regulations are unenforceable due to an already “over-taxed and under-funded and under-staffed system.” Another commenter stated that ATF makes so many “gun laws” that the public cannot possibly understand them, and asked how ATF proposes to enforce them.

### **Department Response**

While the Department acknowledges that most individuals who apply to register and transfer an NFA firearm are not prohibited from possessing or receiving firearms, there have been a significant number of instances in which prohibited persons have submitted NFA applications. Information received from the ATF NFA Branch disclosed that from 2010 to 2014 there were approximately 270 NFA applications by individuals, out of 115,842 applications, that were disapproved due to background check denials. The NFA Branch also tracked the number of applications received from trusts and legal entities during the same period. The Department believes that the disapprovals would have been higher if background checks would have been conducted on responsible persons associated with the 217,996 applications received from trusts or legal entities during this time. This belief is based on the FBI’s denial rate on NICS background checks between November 30, 1998, and December 31, 2014, which is approximately 1.24 percent. Additionally, the Department believes that the background check

requirement has an important deterrent effect as a prohibited person would be less likely to try and acquire an NFA firearm knowing that the person would be subject to a background check.

As a result of the increased use of trusts or legal entities to acquire NFA firearms, the number of qualifying firearms acquired without a background check has greatly increased. Between 2004 and 2014, the number of NFA applications received from trusts or legal entities increased from 1,938 to 90,726. In 2013 and 2014, ATF received a combined total of 162,759 applications from trusts or legal entities.

The Department does not agree that the proposed regulations are unnecessary. Background checks required under the Brady Act (18 U.S.C. 922(t) and 27 CFR 478.102), as part of the licensing process (18 U.S.C. 923(d)(1)(B) and 27 CFR 478.47(b)(2)), and the application process for individuals submitting applications to make or receive an NFA firearm (26 U.S.C. 5812 and 5822, 27 CFR 479.63 and 479.85) are in place to prevent prohibited persons from unlawfully acquiring firearms. The proposed rule is similarly intended to prevent prohibited persons from acquiring firearms by closing down an avenue that can be exploited.

The Department acknowledges that there is a backlog of NFA applications, and notes that the backlog has decreased over the last year. ATF processes applications as quickly as its resources allow.

The Department agrees with the commenters that the existing laws should be enforced, and the Department is committed to focusing its limited prosecutorial resources on the most significant violent crime problems facing our communities. That said, enforcement must be paired with common-sense regulatory efforts to help limit access to firearms by persons prohibited from possessing them. This rule is intended to do just that.

The Department acknowledges that the person picking up the NFA item must still fill out ATF Form 4473, *Firearms Transaction Record*, and pass a NICS background check at the point of sale before taking possession. Such a background check on the person picking up the firearm would verify that that individual is not a prohibited person, but it would not verify that other people who are responsible persons of a trust or legal entity are not prohibited.

The Department does not regard time-of-transfer background checks as sufficient to comply with the transfer provision of the NFA. The Department interprets that provision to require that background checks precede the transfer of NFA firearms. Specifically, the statute provides that a firearm “shall not be transferred unless” the Secretary has approved the application, and that an application “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). The Department construes that language to mean that background checks for individuals and responsible persons must be conducted before the application is approved. Additionally, this provision requires that an individual’s “identification must include his fingerprints and his photograph.” *Id.* A NICS background check does not satisfy the statute’s biometric language (fingerprint cards) requirement. The submission of fingerprints allows a more robust check of criminal history databases and provides a means of eliminating false negative and false positive matches. For example, the relevant individual may have a disqualifying criminal record under another name.

The Department does not agree that the proposed rule would alter the timing of the background check. Background checks under the statute’s transfer provision are not currently performed at the time the weapon is physically transferred, as the commenter suggested. Rather, background checks are currently performed before an application is approved and will continue to be performed in the same manner. With respect to the commenter’s concern that delay in



processing applications might mean that an individual will become a prohibited person while awaiting a background check, the agency has two responses. First, because nothing about the Department's method of processing applications will change because of this rule, the Department believes the commenter's concern is outside the scope of this rulemaking. Second, processing times for applications reflect the delay between the time the application is received by the NFA Branch and the time the application is entered into the NFRTR and processed. As the background check is not conducted until after the information is entered into the NFRTR, any prohibitions that may have occurred after the applicant mailed the application will be disclosed when the background check is conducted.

c. Criminal Activity Assertions Are Not True

i. The NFA and Impact on Crime

**Comments Received**

Many commenters stated that these restrictions will not reduce crime and questioned whether violent crimes have been committed with registered NFA items, or by responsible persons of a trust or legal entity. Several commenters asked if ATF could provide the statistics demonstrating the need for the regulations and direct link between the proposed rule and enhanced public safety.

Many other commenters observed that NFA items are expensive, already heavily regulated, and "virtually unheard of" in the hands of criminals. Although commenters disagreed on the number of crimes they believe have been committed with registered NFA weapons, those addressing the subject agreed that the number was small, and argued that the proposed rule would accordingly have little to no effect on public safety.

## **Department Response**

The Department disagrees that it must show a direct link between the proposed rule and enhanced public safety. Congress has directed the Department to ensure that individuals who are prohibited from possessing NFA firearms do not obtain them, even if those individuals have no intention of using them in an unlawful manner. *See* 26 U.S.C. 5812(a) (“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. 5822 (“Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.”). The Department regards the appropriate question to be whether the rule will better ensure that prohibited individuals do not unlawfully possess NFA firearms, not whether individuals who possess firearms are likely to use them to commit crimes.

Additionally, the Department notes that some individuals who own NFA firearms do in fact commit crimes. A review of trace data and criminal records from 2006 to 2014 disclosed twelve incidents in which owners of NFA firearms were convicted of crimes; however, there is no evidence that these crimes were committed with NFA firearms. Convictions include attempted homicide, conspiracy to commit felony offenses of firearms laws, operating a drug involved premises, possession of unlawful firearms, possession of marijuana, intent to distribute methamphetamine, possession of a firearm during commission of drug trafficking, domestic violence, theft, dealing firearms without a license, and possession of an unregistered NFA firearm.

In one instance the purchaser was arrested 9 days after the purchase of the firearm. In another instance the purchaser was arrested within 3 months of the purchase of the firearm. Both purchasers were convicted of drug related charges.

The Department acknowledges that the majority of firearms traced are handguns. However, between 2006 and 2013, local or Federal law enforcement recovered and ATF traced 5,916 NFA firearms. ATF is authorized to trace a firearm for a law enforcement agency involved in a bona fide criminal investigation. There were also at least seven instances in which the possessor of the firearm at the time it was traced was not the person it was registered to in the NFRTR. Under Federal law, possession of an NFA firearm by a person to whom it is not registered is unlawful (26 U.S.C. 5861(d)).

The Department also emphasizes that NFA weapons are dangerous weapons that can empower a single individual to take many lives in a single incident. Therefore, a low incidence of the use of NFA firearms in crimes does not reflect the threat to public safety that they pose. A low usage of NFA firearms in crime may also bespeak the success of the NFA in preventing such weapons from reaching the hands of prohibited persons in the past. The large increase in transfers in which no background check takes place, however, increases the risk that NFA firearms will reach prohibited persons. The Department does not believe it is reasonable to wait for an NFA firearm to be used in a significant criminal incident before crafting procedures reasonably calculated to carry out its regulatory mandate to prevent prohibited persons from obtaining NFA firearms.

ii. The NFA and Associated Background Checks for Transactions Involving a Trust or Legal Entity

#### **Comments Received**

Many commenters stated that the proposed rule is misleading because it suggests that there are no background checks currently required for trusts or legal entities when, in fact, the person who picks up an NFA item from a licensed dealer on behalf of a trust or legal entity must

complete a Form 4473 and undergo an individual NICS background check prior to taking possession of the NFA item. Some of these commenters provided specific language from ATF's NFA Handbook as support for their point.

### **Department Response**

The Department acknowledges that ATF procedures currently require that FFLs run a background check on any person picking up a firearm on behalf of a trust or legal entity. However, this ensures only that the direct recipient from the FFL is not a prohibited person. It does not verify the status of the other responsible persons associated with a trust or legal entity who will have access to the firearm. Thus, this rule will help ensure that many persons with access to the firearm are neither prohibited possessors nor otherwise ineligible for such access. With the implementation of the rule, responsible persons for trusts and legal entities will undergo a background check as part of the application process. Therefore, a responsible person will not have to undergo a background check at the time of the transfer from the FFL.

#### **d. Individuals Do Not Create Trusts or Legal Entities to Avoid Background Checks**

### **Comments Received**

Many commenters stated that the proposed rule mistakenly contends that individuals create trusts or legal entities solely to avoid background checks when acquiring NFA items. These commenters offered other valid reasons (e.g., for estate planning; to comply with laws and regulations associated with the NFA, especially by preventing accusations or criminal charges involving constructive possession; as the only available mechanism for acquiring NFA items for individuals who reside in a locale where CLEO certification is unobtainable).

## **Department Response**

The Department is unable to assess the reason(s) for the recent exponential growth in the use of trusts, in particular, to acquire NFA firearms, and the proposed rule made no claim about the extent to which such trusts are being used predominantly to circumvent the background check requirement for individuals, as opposed to for other reasons. But the use of trusts has grown exponentially, and as a result so have the number of persons gaining access to NFA firearms without undergoing a background check. Regardless of their motive, the Department does not believe that responsible persons of trusts or legal entities should be excluded from the background check and other requirements that seek to ensure prohibited persons do not gain access to NFA firearms.

Additionally, the Department notes that it believes that even if individuals are not frequently exploiting the potential loophole in the statute, the existence of the loophole invites future exploitation. The Department regards it as wise to close the loophole to eliminate the opportunity for future evasion of the individual background check requirement, even if the tactic has not yet come into common use.

## **2. Rule Differs From NFATCA Petition**

### **Comments Received**

Some commenters noted that NFATCA's petition asked ATF to amend §§ 479.63 and 479.85 to, among other things, require photographs and fingerprints of persons responsible for directing the legal entity, eliminate the requirement for CLEO approval of Forms 1 and 4 for natural persons, and require notification to CLEOs for all Form 1 and Form 4 applicants. One commenter noted that the proposed rule differed from the petitioner's request by adding CLEO certification requirements, not removing them. Another commenter observed that the proposed

rule did largely what the petitioner requested by expanding requirements for all responsible persons involved with corporations and trusts; however, the proposed rule lessened—but did not entirely eliminate—CLEO certification requirements. Several commenters referenced NFATCA’s letter, dated August 31, 2013, in which NFATCA said that it supports the elimination of the CLEO certification requirement, but does not support the proposed rule in its current form. The NFATCA letter states, in part, that “[t]he Executive Branch proposals unduly burden the law-abiding public, will restrain lawful commerce and bury an already overwhelmed agency with an administrative infrastructure that will not serve the public safety interest.”

NFATCA also submitted a public comment to the rulemaking, stating that the proposed rule bears little resemblance to its petition, or to changes that NFATCA discussed with ATF and that were published in “ATF’s Unified Agenda repeatedly over the past several years”<sup>3</sup> for Regulation Identification Number (RIN) 1140-AA43.

### **Department Response**

The Department acknowledges that in proposing to extend CLEO certification rather than notification requirements, and not eliminating all CLEO involvement, the proposed rule differed not only from material contained in the published abstracts of RIN 1140-AA43 in the 2011 and 2012 Unified Agendas, but also from what the petition requested. *See supra* note 3. However, the Department notes that the intent of the Unified Agenda is to provide data on regulatory and deregulatory activities under development throughout the Federal Government. The activities included in individual agency agendas are primarily those currently planned to have a proposed

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<sup>3</sup> This commenter’s footnote stated “*See* Unified Agenda, RIN [Regulation Identifier Number] 1140-AA43 (Fall 2011); RIN 1140-AA43 (2012).” The Department notes that these published abstracts stated that this rulemaking proposed to require, among other things, “that a copy of all applications to make or transfer a firearm be forwarded to the [CLEO] of the locality in which the maker or transferee is located” and to eliminate “the requirement for a certification signed by the [CLEO].”

rule or a final rule issued within the next 12 months. This does not mean that ATF, or any other agency, cannot change the direction of a proposed rulemaking if circumstances warrant. In addition, when ATF issued the proposed rule, ATF believed that the proposed requirements to extend CLEO certification would enhance public safety without overly burdening the public. However as is discussed *infra* in section IV.C.1, the Department has reassessed the need for CLEO certification and has implemented a new approach that focuses on notifying CLEOs, and requires responsible persons of a trust or legal entity to submit fingerprint cards and undergo a background check. See section IV.C.1 for discussion of the reasons for this change.

The Department agrees that a change from a CLEO certification to CLEO notification will require a change to the Forms 1, 4, and 5. See section IV.C.1 for further discussion.

### 3. Constitutional and Statutory Arguments

#### a. Violates the Second Amendment

#### **Comments Received**

Hundreds of commenters stated that the proposed rule violated and infringed their Second Amendment rights. Many commenters stated the proposed rule further eroded and encroached on such rights as they believe that the NFA—with some also adding the GCA—is unconstitutional and already unconstitutionally infringes the rights protected by the Second Amendment. Many commenters referenced the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which found that the Second Amendment protects an individual—not a collective—right to keep and bear firearms.

Numerous commenters specifically connected the perceived Second Amendment infringement to the CLEO certification requirement, as some CLEOs are represented as being unwilling to sign off on applications, regardless of the applicant’s background, or the legality of

the NFA item in the applicant's jurisdiction. *See infra* section IV.C.1.c for a detailed discussion of this issue. These same commenters pointed out that the proposed rule, by extending the CLEO certification requirement to responsible persons of trusts or corporations and legal entities, removes the "gun trust" option, which does not require CLEO certification and thereby effectively bans law abiding citizens from exercising their Second Amendment rights, i.e., constitutes a *de facto* ban.

A commenter focused particularly on silencers, which are included in the definition of firearm under the NFA. 26 U.S.C. 5845(a). This commenter provided data showing the benefits of silencers (e.g., hearing protection), and that the situation is different from when the NFA was enacted—that is, silencers are no longer dangerous or unusual and are typically possessed by law-abiding citizens—and accordingly, merit constitutional protection under the Second Amendment. This commenter stated that 39 States permit private citizens to own and possess silencers, and more than 30 States permit their use in some form of hunting. This same commenter argued that short-barreled shotguns (SBSs), short-barreled rifles (SBRs), and any other weapons (AOWs) should not be controlled under the NFA because they are no more dangerous than conventional shotguns and rifles, they are commonly used by law enforcement and the military, and are favorably suited for law-abiding citizens to use in self-defense.

### **Department Response**

The Department notes that the NFA regulates weapons such as machineguns, short-barreled rifles, short-barreled shotguns, silencers, destructive devices, which include such items as grenade launchers, as well as firearms meeting the definition of "any other weapon," which include disguised devices such as penguns, cigarette lighter guns, knife guns, cane guns and umbrella guns. *See* 26 U.S.C. 5845.



The Department does not believe that the proposed regulation violates, erodes, or otherwise infringes any rights protected by the Second Amendment. The Supreme Court and several Courts of Appeal have recognized, “the right to keep and bear arms has never been unlimited.” *Nat’l Rifle Ass’n (NRA) v. ATF*, 700 F.3d 185, 200 (5th Cir. 2012) (quoting *Heller*, 554 U.S. at 626). The Supreme Court noted explicitly in *Heller* that the Second Amendment did not extend to “dangerous and unusual weapons” not in “common use.” 554 U.S. at 627; *see also United States v. Miller*, 307 U.S. 174, 178-79 (1939) (regarding short-barreled shotguns). Courts of Appeals have consistently found NFA weapons to be “dangerous and unusual.” *See United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012); *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1263 (D.C. Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010); *Hamblen v. United States*, 591 F.3d 471, 473-74 (6th Cir. 2009); *United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008). Moreover, even if one assumes that NFA weapons are of the type protected by the Second Amendment, the Department believes that NFA statutory requirements imposed on these weapons would be considered longstanding presumptively lawful regulations or restrictions and permissible under the Second Amendment given the Supreme Court’s rulings in *Heller*, 554 U.S. 570, and *Miller*, 307 U.S. 174, and circuit court rulings, such as in *NRA*, 700 F.3d 185. Finally, even if the NFA’s statutory requirements—or the requirements imposed by this regulation—are not considered longstanding, the Department believes that they would withstand constitutional scrutiny.

The Department’s position is that the Second Amendment, properly construed, allows for reasonable regulation of firearms. *Heller* emphasized the importance of “prohibiting the carrying of ‘dangerous and unusual weapons’” in defining the limitation on the Second

Amendment right, explaining that the Second Amendment would not prevent the ban of the “weapons that are most useful in military service—M-16 rifles and the like . . . .” *Heller*, 554 U.S. at 627; *id.* at 627-28.

In addition, although the Court did not purport to define the full scope of the Second Amendment right in *Heller*, the Court did consider *United States v. Miller*, 307 U.S. 174, which “upheld against a Second Amendment challenge two men’s federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act.” *Heller*, 554 U.S. at 621-22 (citation omitted). *Heller* explained that the *Miller* Court’s “basis for saying that the Second Amendment did not apply” was that the *type of weapon at issue* was not eligible for Second Amendment protection.

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

*Id.* at 622 (quoting *Miller*, 307 U.S. at 178) (emphasis in *Heller*). Of particular importance to this rulemaking, the *Heller* Court further stated:

We may as well consider at this point (for we will have to consider eventually) what types of weapons *Miller* permits. Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. *That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns* (not challenged in *Miller*) *might be unconstitutional*, machineguns being useful in warfare in 1939. We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” Indeed, that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its

preface. *We therefore read Miller to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.*

*Id.* at 624-25 (emphasis added) (internal citations and quotations omitted). *Heller* thus explicitly recognized an “important limitation on *the right* to keep and carry arms . . . the sorts of weapons protected [are] those ‘in common use at the time.’” *Id.* at 627 (quoting *Miller*, 307 U.S. at 179).

In *NRA*, the Fifth Circuit acknowledged *Heller*’s “non-exhaustive list” of “presumptively lawful regulatory measures,” 700 F.3d 185, 197 (5th Cir. 2012) (citing 554 U.S. at 626-27). The Fifth Circuit held that firearm restrictions that are longstanding, like the NFA, are not likely to burden a person’s rights under the Second Amendment. *See id.* at 196; *see also Heller II*, 670 F.3d at 1253 (“[A] regulation that is ‘longstanding,’ which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment.”).

Like the restrictions on machineguns, the Department believes that other longstanding Federal restrictions on making and transferring SBSs, SBRs, silencers, and AOWs are “firmly historically rooted” and will not burden Second Amendment rights given the Court’s holding in *Heller* regarding presumptively lawful regulatory measures. *See NRA*, 700 F.3d at 204; *United States v. One Palmetto State Amory PA-15 Machinegun*, No. 15-2202, 2015 U.S. Dist. LEXIS 95302 (E.D. Penn. 2015) (holding that the Second Amendment does not create a right to possess a machinegun), and *Hollis v. Lynch*, No. 3:14-CV-03872-M, 2015 U.S. Dist. LEXIS 103656 (N.D. Tex. 2015) (holding that the Second Amendment does not create a right to make machineguns).

Finally, even if a court were to conclude that the NFA and its implementing regulations are not “presumptively lawful,” they would nevertheless pass constitutional muster under existing Second Amendment jurisprudence. The NFA and this final rule are not a ban on NFA items, as some commenters suggest. Rather they are reasonable regulations on the possession of such weapons that the Department believes are consistent with the Second Amendment.

In response to those commenters who seek the repeal of the NFA and a different treatment for certain NFA weapons, like silencers, the Department cannot repeal the NFA, nor can it choose to ignore provisions of the act for certain weapons, or minimize the burden of the statutory language for certain weapons, such as, silencers, SBSs, SBRs, and AOWs. The statute neither requires nor is best read as permitting disparate treatments of NFA firearms in the manner suggested by the comments.

Assuming, *arguendo*, that silencers are within the protection of the Second Amendment in the first place, they do not qualify for heightened Second Amendment protection. To the contrary, silencers were included in the original draft of the NFA in 1934, and have a long regulatory history. See *United States v. Gonzales*, No. 2:10-CR-00967 CW, 2011 U.S. Dist. LEXIS 127121 (D. Utah 2011) (describing legislative history surrounding 1934 enactment of the NFA). Because silencers, SBSs, and SBRs are statutorily defined as NFA firearms, they are regulated in the same manner as the other NFA weapons.

Although the CLEO certification process has been upheld by courts as a reasonable regulation (*see, e.g., Lomont*, 285 F.3d 9), the Department is not requiring such a certification in this final rule. Instead, the final rule contains a CLEO notification provision, requiring applicants to provide notification to the CLEO. Thus, the concern expressed by many commenters that the CLEO certification provision in the rulemaking will effectively ban the

transfer and making of NFA weapons is moot; likewise, commenters' concerns about the alleged arbitrary and capricious nature of the CLEO certification process in some jurisdictions are also moot.

b. Violates the Fourth Amendment

**Comments Received**

One commenter stated that the wait time for ATF to approve NFA transfers is excessive, and that the proposed rule imposes additional restrictions. The commenter stated that these restrictions deprive him of the use of his legally obtained property, and violate the Fourth Amendment as they are a "de facto seizure." Another commenter provided an example in which a county sheriff publicly stated that he would possibly provide CLEO certification, on the condition that the applicant "pass a background check" and "allow the Sheriffs (sic) Department to inspect the home where the weapon will be stored." This commenter stated that this "safety inspection" blatantly violated the Fourth Amendment protection against unreasonable searches.

**Department Response**

The Department believes that the law provides that applicants do not have a property interest in the NFA firearm sought during the application period. Therefore, an NFA firearm is not the property of a transferee until the transferor receives a properly approved NFA Form 4.

The Department takes the view that individuals, trusts, and legal entities do not obtain a property interest in an NFA firearm until the Department has approved an application to make or transfer one. A "protected property interest simply 'cannot arise in an area voluntarily entered into . . . which, from the start, is subject to pervasive Government control.'" *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 272 (5th Cir. 2012); *see also Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) (same). In light of the

comprehensive scope of Federal firearms regulation, the NFA and GCA delineate such an area of pervasive control when it comes to the acquisition or manufacture of such firearms. *See Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993). Moreover, several courts have held that a property interest is lacking where the alleged property is not accompanied by the “crucial indicia of property rights,” such as the right to assign, sell, or transfer the property at issue. *Gonzalez v. NOAA*, 695 F. Supp. 2d 474, 504 (S.D. Tex. 2010) (finding no legally cognizable property interest in Federal shrimping permits); *see also Melancon*, 703 F.3d at 269 (describing these indicia as “the right to possess, use, and dispose”); *Hearts Bluff Game Ranch*, 669 F.3d at 1330 (identifying “the ability to sell, assign, transfer, or exclude” as the crucial indicia of a property right). Because the statutory language in the NFA makes it clear that applicants do not have the right to make or transfer an NFA firearm until a properly approved Form 1 or 4 is issued, the applicant does not have a property interest in the NFA firearm until a properly approved Form 1 or 4 is issued. *See* 26 U.S.C. 5812 and 5822. *See Hollis*, 2015 U.S. Dist. LEXIS 103656 (holding “that Plaintiff had no property interest in either the machine gun or the erroneous approval of the Form 1 application”).

The Department therefore disagrees that delaying or preventing the transfer of an NFA firearm constitutes a “seizure” under the Fourth Amendment. As explained above, individuals, trusts, and legal entities do not have a property interest in an NFA firearm until a properly approved Form 1 or 4 is issued. They therefore lack standing to assert a Fourth Amendment claim because they cannot assert “an interest in the property seized.” *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

As to the comment regarding the home inspection that one CLEO purportedly required of citizens before granting a CLEO certification, the Department notes that the final rule will not

include a CLEO certification requirement so there will be no further need to consent to such home inspections. Instead, the final rule will contain a CLEO notification provision, which should ease commenters' concerns.

c. Violates the Fifth Amendment

i. Due Process Clause

**Comments Received**

Several commenters expressed a concern that local CLEOs would refuse to certify applications for little or no reason, amounting to a violation of due process under the Fifth Amendment. Several commenters also stated that applicants primarily use “gun trusts” due to their CLEOs’ arbitrary and capricious refusal to provide certification, and expressed concern that the proposal essentially removes this option.

In addition, a few commenters noted that Federal appellate courts have recognized the validity of trusts established with a prohibited person as the settlor, which allows the prohibited person to maintain the prohibited person’s “ownership” interest in the property while surrendering the prohibited person’s right to the “possessory” interest to a trustee, *see United States v. Zaleski*, 686 F.3d 90, 93 (1st Cir. 2012); *United States v. Miller*, 588 F.3d 418, 419-20 (7th Cir. 2009); *Cooper v. City of Greenwood*, 904 F.2d 302, 305-06 (5th Cir. 1990). One of these commenters also stated that trusts provide a well-established method to maintain regulatory compliance without exercising possession, and provided the common example of beneficiaries who are minors. This commenter predicted that the proposed rule, if finalized, would most certainly be challenged as a “taking” under the Fifth Amendment.

## Department Response

The Department believes that most of the commenters' concerns are addressed with the change from CLEO certification to CLEO notification. Moreover, this rule does not eliminate or significantly burden the use of trusts or legal entities by persons who may wish to employ them as part of the NFA firearm acquisition process.

The Department disagrees with commenters asserting that the proposed regulations would lead to a violation of an applicant's due process rights under the Fifth Amendment. Recently, at least two courts considered whether a denied NFA applicant had a property interest in the denied Form 1 application or in the NFA weapons he sought to make. Both district courts ruled that the applicant had no property interest in the ATF Form 1 or firearm at issue. *Hollis*, 2015 U.S. Dist. LEXIS 103656; and *One Palmetto State Armory PA-15 Machinegun*, 2015 U.S. Dist. LEXIS 95302.

Procedural due process challenges must demonstrate that the “state has deprived a person of a liberty or property interest.” *Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012) (quoting *Welch v. Thompson*, 20 F.3d 636, 639 (5th Cir. 1994)). If it has, then the Court “must determine whether the procedures relative to that deprivation were constitutionally sufficient.” *Id.* As explained in the preceding section regarding whether this rule will effect a “seizure” in violation of the Fourth Amendment, individuals do not have a property interest in an NFA firearm until a properly approved Form 1 or 4 is issued.

Moreover, most, if not all, NFA applicants who will be impacted by the proposed change in the definition of a “person,” which requires “responsible persons” for a trust or legal entity to undergo a background check, will have no legally cognizable property interest in either the NFA firearm sought or the NFA application form. Several courts have held that a property interest is lacking where the alleged property is not accompanied by the “crucial indicia of property rights,”



such as the right to assign, sell, or transfer the property at issue. *Gonzalez v. NOAA*, 695 F. Supp. 2d at 504 (finding no legally cognizable property interest in Federal shrimping permits). Further, the fact that it is unlawful to possess a firearm before ATF approves the relevant form reinforces the Department's conclusion that there is no property interest in such firearms until such forms are properly issued. *See Hollis*, 2015 U.S. Dist. LEXIS 103656.

As for the comments expressing concerns about protecting the property interest of minors, the proposed regulation will allow trusts to possess the NFA weapon until the minor comes of age. Once the minor is of age, the minor can then complete the transfer application and background check and, if not otherwise prohibited from possessing an NFA firearm, take possession of the NFA weapon. The only change the rule makes is that it requires that responsible persons in trusts undergo background checks and not be prohibited persons. If anything, therefore, the rule will provide trust beneficiaries with an added measure of protection by ensuring that trust property is held in the hands of a law-abiding person who is not prohibited from possessing firearms under Federal or State law.

Moreover, to the extent that courts have recognized a felon's ability to employ a trust or other device to maintain an ownership interest, so long as there is no ability to physically possess or control the firearm, those cases have no application here. Trust beneficiaries who cannot physically possess or control firearms held in trust for them will not typically be responsible persons under the rule. Additionally, this rule pertains to the acquisition of a firearm, not the disposition of a firearm already owned by someone who later becomes prohibited.

#### ii. Self-incrimination

#### **Comments Received**

The Fifth Amendment provides a right against self-incrimination, which permits an individual to refuse to disclose information that could be used against such individual in a

criminal prosecution. One commenter argued that a criminal who desired to obtain an NFA weapon would not go through the appropriate routes of submitting to ATF the required forms, paying the associated tax, and waiting for the forms to be approved. This commenter cited case law, *Haynes v. United States*, 390 U.S. 85 (1968), as support for the proposition that felons and other prohibited individuals are not required to register NFA weapons due to the Fifth Amendment and self-incrimination.

### **Department Response**

This comment has no relevance to the rule. *Haynes* does not stand for the proposition that a felon is entitled to obtain an NFA weapon without undergoing a background check because to do so would violate the felon's rights under the Fifth Amendment. While individuals cannot be compelled to give incriminating information against themselves during the NFA application process, they do not have the right to opt out of the background check process. Nor do they have the right to provide false information during the process. Further, they do not have a right to an approval of their application or to possess the firearm without an approved application.

Commenters should be aware that *Haynes* was based on an earlier version of the NFA where transferees were required to notify ATF of their possession of firearms regardless of whether possession was legal. The pre-1968 version of the NFA was "repeatedly . . . attacked on self-incrimination grounds," *United States v. Gullett*, 322 F. Supp. 272, 273 (D. Colo. 1971). "In *Haynes* the Supreme Court ruled that a timely assertion of the privilege was a defense to a prosecution for violation of former section 5851, which forbade the possession of certain classes of firearms not registered with the Secretary of the Treasury or the Secretary's delegate. The court found that the crime created by section 5851 was not meaningfully distinguishable from the

section 5841 crime of failure to register possession of certain firearms and that compliance with the registration provision would have compelled petitioner to provide evidence facilitating his prosecution for violation of either the making or transfer clauses of section 5851.” *Id.*

In response to *Haynes*, Congress amended the NFA and enacted, among other provisions, 26 U.S.C. 5848, which provides that registration information may not be used, directly or indirectly, against a registrant in a criminal proceeding for an offense occurring prior to, or concurrent with, the registrant’s registration. Because Congress specifically drafted the legislation to protect a registrant from criminal prosecution due to the registrant’s act of registration, it follows that registration information cannot be used in a Federal or State prosecution for illegal acquisition of a registered firearm, a past crime involving the use of a registered firearm, or illegal possession of a registered firearm. 26 U.S.C. 5848(a). However, if the government obtains independent evidence of the offense, there is no immunity from prosecution. Also, section 5848 does not preclude the use of registration information in a false statements prosecution under 26 U.S.C. 5848(b). The Supreme Court approved the current statute on Fifth Amendment grounds in *United States v. Freed*, 401 U.S. 601, 604-07 (1971).

d. Violates the 14th Amendment

#### **Comments Received**

The 14th Amendment provides that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Many commenters stated that CLEOs categorically or arbitrarily refuse to sign any ATF forms, even though the NFA firearm is completely legal in their jurisdiction. Further, according to other commenters some CLEOs impose additional burdensome and arbitrary conditions not consistent with the law, or even common sense, to

obtain their signature. A few commenters believed that, as written, the proposed rule allows CLEOs to exercise an “administrative veto” in a selective and arbitrary, and not uniform, manner across the United States, thereby violating the 14th Amendment’s Equal Protection Clause, as well as the Due Process Clause.

### **Department Response**

As previously stated, the final rule will not require CLEO certification or approval, but will instead require CLEO notification. This change moots the concerns—whether valid or not—that a CLEO’s refusal to grant an individual a certification would violate the 14th Amendment.

#### e. Federalism Concerns

### **Comments Received**

A few commenters argued that the proposed rule unnecessarily interferes with State law in several ways, including by: (1) undermining State law by granting CLEOs de facto arbitrary power to establish policies directly contrary to State law; (2) intruding on State law governing corporations, trusts, and LLCs by defining “responsible persons” of such entities; (3) undermining State laws limiting disclosure of information regarding ownership of firearms by mandating that an applicant share such information with a CLEO to obtain CLEO certification; and (4) imposing an unfunded mandate on CLEOs by expanding the CLEO certification requirement.

### **Department Response**

Given that the final rule will not require CLEO certification but rather only CLEO notification, the Department believes that any Federalism concerns raised by this rule are moot.

Moreover, this rule defines “responsible person” for purposes of NFA registration, and for no other purpose. Nor does this rule purport to impose any dissemination obligations or restrictions upon CLEOs with respect to the notifications they receive. Accordingly, this rule does not infringe upon legitimate State prerogatives in those areas.

f. Exceeding Statutory Purpose Concerns

**Comments Received**

A few commenters asserted that the original purpose of the NFA was to use the tax code solely to provide a basis for prosecuting “gangsters” who possessed untaxed, unregistered firearms, and not to prohibit NFA firearms, or eliminate the ability to transfer them to law-abiding citizens who paid the tax and followed the registration procedures. One of these commenters further asserted that by passing the Firearm Owners’ Protection Act (FOPA), Pub. L. 99-308, 110 Stat. 449 (1986), Congress made clear that “ATF’s regulations and enforcement activities of *legal owners* of firearms—like those who seek to register firearms under the NFA—had already gone too far.” Specifically, this commenter quoted section 1(b) of FOPA, as prohibiting the Department from placing “undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms” when implementing the GCA. These commenters asserted that the proposed rule exceeds the statutory purpose as it is not a provision to ensure the payment of NFA tax, and it imposes additional undue and unnecessary burdens on law-abiding citizens.

Another commenter, citing the Supreme Court’s decision in *Mistretta v. United States*, 488 U.S. 361 (1989), asserted that the proposed rule represented an “aggrandizement of executive power” and a violation of the separation of powers doctrine because it would function as an amendment to existing legislation.

Another commenter stated that ATF lacked statutory authority to promulgate a regulation creating a new class of persons (i.e., responsible persons)—and to require that a transferee provide additional information (i.e., for the purposes of background checks) to be submitted by principal, agents, or employees of the transferee. This commenter maintained that Congress is familiar with the term “responsible person” and cited two statutory sections where the term was used (i.e., 18 U.S.C. 841, where “responsible person” means “an individual who has the power to direct the management and policies of the applicant pertaining to explosive materials,” and 21 U.S.C. 379aa, which refers to the “responsible person” as “the manufacturer, packer, or distributor whose name . . . appears on the label of a nonprescription drug marketed in the United States.”). This commenter maintained that Congress has debated, on numerous occasions, background checks for firearms and has chosen, “through its act of omission,” not to create a responsible person definition for the NFA or firearms. This commenter argued that the proposed rule was an “end run” around Congress.

### **Department Response**

The Department does not agree with comments that this rulemaking exceeds its authority to issue regulations for administration of the NFA. Congress granted the Attorney General<sup>4</sup> express authority to establish, by regulation, the procedures to be used for the transfer of NFA weapons, including the manner in which transferees and transferors are identified on NFA application forms. *See* 26 U.S.C. 5812(a). The Attorney General has, in turn, delegated that authority to ATF. *See* 28 CFR 0.130(a) (delegation of authority to ATF to administer laws related to firearms under 18 U.S.C. chapters 44 and 53). This rulemaking is being undertaken by

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<sup>4</sup> Congress originally delegated the authority to promulgate NFA regulations to the Secretary of the Treasury; Congress re-delegated that authority to the Attorney General. *See* 26 U.S.C. 7801(a)(2); 28 U.S.C. 599A(c)(1).

ATF under its authority delegated by Congress and the Attorney General. *See* 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A)(i), 7805(a); 28 CFR 0.130(a).

To the extent commenters assert that the proposed rule is inconsistent with the purpose underlying the NFA, the Department respectfully disagrees. The history of the NFA makes clear that Congress intended to use its tax authority to ensure the transfer of certain firearms was subject to a transfer tax and registration requirement to help prevent violent criminals from obtaining those firearms.

During the Great Depression, the Nation faced the difficulty of controlling violence by gangsters. Representative Robert L. Doughton noted that “for some time this country has been at the mercy of the gangsters, racketeers, and professional criminals.” 78 Cong. Rec. 11,400 (1934). The Attorney General, Homer Cummings, warned Congress that “there are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined.” *Nat’l Firearms Act Hearings on H.R. 9066 Committee on Ways and Means*, 73d Cong. 4 (1934). In reviewing the legislative history, modern courts have noted, for example, that “the emergence of organized crime as a major national problem led to the enactment of the National Firearms Act of 1934.” *Lomont*, 285 F.3d at 11. In 1934, Congress passed the NFA requiring everyone, including criminals, to register NFA firearms or face prosecution for failing to do so. In this way, Congress intended to keep criminals from obtaining NFA firearms or, if they obtained these firearms, to provide a powerful tool with which to prosecute them. When questioned about the impact of the tax and registration requirements on law-abiding citizens, the Attorney General testified that the requirement is “not an irrational request to make of the honest citizen who wants the criminal class stamped out.”

*Nat'l Firearms Act Hearings on H.R. 9066 Committee on Ways and Means, 73d Cong. 25*  
(1934).

The proposed rule's definition of "responsible person," and its requirement that such persons undergo a background check prior to making or receiving an NFA firearm, are fully consistent with this legislative history and with the intended purpose of the NFA. The proposed rule serves Congress's intent in passing the NFA because it further denies criminals the ability to obtain NFA firearms. The proposed rule does not meaningfully limit the availability of firearms to the law-abiding public.

A similar response applies to the comments asserting that the proposed rule's requirement that responsible persons undergo a background check is inconsistent with Congressional intent underlying FOPA. The Department is certainly aware that, in passing FOPA, Congress expressed that it was not its intent to place undue or unnecessary restrictions or burdens on law-abiding citizens with respect to the lawful private possession of firearms for lawful purposes. FOPA, Pub. L. No. 99-308, 100 Stat 449 (1986). However, this expression of intent was set out in a section of FOPA amending the GCA, not the NFA. In the context of the dangerous class of weapons regulated by the NFA, the Department's assessment is that the background check requirement is within its statutory authority, and the regulatory burden is proportionate and appropriate.

In any event, the rule in no way places undue or unnecessary Federal restrictions or burdens on law-abiding citizens, but rather imposes regulations reasonably designed to fulfill the purposes of the NFA. The proposed rule is crafted to ensure consistent application of the law and effectuate Congress's preference that criminal background checks be conducted on unlicensed persons to whom firearms are transferred, including those who exert control over



NFA firearms on behalf of trusts and legal entities. By defining many individuals affiliated with trust and legal entities who exert control over NFA firearms as “responsible persons” and requiring them to undergo background checks, the proposed rule helps achieve the Congressional objective of preventing the transfer of firearms to those who are prohibited or otherwise ineligible to possess or receive them.

g. Miscellaneous

One commenter challenged the adequacy of the industry impact disclosures in the proposed rule, asserting they were inaccurate and incomplete. Another commenter generally asserted that the proposed rule violated the constitutional rights of corporations.

**Department Response**

The Department has undertaken its best efforts to accurately calculate the rule’s benefits and costs. The Department believes the financial impact information contained in the NPRM refutes the commenter’s challenge to the adequacy of the financial impact disclosures. The Department fully and accurately assessed the financial impact of the cost of this rulemaking on all interested parties, including various segments of the firearms industry; businesses that depend on the firearms industry; firearm purchasers; State and local police; trust attorneys, and its own resource costs in administering the proposed rule. The information set forth in the NPRM with respect to financial impact meets or exceeds the thresholds required for the proposed rule to become a final rule.

The NPRM included the required statutory and executive order review, which fully addressed the financial impact of the proposed rule. These reviews concluded that the annual effect of the proposed rule on the economy will not exceed \$100 million and that the proposed rule would not adversely affect in a material way the economy, a sector of the economy,

productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Accordingly, the proposed rule did not reach the threshold of an economically significant rulemaking under Executive Order 12866.

Moreover, because the statutory and executive order reviews in the NPRM included the costs of CLEO certification in their assessments, the cost estimates included in each of those reviews significantly overstate the cost that will be associated with the final rule. As noted, the final rule has eliminated the CLEO certification requirement and replaced that requirement with a less burdensome notice requirement. Thousands of commenters agreed that CLEO certification was the most expensive and cumbersome aspect of the proposed rule, and asserted that the elimination of the CLEO certification provision would result in substantial cost savings to the public and law enforcement. Examples of savings suggested in the comments included: (1) would-be applicants intended to create trust entities solely for the purpose of avoiding the CLEO certification process will now save the cost of that trust creation; (2) applicants who opt not to create a trust or cannot afford a trust will no longer have to expend time and resources obtaining CLEO certification; and (3) State and local law enforcement will not be required to expend the time and resources needed to complete certifications.

The Department does not agree that requiring responsible persons of trusts and legal entities to provide identification information and submit to a background check violates the constitutional rights of those entities. Background checks are lawful as applied to individuals, and the Department believes they are similarly lawful when applied to the responsible persons behind corporate entities. In fact, responsible persons of FFLs are subject to a background check, as are responsible persons of corporate entities that wish to obtain explosives permits or

licenses. There is no reason to believe that because NFA weapons are involved, that same approach violates the Constitution in this context.

#### 4. Consequences of Implementing Rule

##### **Comments Received**

Many commenters stated that the CLEO certification requirement makes the proposed rule “unworkable” and demonstrates the need to eliminate this requirement for individuals as well. A few other commenters foresaw the proposed rule exposing ATF to potential lawsuits filed by law-abiding citizens who could not obtain NFA weapons because some CLEOs refuse to certify NFA applications, and protested that the proposed rule would eliminate the option of obtaining NFA items without a CLEO certification through a trust. See section IV.C.4.c, on general applicability, for additional information. Others added that that the certification requirement was an unworkable burden on both NFA applicants and State law enforcement agencies and that nothing in the proposed rule suggests that ATF has any intention to expand the size or funding of the NFA Branch to handle the increased workload as the number of individuals and Forms to check would drastically expand.

Several commenters stated generally that the proposed rule would cause “unintended consequences” and have “negative repercussions.” Many commenters stated that the proposed rule has the potential to dramatically increase the processing times and further burden what they regard as ATF’s already overwhelmed NFA Branch, which they assert presently takes 8 to 10 months—with some commenters stating even longer times, (e.g., 6-15 months)—to process an application. One commenter stated that the NFA Branch would come to rely more on CLEO signoffs and would fail to thoroughly vet transferees as it would struggle to maintain an acceptable rate of transfer approvals. The commenter asserted that the CLEO process in its

current form is marred by corruption (e.g., bribery; cronyism) in many jurisdictions, and feared that a prohibited person could exploit the corruption created by the expanded CLEO requirement to obtain and misuse a NFA firearm, as the ATF would be forced to rely upon the CLEO certification to keep pace with review of the number of forms submitted. A few commenters stated that the proposed rule would impact trustees' abilities to manage trusts with the proposed requirement for new responsible persons to submit a Form 5320.23 as well as obtain a CLEO sign-off within 30 days of the new responsible person's appointment. Another commenter alluded to potential State actions whereby States may enact legislation and put in place systems to obtain and sell or transfer machineguns to their citizens—nullifying ATF's authority—since individual gun rights have been afforded greater respect in a number of States after *Heller*, 554 U.S. 570. The commenter stated that, under 18 U.S.C. 922(o), a State has a clear congressionally-granted power to transfer machineguns to any individual if authorized by State law. Still other commenters stated that the proposed rule would have negative economic effects, including damage to the suppressor<sup>5</sup> industry and related small businesses, increased costs to local law enforcement agencies, and potential loss in tax revenue and funding to ATF. See section IV.E.1.g.i for full discussion of lost tax revenue.

Several commenters expressed concern that the proposed rule would impact an applicant's ability to file applications electronically.

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<sup>5</sup> "Suppressor" is a term commonly used by the firearms industry and the general public to refer to firearms that are defined in the NFA as "silencers." The Department generally uses the word "silencer" in this preamble because that is the statutory term. See 26 U.S.C. 5845(a)(7) (defining silencer for purposes of the NFA by cross-reference to 18 U.S.C. 921(a)(24)).

## **Department Response**

As previously stated, in response to the concerns expressed by commenters, the final rule will no longer include a CLEO certification provision; instead, the final rule will include a CLEO notification provision that will require applicants simply to notify the CLEO in writing of the application in accordance with the language of the final regulation. Thus, the many concerns expressed by commenters regarding the CLEO certification are moot. The Department also believes that with the shift to CLEO notification, there will be cost and time-saving benefits for all applicants.

Likewise, concerns about the Department's reliance on CLEO certification to complete background checks on NFA applicants are moot. The Department will continue to conduct background checks in accordance with established procedures.

The Department believes it has considered all reasonably foreseeable consequences and possible repercussions arising from the rule. As with most meaningful changes to regulations or laws, the new rule may cause some operational or procedural changes, and may alter the workload and costs for industry members and Government workers. The Department acknowledges that this final rule may increase the time required to process applications received from trusts and legal entities, as well as for individuals, as an increased number of applications undergo more complete checks. The Department estimates that this final rule initially will increase processing times of these applications from the current four months processing time to six to eight months for processing. The Department anticipates that this time will be reduced once the NFA Branch adjusts to the new process. In addition, ATF will work to increase its resources and staffing to process the applications. Of course, continued increases in the number of applications submitted may correspondingly continue to place pressure on processing times.

The Department has done its best to consider all possible consequences arising out of the final rule and has considered, among other things, the increased operational cost for the Government and industry members; the increased cost associated with additional fingerprint cards and photographs for responsible persons; and the increased labor cost associated with the time it takes for applicants and industry members to complete the required forms. Having considered all of the reasonably foreseeable costs and benefits, the Department has determined that the benefits of ensuring NFA weapons are less easily obtained by persons prohibited from possessing them outweigh the cost of implementing the rule.

In response to commenters who believe that this rulemaking may “goad” States into passing firearm laws that attempt to “nullify ATF’s authority” in this area, the Department has two responses. First, the Department does not believe that State efforts to interfere with the rule’s effectiveness lessen the need for it. The Department believes that the rule will help to fulfill the purposes of the NFA and help to ensure public safety even if State efforts might make it somewhat less effective than it would otherwise be.

Second, the Department believes that, to be valid, State firearms laws must be consistent with Federal law. The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that State law that conflicts with Federal law is “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). When determining if such a conflict exists, the “purpose of Congress” is the ultimate touchstone. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The purpose of

the NFA is to enhance public safety and ensure that prohibited persons do not obtain firearms. State laws that conflict with the NFA's purpose may therefore be preempted.

## 5. General Alternatives to Rule

Many commenters stated the proposed rule failed to consider more cost effective and practical alternatives that would enhance public safety and enable ATF to better meet administrative obligations under the NFA, and suggested other mechanisms that ATF should consider. The majority of commenters suggested that ATF eliminate the CLEO certification requirement for all NFA transactions, for reasons discussed in section IV.C.1. Many commenters also proposed general alternatives. These proposed alternatives included eliminating the NFA altogether; removing some categories of items subject to NFA regulation (such as silencers); varying the regulatory requirements depending on the nature of the NFA item; amending NFA transaction forms to more strongly emphasize criminal liability for possession by a prohibited person; developing and improving enforcement efforts; and improving the administrative process.

### a. Eliminate the NFA Altogether

#### **Comments Received**

Several commenters suggested that the NFA transfer procedures be repealed. Some of these commenters suggested replacing NFA transfer procedures with the issuance of "NFA cards," that would allow the card-holder to purchase any NFA weapon. One of these commenters recommended that card applicants be required to undergo background checks and submit fingerprints and photographs.

Several commenters, including FFLs, who urged repeal of the NFA, suggested that transfer of NFA firearms should be handled in the same manner as GCA transfers, with either the

\$200 tax and registration requirements being abolished or having the tax collected at the point of sale by the FFL. One of these commenters asserted that a simple and effective background check by the FBI's National Crime Information Center would serve the same function as the current NFA procedure at greatly reduced cost. Another commenter characterized NFA regulations as "archaic" and argued that they should be repealed and changed in light of "advances in technology and linked NICS databases." Another commenter urged that ATF abolish the requirements for fingerprints, photographs, and CLEO certification for all NFA transfers and add a requirement that the NFA Branch process and return all new applications in no more than 10 business days from date of receipt.

### **Department Response**

The Department does not have the authority to repeal the NFA or any of its provisions; the NFA is a statute that only Congress may repeal or alter. Only Congress can remove a weapon from the purview of the NFA, or alter, increase or decrease, the making or transfer tax on a NFA weapon. ATF does not have the authority to change any of the requirements mandated in the statute. The NFA provides very limited authority to permit exemptions from the transfer tax, and commenters' requested exemptions do not fall within that authority.

Specifically, the NFA provision governing the making of an NFA firearm, 26 U.S.C. 5822, requires that a person who seeks to make an NFA firearm (a) apply to make and register "the firearm," (b) pay applicable taxes on such firearm, (c) identify the firearm to be made, (d) identify himself, and if an individual, "include his fingerprints and his photograph" and (e) obtain "approval of the Secretary to make and register the firearm." 26 U.S.C. 5822. The statutory provision governing the transfer of NFA weapons, 26 U.S.C. 5812(a), is substantively similar to section 5822, requiring (a) an application for the specific firearm, (b) the



payment of relevant taxes, (c) identification of the firearm, (d) identification of the applicant (with fingerprints and a photograph required for individuals), and (e) approval of the transfer of the firearm. The Department therefore cannot abolish the fingerprint and photograph identification requirements, nor issue blanket permits to individuals to make or transfer NFA firearms.

To the extent commenters would like the Department to change how it conducts its background checks, or not require fingerprints and photographs for applicants that are not individuals, the Department believes that its current procedures for background checks are the best means of ensuring that prohibited individuals do not obtain NFA firearms, and that it would be administratively burdensome and encourage circumvention to create different application requirements for individuals, on the one hand, and trusts and legal entities on the other.

b. Remove Certain Categories of Items Subject to NFA Regulation or Subject Them to Minimal Regulation Within the NFA Framework.

Many commenters suggested that certain categories of NFA-regulated items should be removed. A few commenters stated that silencers, short-barreled rifles, short-barreled shotguns, and weapons falling within the NFA's "any other weapon" (AOW) definition should be regulated in the same manner as non-NFA firearms—requiring only a NICS background check when transferred from an FFL. Another commenter suggested that there be a more nuanced approach to regulating NFA items—not a one-size-fits-all approach—and that some could have fewer regulatory requirements than others. The suggestions for treatment of the particular categories are separately addressed.

i. SBRs, SBSs, and AOWs

**Comments Received**

Many commenters argued that SBRs and SBSs are functionally no different than handguns. The same commenters noted that a criminal could easily make an SBR or SBS by cutting down a long gun, and stated that SBRs and SBSs should be treated the same as handguns. Several commenters argued that SBRs and SBSs are less accurate than handguns. These commenters asked how SBRs and SBSs are more deadly or more dangerous than AR-15-style pistols and other handguns that are more readily concealable.

A few commenters stated that ATF should deregulate SBRs and SBSs and remove them from the NFA. These commenters suggested that ATF allow FFLs to sell SBRs and SBSs in over-the-counter transactions, in the same manner as GCA long guns (rifles and shotguns). A few commenters stated that there is no reason to regulate SBRs and SBSs when these items are not normally used in crimes. A few other commenters stated that continuing to regulate these items will have no impact on crime.

Many commenters also believed that AOWs do not warrant NFA classification, and should also be handled under GCA transfer standards. These commenters noted that AOWs generally pique the interest of collectors—not criminals—and are therefore owned by law-abiding citizens for lawful purposes. Another commenter suggested that ATF increase taxes on machineguns, and remove SBRs and SBSs from NFA regulations. Another commenter suggested that ATF direct its investigative energies toward AOW and machinegun applications, and apply lesser treatment for SBRs and silencers (i.e., NICS check only). Other comments pertaining to silencers are addressed in section IV.B.5.b.ii, below.

## **Department Response**

As noted, only Congress can bring a weapon under the purview of the NFA, and only Congress can repeal or remove a weapon from the purview of the NFA. All of the weapons referenced in these comments (SBSs, SBRs, silencers, AOWs, and machineguns) have been designated NFA weapons since the statute was enacted in 1934. With the exception of the reduced transfer tax on AOWs, no statutory provision in the NFA specifically provides for differing treatment of NFA firearms. While ATF has the authority to remove some firearms from the purview of the NFA due to certain factors that make them primarily a collector's item and not likely to be used as a weapon, ATF does not have the authority to change the definition of "firearm" under 26 U.S.C. 5845(a). To the extent that commenters would like the agency to take a more flexible approach to regulating NFA firearms, for example, by reducing or eliminating background checks, the Department takes the position that uniform measures best fulfill the NFA's statutory purposes and benefit public safety.

### **ii. Silencers**

#### **Comments Received**

The Department received a number of comments concerning silencers (commonly known as "suppressors," *see supra* note 5). Many commenters pointed out that silencers do not measurably contribute to gun violence and are important and popular safety devices within the hunting and shooting sports communities to protect from hearing loss and reduce noise pollution, and may also be used for home protection. A few commenters stated that multiple studies have clearly shown that earmuffs, even when used together with earplugs, do not adequately protect against hearing loss when firing most calibers of weapons. A few commenters pointed out that silencers do not make a gun silent, and provided information showing the silencers' goal is

simply to reduce the sound to a certain decibel level to avoid hearing damage. One commenter provided in-depth research and data on noise-reducing benefits and superiority of silencers to ear-level devices. This commenter asserted that the proposed rule represents a step backward in protecting against hearing loss. Many commenters stated that several other countries with much stricter gun regulation than the United States (e.g., United Kingdom, Finland) sell silencers without restriction and directly “off the shelf.” Another commenter stated that many countries encourage the use of silencers to keep noise down and improve hearing safety. Many commenters observed that silencers are legal in several States (e.g., North Carolina, Washington, Texas). Many commenters advocated that silencers should only require a NICS check. Another commenter suggested that if ATF retains the CLEO certification requirement, silencers be exempted from such a requirement. Another commenter suggested that ATF reduce the tax stamp cost for silencers to \$5.00 or to remove silencers from the NFA altogether. Another commenter stated that silencers should not need a tax stamp in States that permit silencers.

### **Department Response**

The NFA defines silencers as firearms. 26 U.S.C. 5845(a)(7). The NFA defines the word “silencer” by reference to section 921 of title 18, *see id.*, which defines the terms “firearm silencer” and “firearm muffler” to mean “any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.” 18 U.S.C. 921(a)(24). Thus it is the NFA statute, and not the Department, that defines silencers (or “suppressors”) as firearms for purposes of the NFA. And because silencers are “firearms” for purposes of the NFA, they are

subject to the restrictions on making and transferring firearms in the NFA. *See* 26 U.S.C. 5812(a), 5822.

As noted, only Congress can remove a class of weapons from the purview of the NFA. ATF does not have the authority to remove silencers from the NFA and does not believe it would be prudent to make different types of firearms subject to different background check requirements. The NFA provides very limited authority to permit exemptions from the transfer tax, and commenters' requested exemptions do not fall within that authority. ATF also lacks the authority to reduce tax stamp costs associated with NFA firearms, as those costs are fixed by statute. Finally, given that the Department is not requiring CLEO certification for any items covered by the NFA, the comments relating to removing the CLEO certification requirement for silencers are moot.

c. Ways for ATF to Stress Criminal Liability for Possession by a Prohibited Person

**Comments Received**

A commenter suggested that ATF amend all forms associated with NFA transactions to add warnings indicating that any individual or any member of a legal entity that permits a prohibited person access to any NFA item has committed a criminal act. The added language should also state that for a legal entity, the criminal responsibility for permitting such access rests with the legal entity and all of its individual members. The commenter further asserted that legal entities are not widely used by prohibited persons to acquire or possess NFA items because the NFA forms submitted to ATF identify all members of the legal entity involved in the transfer, and a prohibited person would likely fear being identified from the form and prosecuted. The commenter asserted that no evidence exists that ATF actually uses these names to identify, investigate, and prosecute criminal acts, and he suggested that ATF should do more to develop

efforts to identify, investigate, and prosecute possession of NFA items by prohibited persons. If ATF were to institute such efforts, ATF could establish an information baseline to show the extent of any illegal practices, which could support any necessary regulatory or legislative changes.

### **Department Response**

The Department believes that current NFA transfer forms (ATF Forms 1, 4, and 5) adequately convey information about the penalties for unlawful possession of an NFA weapon. With respect to the assertion that legal entities are not widely used by prohibited persons to circumvent background checks, the absence of background checks for transfers involving trusts or legal entities renders it extremely difficult to assess how often prohibited persons have obtained NFA firearms through such transfers. Finally, ATF enforces the criminal laws within its jurisdiction, and if it becomes aware of any firearm—including NFA firearms—in the possession of persons prohibited from having it, it will take appropriate actions.

#### **d. Miscellaneous General Comments**

### **Comments Received**

A few commenters requested that ATF reopen the NFRTR to permit the legal ownership of machineguns manufactured after 1986 (post-1986 machineguns). A few other commenters suggested revising the requirements by simply eliminating the “cut off” date in the NFA to allow for newly manufactured NFA weapons (e.g., machineguns, automatic rifles) as the current stock is very limited, and to replace worn and unsafe weapons with new guns when “old weapons become nothing more than high-priced collector items.” A commenter stated that this change would reduce the purchase price due to increased market availability and would increase tax revenue. This same commenter supported a higher cost tax stamp for the post-1986

machineguns, and for these guns to continue to be heavily regulated. Another commenter stated that having new firearms available would greatly increase the income of both government and private firearms manufacturers, which benefits local governments through sales tax.

A commenter stated that ATF needs to rewrite the proposed rule to comply with the Plain Language Act of 2010. Another commenter suggested that, prior to drafting regulations, ATF should start a dialogue to enable “sound and rational” regulations to promote safety without the “animosity and conflict” that has divided the country on so many issues. Another commenter expressed his willingness to work with ATF to conduct geographic information system research to help devise a common sense approach to crime reduction. One commenter suggested that ATF delay the final rule’s effective date to allow ATF to process its backlog of NFA applications.

A few commenters asked general questions and for additional information about other terms used in the proposed rule. For example, a commenter requested that ATF define the term “make” and asked if the proposed rule applied to all firearms or only to fully automatic weapons. Another commenter stated that the term “certain other firearms” was so vague that most semi-auto cartridge firing mechanisms would be considered illegal. Another commenter asked about a “destructive device.” This commenter asked what “constitutes” a destructive device, and for guidance to ensure that this term is not open-ended.

### **Department Response**

ATF does not have the authority to remove the general prohibition on the transfer and possession of machineguns that were not lawfully possessed on May 19, 1986. This is a statutory prohibition and therefore only Congress has the authority to remove this prohibition. 18 U.S.C. 922(o). Further, the statute requires that any machinegun be lawfully possessed by

May 19, 1986. ATF does not have the authority to permit nongovernmental entities the ability to possess machineguns or other NFA firearms that are not lawfully registered in the NFRTR.

With respect to commenters who believe that the Department should engage in additional dialogue or gather more data before issuing this rule, the Department disagrees. The Department has complied with the notice and comment procedures in the Administrative Procedure Act, other requirements imposed by statute, and relevant procedures required by the President for the promulgation of rules. The Department invited public comment to improve and refine the proposed rule and it has used public comments to do so. But the Department is not persuaded that further delay in promulgating the rule is likely to improve it or is otherwise in the public interest.

The Department does not agree with the comment asserting that the final rule's effective date should be delayed until the backlog of NFA applications has been cleared. ATF's capacity to process NFA applications during a given timeframe is limited by resource constraints; absent a dramatic reduction in the number of applications ATF receives, it will likely continue to have some number of applications that await processing (i.e., a "backlog"). That said, ATF has substantially reduced the backlog of pending applications over the course of the past year.

The terms in the proposed rule about which the commenters sought clarification, such as "make" and "destructive device," are defined by the NFA and in its supporting regulations. The definitions may be found in 26 U.S.C. 5845 and 27 CFR 479.11.



### *C. Comments Addressing Specific Portions of the Rule*

#### 1. CLEO Certification

##### a. CLEO Certification Is Unnecessary and Unreasonable

#### **Comments Received**

Several commenters stated that ATF's access to NICS and other databases provides a more accurate background check than a CLEO certification. These commenters stated the CLEO signoff is "worthless," as the CLEO's signing or refusing to sign is in most cases based on the CLEO's personal political preferences; the CLEO signature has potential for abuse with the signature given for political support or other compensation; and that even on the limited occasions CLEOs perform background checks, they use NICS or the State equivalent for this type of check. Many commenters, noting that the CLEO certification requirement predated NICS, asserted that the CLEO certification no longer serves its original purpose. One commenter described the certification as "antiquated and a gross waste of resources." Another described it as "outdated, redundant, and superfluous," and urged ATF to eliminate it under the guidance provided in Executive Order 13610 of May 10, 2012, "Identifying and Reducing Regulatory Burdens."

Several other commenters noted that ATF acknowledged in the proposed rule that even without CLEO certification, ATF already has a "fuller picture of any individual than was possible in 1934." Many commenters also generally noted that technological and societal changes have made it less likely that a CLEO is the best source for information indicating an individual may be prohibited from firearm possession. One commenter observed that many applicants never previously interacted with their local CLEOs, and, consequently, CLEOs do not serve the function they once did to assess the character or potential of an individual to misuse an

NFA item. Many commenters agreed with this assessment as they personally never had any interactions with their local CLEOs.

Many commenters asserted that the sign-off creates an insurmountable challenge and an unreasonable burden on applicants and CLEOs. Hundreds of commenters agreed that the consequence of retaining CLEO certifications for individuals and extending this requirement to responsible persons associated with legal entities would result in a *de facto* ban of NFA firearms, because they report that some CLEOs will not provide the necessary certification.

Several commenters raised privacy concerns with the CLEO certification requirement, and asserted it should be completely eliminated in the interest of protecting personal tax information. These commenters considered the \$5 or \$200 tax paid to manufacture or transfer a NFA firearm or device to be “protected” or “confidential” tax information, and stated that the mere application before paying the tax should not be reported to or involve any local CLEO or other government official. Another commenter questioned why his private tax information must be subject to law enforcement inspection and approval. This commenter worried that his personal, nonpublic information might become public record if the local law enforcement agency received a Freedom of Information Act request. The commenter stated that ATF has a “well structured system for protecting [his] applications;” however, he did not know of any Federal or State guidelines applicable to local law enforcement protecting his personal tax information. A few other commenters also raised concerns with some CLEOs retaining copies of the forms they sign. These commenters stated that they cannot object to such retention or they would never receive signoff from the CLEOs. A few commenters believed that sharing Federal tax information involuntarily with local agencies was against the law. Another commenter

expressed concern that his personal privacy was also invaded by permitting local government officials to know what firearms are in his home.

In addition, several commenters asked general questions about why CLEO certification was needed at all or why CLEO certifications are not required on all firearm transfers. Another commenter noted that there is no CLEO certification requirement for SOT-licensed manufacturers of NFA items to obtain their licenses, and such manufacturers merely need to send an “intent letter” informing local police agencies of their intent to manufacture NFA items in their local areas. This commenter asked how ATF determines SOT manufacturers are “trusted” persons with no CLEO certification. Further, this commenter opined that manufacturers of NFA items “pose greater risk” and should have “considerably more scrutiny” than an individual or legal entity desiring to possess a few items.

### **Department Response**

The Department acknowledges that some trusts and legal entities would be unable to obtain a CLEO certification, for reasons other than a responsible person being prohibited or local ordinances prohibiting such firearms, which would result in those trusts and legal entities being unable to obtain an NFA firearm. As the proposed rule was not intended to deny those trusts and legal entities the opportunity to acquire such firearms where permitted by law, the Department has changed the CLEO certification to a CLEO notification. Additionally, the Department believes that with the shift to CLEO notification, there will be cost and time-saving benefits for all applicants, including those who find the current CLEO certification process daunting.

The Department disagrees with the concern that providing the application to make or transfer NFA items to local law enforcement as part of CLEO notification is an unlawful release of tax information. Since the application has not been received by ATF at the time of CLEO

notification, it does not constitute “return information.” *See Lomont*, 285 F.3d at 15.

Additionally, while it is unlawful for employees of the Federal Government to release an individual’s tax information, *see* 26 U.S.C. 6103(a), in this instance it is the individual that shares the information. Therefore, even if such information were “return information,” no employee of the Federal Government would be disclosing it. *Lomont*, 285 F.3d at 15.

The Department does not agree with commenters that ATF does not have the authority to formulate regulations enforcing the provisions of the NFA. Congress expressly delegated authority to the Attorney General in section 5812 and 5822, among other sections. Congress provided the Attorney General with the authority to require certain identification procedures for transferors and transferees. *See* 26 U.S.C. 5812(a) (providing, *inter alia*, that “[a] firearm shall not be transferred unless . . . the transferee is identified in the application *form in such manner as the Secretary may by regulations prescribe*, except that, if such person is an individual, the identification must include his fingerprints and his photograph . . .” (emphasis added)); 26 U.S.C. 5822 (same with respect to making firearms). These sections require fingerprints and photographs for individuals at a minimum, but the information that the Attorney General can seek is not limited to these things. Finally, the Attorney General has delegated the authority to the Director of ATF to investigate, administer, and enforce the Federal firearms laws. *See* 28 CFR 0.130.

Finally, the Department has the authority to require CLEO notification for the same reason that it has the authority to require CLEO certification. Sections 5812 and 5822 give the Department broad authority to promulgate regulations governing application forms, including regulations pertaining to the identification of a firearm and its maker or, in the case of a transfer, its transferee and transferor. *See* 26 U.S.C. 5812(a), 5822. Both sections provide that

applications “shall be denied” if the transfer, receipt, making, or possession of the firearm would place the transferee or person making the firearm in violation of law. *See id.* Neither, however, “restricts the Secretary’s broad power to grant or deny applications in any other respect.” *Lomont*, 285 F.3d at 17. The notification requirement thus falls within the Department’s authority to request information from individuals who seek to make or transfer NFA firearms that helps it to fulfill its statutory mandate to prevent prohibited individuals from obtaining NFA firearms.

b. Authority to Require CLEO Certification

**Comments Received**

Many commenters stated that the proposed extension of the CLEO certification requirement exceeds ATF’s statutory authority. A few commenters noted that ATF cites to 26 U.S.C. 5812 and 5822 of the NFA as the statutory authority for the proposed rule, but disputed that these statutory provisions provided ATF with authority to impose a CLEO certification requirement on individuals, much less a responsible person of a legal entity. These commenters argued that section 5812 authorizes ATF to prescribe the form of NFA applications with the limited purpose of identifying the transferor, transferee and firearm, and that seeking opinions from local CLEOs goes beyond establishing the actual identity of the applicant.

One commenter asserted that the Attorney General cannot delegate the duties of the office to a CLEO—a non-Federal agency—as a CLEO’s arbitrary or capricious actions, or failure to act, are not subject to review under the Administrative Procedure Act (5 U.S.C. 551-559). Other commenters stated that ATF cannot delegate this authority arbitrarily to itself or to a third party without authorization from Congress and that requiring CLEO certification gives “absolute and unchecked discretion” to local CLEOs. Another commenter stated that no

provision in the NFA provides ATF the authority to refuse to issue a “stamped application form” when the applicant can be identified by a method other than CLEO certification. This commenter stated that section 5812(a)(3) only requires that an individual be identified by fingerprints and photographs, not by CLEO certification. All these commenters contended that the local CLEO certification should be eliminated not expanded.

### **Department Response**

Although the Department does not agree with the assertions that ATF lacks statutory authority to require CLEO certifications, for other reasons described herein at section IV.C.1.a-d, the Department has removed the CLEO certification requirement from the final rule. Since removal of the CLEO certification requirement is the ultimate result advocated by these commenters, in-depth discussion of their assertions is not necessary to the final rule.

In addressing the comments, it must be noted that Congress provided the Attorney General with the authority to require certain identification procedures for transferors and transferees. *See* 26 U.S.C. 5812(a). These sections require fingerprints and photographs for individuals at a minimum, but the information that the Attorney General can seek is not limited to these things. CLEO certification and CLEO notification are also identification procedures authorized by section 5812(a).

Under the proposed regulation, ATF would not have delegated the application process to the CLEO. ATF merely proposed to extend to the responsible persons of trusts and legal entities the CLEO certification requirement, which was the same process that had been in place for many years with individuals. A certification was just one step involved in the process of determining if an application could be approved. These issues are moot, however, as ATF will adopt a CLEO notification process instead.

### c. CLEO Issues with Certifying

#### **Comments Received**

Numerous commenters, including trade associations and individuals, discussed the reasons some CLEOs refused to approve NFA applications. These commenters disputed ATF's statement in the proposed rule that liability concerns are a primary reason some CLEOs refuse to approve NFA applications. A commenter stated that ATF was wrong to rely on this "false premise," and requested that ATF perform a "systematic study and survey of CLEOs to develop a solution to the actual problem at hand rather than disrupt established procedures for entities developed over the past 80 years." Many commenters stated that CLEOs often refuse to sign based on personal or political concerns, not civil liability concerns. Some of the stated political reasons include that the transferee did not donate to their political campaigns; general political liability—as opposed to civil liability—concerns; and the CLEO's personal disagreement with the policy choices of the CLEO's States and Congress to permit private ownership of NFA firearms. Another commenter stated that there are jurisdictions where CLEOs collectively refuse to sign, exercising their "personal fiat." Many commenters related personal experiences purporting to show that CLEOs in certain regions and jurisdictions refuse to sign due to political party affiliation and ideological beliefs. Several commenters urged ATF to place time limits within which CLEOs would be required to act on certifications requests; if the CLEO failed to act on the certification request within the time limit, ATF would be required to proceed as if the certification had been approved. Many commenters referenced newspaper articles and other sources that provide quoted statements from local CLEOs regarding their reasons for refusal and their publicly announced policies to no longer consider applications for silencers, short-barreled shotguns, explosives, etc. Another commenter asked if ATF has proposed guidelines that

CLEOs must follow to ensure no discrimination. This commenter also asked if ATF will establish a system to prosecute and reprimand CLEOs who refuse to provide certification when there are no issues preventing such certification.

NFATCA's comment noted that in the NPRM ATF had accurately cited a quote from NFATCA's 2009 petition regarding CLEO concerns over liability (“[s]ome CLEOs express a concern of perceived liability; that signing an NFA transfer application will link them to any inappropriate use of the firearm”), but asserted that this point was secondary to its primary concern that the CLEO certification requirement was unlawful. NFATCA further asserted that in focusing on liability, ATF had failed to acknowledge that many CLEOs would not sign NFA certifications for reasons other than liability, such as budgetary concerns and opposition to private ownership of NFA firearms, or firearms in general.

NFATCA, the American Silencer Association (ASA),<sup>6</sup> and a majority of other commenters, all advocated complete elimination of the CLEO certification requirement.

### **Department Response**

The Department acknowledges that there are many reasons why a CLEO may not sign an NFA application. Taking these concerns and other factors into consideration, the Department has removed the CLEO certification requirement from the final rule.

The Department notes, however, that its decision to remove the certification requirement from the final rule does not reflect agreement with assertions, such as those put forward by NFATCA in the comments, that the CLEO certification requirement is unlawful.

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<sup>6</sup> Now known as the American Suppressor Association.



#### d. Alternatives to CLEO Certification

##### **Comments Received**

The majority of commenters were opposed to the expanded CLEO certification requirement, and many suggested alternatives to this requirement. The most commonly cited alternative was to completely eliminate the requirement for all NFA transfers. Many commenters suggested that instead of CLEO certification, ATF could require notification whereby the individual or the responsible person executing the form in the name of the legal entity must provide the local CLEO with a copy of Form 1, 4, or 5 submitted to ATF, and provide the CLEO a reasonable time for review. If, by the end of that time period, the CLEO has not provided ATF with information showing cause for denial, ATF should consider the application cleared at the CLEO level and proceed with the application. The commenters believed this alternative would meet the statutory requirements of sections 5812 and 5822 of the NFA without allowing CLEOs to arbitrarily deny applications. The time period that commenters considered “reasonable” varied, with suggestions for periods of 7, 15, 30, and 60 business days. A commenter noted that a similar process is already used with Form 7. Several commenters noted that NFATCA had recommended this alternative in its petition (i.e., eliminating the CLEO certification requirement and replacing it with notification to the CLEO of the pending transfer, combined with ATF conducting a NICS check of an individual and principle officers of a trust or legal entity). Several commenters noted that ATF previously indicated its intent—per published abstracts in the Unified Regulatory Agenda in 2011 and 2012—to propose notification instead of CLEO certification and eliminate such certification altogether.<sup>7</sup> At least one of these

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<sup>7</sup> Fall 2011 Unified Regulatory Agenda (<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=1140-AA43>) and 2012 Unified Regulatory Agenda (<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>)

commenters requested that ATF provide a reasoned explanation for changing course from a regulatory alternative that would be more “cost effective, serve legitimate statutory objectives, and avoid legal vulnerabilities.”

A few commenters suggested ways to amend §§ 479.63 and 479.85, as well as Forms 1, 4, and 5, to provide for a notification process similar to the one the Department has chosen to adopt. One commenter provided specific language to replace the CLEO certification on Form 1. Another commenter suggested replacing the CLEO certification language on Form 4 with a certified statement—under penalty of perjury or falsification of an official government form—by the individual or the responsible person of the legal entity executing the form. This statement would indicate that such individual or responsible person has “conferred with their attorney and/or the local law enforcement officials and that the individual or the entity and each ‘responsible person’ in the entity are not prohibited by local or state law from owning or possessing the items being transferred to them on the form and that they are not a prohibited ‘alien’ who cannot own or possess the items.”

Many commenters supported eliminating CLEO certification and instead requiring all members of a trust, once the application is returned “approved” from ATF, to undergo a NICS check prior to the transfer of the NFA firearm. One commenter suggested that ATF keep the NICS check requirement for the individual or responsible person completing Form 4473 to obtain the transferred item. This commenter also suggested that ATF keep the current process where only the individual or one of the responsible party(s) of a legal entity complete and sign the transfer form.

Many commenters suggested that if the objective is to prevent restricted persons from owning NFA items, a simpler solution would be to substitute fingerprinting and background

checks for the CLEO certification requirement for all NFA transfers. Many other commenters concurred with eliminating CLEO certification and making NFA weapons point-of-sale items as they saw no difference between the background checks performed by ATF's NFA Branch and those performed by FFLs.

A commenter stated that the best alternative is to either keep the status quo—requiring CLEO certification for individual applicants—or eliminate the CLEO certification requirement for trusts while retaining the need for a standard “NFA-style” background check for each individual. Other commenters requested that ATF consider either no change to ATF's stance on trusts and legal entities regarding CLEO certification or remove the CLEO certification requirement for all NFA items. Other commenters urged ATF to eliminate the CLEO certification requirement for all transfers, replacing it with various forms of automated background checks. Another commenter suggested an “equitable solution” would be to have an applicant's local police department provide a “letter of good conduct,” which states that “you are who you say you are and provides a list of any criminal offenses you may have had.” This commenter named a local police department that issued these letters quite regularly.

Many commenters questioned the intention of CLEO certification. If the objective is to verify the applicant's identity (i.e., that the applicant is the one signing the form and is the person in the provided photograph), these commenters maintained that any Notary Public could accomplish this objective. Other commenters supported methods used by other Federal agencies to verify identification, such as local police departments, State police, or fingerprinting companies. Another commenter suggested that instead of CLEO certification, that local ATF offices take the applicants' photographs and fingerprints, perform background checks, and

approve applications on the spot. This commenter suggested that the local ATF offices could additionally perform a NICS check as required by Form 4473.

Many other commenters suggested alternatives under which ATF could require individual applicants and responsible persons to provide various forms of government-issued identification with photographs to verify identity. One commenter suggested revising the application forms to include a page for individuals and all responsible persons of legal entities to attach photograph(s) showing the front and back of a currently valid State-issued identification or driver's license. Another commenter stated that ATF only needs a full name, date of birth, and Social Security number to perform background checks. Another commenter suggested that instead of having CLEOs verify fingerprints and photographs, there be a database containing an approved set of fingerprints and photograph of each applicant. Another commenter questioned the rationale for relying on CLEO approval for Federal law, and suggested for improving efficiency to either make the entire process Federal or have the entire process rely on "local/state" law.

Another commenter suggested that ATF reform the process to have the \$200 tax either be an "excise tax" payable at the point of sale or, with the advances in technology, have the retailer print out a tax stamp at the point of sale. This would enable the purchaser to complete a Form 4473, enable a NICS check to be performed, and enable remittance of the taxes through the retailer.

Although many commenters preferred that the CLEO certification requirement be completely eliminated, they also provided compromise positions if ATF were set on keeping and expanding the CLEO certification requirement. These commenters suggested that ATF make the CLEO certification a "shall issue" and require CLEOs to decide based on legal restrictions and

obligations, and sign off on the certification, if the background check is “clean” unless there is a valid reason not to sign (e.g., criminal or mental health history).

If ATF were to maintain the certification, a few commenters suggested changing the sequence of CLEO review by requiring ATF to provide the application information to the CLEO only after conducting a review. Many commenters suggested that ATF provide for judicial review of instances where CLEOs would not sign off on the certification; others requested that the CLEO be required to state the reason for the denial and provide “real tangible evidence” and state “specific, objective and legally relevant reasons” for the non-concurrence or denial.

Several commenters suggested that Forms 1, 4, and 5 be revised to provide an area indicating that the local CLEO would not sign off on the form, and in such instances ATF could require more information or perform a more extensive background check. For example, one commenter suggested adding three signature lines on the forms: (1) first line—for the CLEO to sign and state “no disqualifying information;” (2) second line—for the CLEO to sign and state “information indicating disqualification” and for the CLEO to explain the disqualification; and (3) third line—for the applicant to certify “I certify I submitted this to this CLEO (name address) over 30 days ago and received no response.”

Many commenters recommended that ATF broaden the list of officials who could provide certifications, to include local district attorneys, judges, officials in local ATF offices, or a designated official in each State, among others.

Many commenters suggested that individual applicants and responsible persons of legal entities who hold a concealed carry permit or license in the State where they reside—authorizing them to purchase, obtain, or carry weapons—should be exempt from the CLEO certification

requirement, as well as the photograph and fingerprint requirements, since State and Federal background checks have already been performed and verified.

One commenter requested that ATF consider not requiring CLEO certification for active and retired law enforcement officers, active and retired military officers, including Guard and Reserve officers, and any government employee with a security clearance, as well as FFLs. Other commenters suggested that the CLEO certification requirement be removed for silencer ownership. Another commenter recommended requiring CLEOs to sign off on forms in States where SBRs, machineguns, and silencers were legal. Another commenter recommended that ATF require differing levels of CLEO certification per NFA item, and that silencers and “any other weapons” should not be subject to CLEO certification.

Another commenter suggested simply that a large red “F” be placed on the driver’s license of a convicted felon to ensure that criminals do not obtain or use firearms, and proprietors of gun ranges and sellers of ammunition could easily ascertain who is permitted to do business with them and who is not.

### **Department Response**

Although the Department does not agree with all of the concerns expressed or suggestions made in the above-summarized comments, it does concur with the conclusion of many commenters that the benefits of CLEO certification do not outweigh the costs of the CLEO certification requirement, and that alternate procedures will satisfy the statutory requirements of section 5812 and 5822. Consequently, as previously noted, the Department has removed the CLEO certification requirement from the final rule. As an alternative to certification, the final rule adopts a CLEO notification requirement that is similar to that suggested by many commenters. In conjunction with the mandatory background check required of all applicants,

including responsible persons of trusts and legal entities, the requirement of CLEO notice fulfills the primary objectives that have supported the certification requirement: it provides the CLEO awareness that a resident of the CLEO's jurisdiction has applied to make or obtain an NFA weapon and affords the CLEO an opportunity to provide input to the ATF of any information that may not be available during a Federal background check indicating the applicant is prohibited from possessing firearms. As noted in the NPRM, although the NICS provides access to a substantial number of records to verify if an individual is prohibited from possessing firearms, CLEOs often have access to records or information that has not been made available to NICS. Providing notice to the CLEO of a prospective NFA transfer with instructions on how to relay relevant information to ATF will help fill possible information gaps in NICS by affording the CLEO a reasonable opportunity to provide relevant information to ATF.

To effectuate the CLEO notice requirement, the Department is revising the regulations in §§ 479.63 and 479.85 to require the applicant or transferee, and all responsible persons, to provide a notice to the appropriate State or local official that an application is being submitted to ATF, and conforming changes will be made to ATF Forms 1, 4, and 5. In addition, responsible persons for trusts or legal entities will be required to provide CLEO notification on ATF Form 5320.23, *NFA Responsible Person Questionnaire*.

Consistent with the recommendation of many commenters, the changes to Forms 1, 4, and 5 will also include a certification requirement by the applicant or transferee under penalty of perjury, that the applicant or transferee has provided notification to the CLEO; a corresponding change will be made to Form 5320.23 for certification by responsible persons of trusts and legal entities. Applicants will also be required to provide the name and location of the CLEO to whom the form was sent, and date the form was sent. Removal of the CLEO certification requirement

also means that CLEOs will no longer need to attest to the authenticity of the applicant's or transferee's photographs and fingerprints. To ensure verification of identity, however, the official taking the applicant/transferee's fingerprints must sign the fingerprint card to certify the official has verified identity of the applicant/transferee. In reaching the decision to substitute CLEO notification for certification, the Department determined that the proposal to have local ATF offices process NFA applications and conduct background checks was neither efficient nor feasible due to other mission requirements and resource constraints. For a discussion of other suggested alternatives the Department has elected not to implement, see section IV.C.3.c (addressing recommendations that background checks be conducted only at time of transfer) and section IV.B.1.b (addressing recommendations that NICS checks alone are sufficient for NFA transfers).

The Department recognizes comments received suggesting that the Department (1) require that CLEOs certify forms, (2) require that CLEOs provide reason for not certifying forms, (3) make judicial review available when a CLEO does not certify a form, and (4) expand the number and types of officials who may provide certifications. As the certification has been replaced with a notification, the suggested changes are no longer a necessary part of the process. Additionally, the Department rejects comments proposing that ATF, rather than the applicant, provide a copy of the application to the CLEO; ATF is prohibited from releasing an individual's tax return information.

The Department rejects the suggestion of collecting the "excise tax" and printing out the tax stamp at the point of sale. The Department believes that allowing nongovernmental entities to issue tax stamps could lead to fraud and abuse.



The Department has not adopted suggestions that the fingerprints and photograph requirement be replaced by State permitting or licensing because such State-issued documents may not meet the biometric fingerprint check requirements of 26 U.S.C. 5812 and because the background check process for each State-issued concealed carry permit or license is different and not all permits or licenses qualify as an exception to a background check. Additionally, it is unclear to what extent the Department has the legal authority to require local and State officials to aid it in implementing Federal firearms regulations.

The Department recognizes comments regarding exempting certain categories of persons and certain types of NFA firearms from CLEO certification. While CLEO certification has been replaced with a CLEO notification, all applicants, including active and retired law enforcement, active and retired military officers, and government employees with security clearances, and all types of NFA firearms, including silencers, will be subject to the notification requirement.

The Department does not adopt the suggestion of special markings on a driver's license for convicted felons. The Department does not have the authority to require this information on State-issued identification documents.

## 2. Fingerprints and Photographs for Background Checks

### a. Authority to Require Submission of Fingerprints and Photographs of Responsible Persons for Trusts and Legal Entities

#### **Comments Received**

Many commenters stated that the proposed rule exceeds ATF's statutory authority to require photographs or fingerprints of responsible persons. One of these commenters, NFATCA, acknowledged that its 2009 petition requested a requirement that responsible persons of legal entities submit photographs and fingerprints, but advised that it has changed its conclusion as to

the statutory authority of ATF to impose this requirement, and was withdrawing its 2009 recommendation. A few commenters argued that the provision of the NFA that ATF cited as authority for extending the photograph and fingerprint requirement to responsible persons of legal entities, section 5812, does not support ATF's position because the text of that section extends the photograph and fingerprint requirement only to individuals, and not to legal entities.<sup>8</sup> Because section 5812 of the statute specifically names only one class of transfers covered by this requirement (i.e., individuals), they argue, ATF is without statutory authority to extend it to any other type of transfer (i.e., those involving legal entities).

### **Department Response**

The Department does not agree with comments that this rulemaking exceeds its authority by requiring photographs or fingerprints of responsible persons. Information that the Attorney General can seek is not limited to fingerprints and photographs for individuals. The inclusion of individual transfers as a specific category that requires the submission of fingerprints and photographs in 26 U.S.C. 5812 does not equate to a limitation on the authority of ATF to extend that requirement to transfers involving trusts or legal entities. *See* 26 U.S.C. 5812.

The Department believes it may require trusts and legal entities to submit identifying information regarding their responsible persons as a component of the identifying information it requires a trust or legal entity to submit prior to obtaining authorization to receive or make an NFA firearm. Sections 5812 and 5822 provide broad authority for the Department to require the identifying information of any applicant to make or transfer an NFA firearm. Section 5812 prohibits the transfer of a firearm "unless . . . the transferee is identified in the application form in such manner as ATF may by regulations prescribe." Similarly, section 5822 prohibits the

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<sup>8</sup> The commenters limited their discussion to the text of 26 U.S.C. 5812 but noted that 26 U.S.C. 5822 provided substantively similar language in the context of an application to manufacture an NFA firearm.

making of any firearm unless the maker has “identified himself in the application form in such manner as ATF may prescribe.” The Department views the identities of responsible persons associated with trusts and legal entities as a vital aspect of the identities of those entities themselves. The very purpose of the NFA would be undermined if a criminal could use a trust or legal entity the criminal controls to obtain an NFA firearm without submitting any personally identifying information to the Department.

b. Alternatives to Requiring All Responsible Persons to Provide Fingerprints and Photographs

**Comments Received**

Many commenters asserted that all NFA applicants, including legal entities, should be required to undergo background checks and submit fingerprints and photographs. Some of these commenters differed, however, as to which individuals associated with a legal entity should be subject to these requirements. Several commenters supported background checks for trustees only. A few commenters asserted that successor trustees and other members of trusts (other than the original trustee) should be excluded. Many commenters stated that beneficiaries do not have actual possession and should also be excluded. Another commenter suggested requiring all responsible persons to submit a background check annually to the “head of the trust” to be maintained on file, and to make that head person responsible for all law enforcement approvals. A few commenters supported background checks on the “main person” in the trust or legal entity. Other commenters supported background checks on a single responsible person only. Several commenters supported background checks only on the person in the legal entity picking up the firearm.

A few commenters suggested requiring a one-time fingerprinting and background check of responsible persons associated with a trust at the creation of the trust, not on every transfer of

regulated items contained in the trust. Another commenter suggested requiring only the executor to provide fingerprints and photographs and undergo a background check one time, and that this process be repeated whenever the executor dies or forfeits the executor's position to the next person appointed as executor or owner of the corporation. Another commenter suggested only requiring fingerprints and photographs from trustees once, or perhaps once every ten years upon a new NFA item form. This commenter urged that ATF also adopt the "once every ten years rule" for individuals, too.

In addition to recommendations specific to trusts and legal entities, several commenters suggested that ATF devise alternative methods to identify individuals. Some commenters recommended the use of digital technology to submit photographs and fingerprints, citing as examples other Federal agencies such as the Securities and Exchange Commission (which uses a digital fingerprinting service) and the Transportation Security Agency (which uses a digital service to perform background checks on its employees).

### **Department Response**

The Department agrees with comments that beneficiaries should not generally be included in the definition of responsible person and has removed beneficiaries from the definition in the final rule. The Department does not agree with comments that background checks should only be conducted on the "main person" in the trust or legal entity, a single responsible person for the trust or legal entity, or only the person picking up the firearm. These recommendations fail to account for multiple individuals within a trust or legal entity that will exercise control over NFA firearms. The "responsible person" definition in the final rule accounts for such individuals, and requires them to meet the same requirements that apply to all other individuals who apply to make or possess an NFA firearm.

The Department concludes that proposals involving one-time or periodic background checks and submission of fingerprints and photographs—for example at the creation of a trust or legal entity or only once every ten years—do not meet the NFA’s requirement that each NFA transaction must be accompanied by an individual application and registration. *See* 27 CFR 479.62 and 479.84. Moreover, such proposals do not adequately ensure that an applicant is not prohibited at the time each NFA weapon is made or acquired; a background check in conjunction with each application is needed to ensure no change in status has occurred. With respect to allowing a single-submission of fingerprints and photographs, the NFRTR is a tax registry that does not have the technical capacity or statutory authorization to track such documents. The Department acknowledges that other Federal agencies utilize electronic fingerprinting technology. However, ATF does not currently have the resources to utilize this technology.

### 3. Legal Entities

#### a. Purposes of Trusts and Legal Entities

#### **Comments Received**

Many commenters stated that the proposed rule ignored or misunderstood the common circumstances surrounding the creation of an NFA trust, and did not account for the “myriad of innocuous and legitimate” reasons why a trust would own an NFA item, for example to pass the NFA item to one’s heirs. Several commenters stated that the proposed rule, by naming a beneficiary as a “responsible person,” deprived individuals from common estate planning techniques (e.g., using living trusts and naming their minor children as beneficiaries). In addition, a few commenters stated that the proposed rule intruded upon the traditional uses of trusts and upon the rights of settlors to manage their estate plans by proposing that any new

responsible person must submit a Form 5320.23 as well as a CLEO signoff within 30 days of the responsible person's appointment.

Many commenters stated that trust use is on the increase as many people live in areas where the CLEO simply will not sign an NFA certification, causing law-abiding citizens to use trusts and corporations to bypass the CLEO certification requirement in order to lawfully make or obtain an NFA weapon. One of these commenters added, "[t]he simple truth is, corporations and trusts are formed NOT to circumvent background checks, but to take power away from an antiquated unfair system of CLEO signoff."

Many commenters stated that a trust's main purpose is to hold assets, property, and expensive collector investments for inheritance, and as such is a critical estate planning and management tool. Other commenters stated that trusts are being used to lawfully permit multiple people and families to share access to, and use, legally owned and registered NFA items. These commenters noted that without a trust, only the person who directly purchased the NFA item can lawfully possess it. Another commenter asserted that absent ownership by a trust the NFA item must always be in the registered individual's possession when it is out of the safe. Several commenters noted that the NFA makes it unlawful for any person "to possess a firearm that is not registered to him in the National Firearms Registration and Transfer Record."

26 U.S.C. 5861(d). Hence, if the item is registered only to an individual, and not a trust or legal entity, then family members of the registrant who possess or use the NFA item are exposing themselves to serious criminal charges. *See* 26 U.S.C. 5871, 5872. Several commenters provided personal examples where trusts prevented legal complications by allowing possession of the NFA item by individuals named in a trust during life changing events (e.g., military deployment or death).

Many commenters stated that a trust eases the burden of transferring NFA items upon the death of the grantor/settlor. Other commenters stated that a trust prevents the need to pay a \$200 transfer tax, amounting to a “double tax,” and file another Form 4 to transfer and retain the property, should one of the family members die before the other family member. Other commenters stated that trusts are used to ensure that remaining family members could not be prosecuted for being in possession of an illegal firearm upon death of the person who obtained the NFA tax stamp. Several other commenters stated that another benefit to a trust is that a settlor can list the settlor’s children as beneficiaries, and after the settlor’s death, a trustee will continue to oversee the items until the children are of legal age to possess the items. Many commenters also stated that these beneficiaries should not have to submit to their civil liberties being violated simply because they inherited private property.

Two commenters stated that most (NFA) trusts are being used to lawfully obtain silencers. These commenters stated that if ATF really desired to reduce the use of trusts, it should remove silencers from the NFA “list.” Several commenters noted that trusts are established in a variety of contexts (e.g., voluntary or mandated by law; by a decedent’s will or during the lifetime of a settlor), and some of the contexts should “ameliorate” concerns regarding potential misuse. These commenters, and others, noted that many trusts are specialized and designed as “gun trusts” with safeguards, pertinent to the settlor, trustees, and beneficiaries, to ensure compliance with the regulation of NFA firearms.

A commenter noted that the Seventh Circuit Court of Appeals held that a trust is a proper legal entity for holding a firearm where the settlor was prohibited, provided that the trust included proper safeguards to ensure that a prohibited person did not possess the firearm. *Miller*, 588 F.3d 418. Some commenters noted that trust agreements may exclude prohibited persons.

Several commenters provided examples of language and provisions in trusts designed specifically to hold NFA items that required full compliance by all members and trustees with laws governing possession of NFA firearms. For example, one commenter cited to provisions in her trust stating that “any trustee that is or becomes an ineligible person as defined by Federal law or State law must be deemed as to have immediately resigned and must immediately surrender all NFA items held on behalf of the trust.” Several commenters asserted that ATF should set a wide variety of requirements necessary for a trust to hold NFA items.

Another commenter stated that, if necessary, ATF could add additional language to the transferee’s certification, 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, and could add a definition of “prohibited person” consistent with 18 U.S.C. 922(g) in the “Definitions” section of the application. This commenter proposed specific language for this purpose.

### **Department Response**

The Department is aware of the legitimate reasons individuals may choose to utilize a trust or legal entity to acquire an NFA item. These include facilitating the transfer of an NFA item to a decedent’s heirs and providing a mechanism that allows several individuals to lawfully possess the same NFA item. To the extent that courts have recognized a felon’s ability to employ a trust or other device to maintain an ownership interest, so long as there is no ability to physically possess or control the firearm, trusts have been employed. The Department also recognizes that some trusts created to hold NFA assets contain provisions seeking to ensure that Federal, State, and local laws regarding possession and transfer of NFA firearms are not violated.



The final rule that the Department is promulgating is not designed or intended to reduce the use of trusts for estate planning or other lawful purposes. Instead, provisions of the final rule are intended to facilitate the ability of trusts and legal entities to comply with the statutory requirements of the NFA through the establishment of tailored mechanisms that help ensure prohibited persons are not able to misuse such entities to illegally obtain NFA firearms. The final rule accomplishes this objective by defining as responsible persons those individuals associated with a trust or legal entity who are able to control firearms, and requiring those individuals to undergo the background checks and submit fingerprints and photographs required by statute and ATF's regulations.

With respect to the concerns voiced by many commenters regarding the impact a new rule may have on estate planning, the provisions of the final rule do not materially alter long-existing procedures ATF has established to facilitate the registration of NFA firearms to legal heirs. Those procedures take into account that a decedent's registered NFA firearm(s) must be managed by the executor or administrator of the estate, and provide for a reasonable amount of time to arrange for the transfer of the firearms to the lawful heir. They further provide that a decedent's registered NFA firearm(s) may be conveyed tax-exempt to lawful heirs as an "involuntary transfer" resulting from the death of the registrant.

In promulgating the final rule, the Department has also evaluated the assertions by several commenters that:

- new Federal regulations are not necessary because many trusts designed to hold NFA assets contain voluntary, self-imposed, provisions designed to preclude prohibited persons from acquiring NFA weapons through the trust

- ATF should set requirements mandating provisions in trust agreements for trusts that acquire NFA weapons

With respect to the assertion that trust self-regulation renders new regulation unnecessary, the Department notes that ATF has no authority to enforce private trust agreements, nor may private trusts have the authority to obtain NICS background checks of associated individuals. Hence, self-regulation does not adequately ensure statutory compliance. With respect to suggestions ATF should regulate the terms of trust agreements for trust holding NFA firearms, ATF believes it is more efficient and effective simply to require responsible persons to submit to background checks than to dictate the language in trust documents.

Finally, the Department does not agree with commenters' assertions that additional language needs to be added to the certification in ATF Forms 1, 4, and 5 regarding firearm possession by prohibited persons. The instructions on these Forms already include specific information on who is considered a prohibited person.

#### b. Number of Trust and Legal Entity Form 1, 4, and 5 Applications

##### **Comments Received**

A commenter desired more information and clarification concerning the number of legal entities that file Form 1, 4, and 5 applications. This commenter stated that the NFATCA petition—as described by the NPRM, section II. Petition—contends that the number of applications to acquire NFA firearms via a legal entity has increased significantly. This commenter noted that this same section of the NPRM also provided ATF research data showing that the number of Form 1, 4, and 5 applications submitted to ATF by legal entities that are not FFLs have increased from “approximately 840 in 2000 to 12,000 in 2009 and to 40,700 in 2012.” This commenter could not determine ATF’s statistical methodologies, as they were “neither

stated nor explained” in the NPRM, and ATF’s analyses did not seem to allow for the same legal entity filing multiple Form 1, 4, and 5 applications during the reporting periods CY 2000, CY 2009, and CY 2012. The commenter contended that it was not uncommon for a legal entity (or an individual) to file multiple Form 1, 4, and 5 applications during a single calendar year. In addition, this commenter noted that ATF did not provide corresponding data to show how many non-legal entities or natural persons submitted to ATF Form 1, 4, and 5 applications during the same reporting periods (i.e., CY 2000, CY 2009, and CY 2012). As a result, this commenter maintained that ATF’s methodologies used in the NPRM left many important questions unanswered, including:

- 1) What are the actual number of separate and distinct Legal Entities that submitted ATF Form 1, 4, and 5 applications during these same reporting periods, including CY 2000, CY 2009, and CY 2012?
- 2) What are the actual number of separate and distinct non-Legal Entities or natural persons that submitted ATF Form 1, 4, and 5 applications during these same reporting periods, including CY 2000, CY 2009, and CY 2012?
- 3) What is the increase (or decrease) in the actual number of separate and distinct Legal Entities that submitted ATF Form 1, 4, and 5 applications during these same reporting periods, including CY 2000, CY 2009, and CY 2012?
- 4) What is the increase (or decrease) in the actual number of separate and distinct non-Legal Entities or natural persons that submitted ATF Form 1, 4, and 5 applications during these same reporting periods, including CY 2000, CY 2009, and CY 2012?
- 5) How does the increase (or decrease) in the actual number of separate and distinct Legal Entities that submitted ATF Form 1, 4, and 5 applications compare with the increase (or decrease) in the actual number of separate and distinct non-Legal Entities or natural persons that submitted ATF Form 1, 4, and 5 applications during these same reporting periods, including CY 2000, CY 2009, and CY 2012?

Another commenter also desired information regarding parties that file multiple applications, and asked how many of the applications received during the CY 2012 represent parties who have applied for more than one NFA-registered item.

Another commenter stated that there was an “unexplained discrepancy” between the numbers that ATF used in Table A of the NPRM for the number of applications for legal entities

received in 2012 and the numbers ATF used in its “Firearms Commerce in the United States Annual Statistical Update 2013” (ATF’s 2013 Statistical Update), available at <https://www.atf.gov/sites/default/files/assets/pdf-files/052013-firearms-commerce-in-the-us-annual-update.pdf>. This commenter provided statistics from Exhibit 7 of this statistical update, which showed the number of applications for CY 2012 as totaling 230,937 with the number of applications for Form 1 as 7,886; Form 4 as 52,490; and Form 5 as 170,561. This commenter noted that ATF’s 2013 statistical update did not break down the application numbers for legal entities, individuals, or qualified FFLs (Gov/FFLs) so the commenter did not have any numbers to compare with the breakdown done in the NPRM, Table A. However, this commenter compared the numbers provided in Table A of the NPRM with those in ATF’s 2013 Statistical Update Exhibit 7 as follows:

Table A CY 2012 # Applications	Statistical Update CY 2012 # Applications
ATF Form 1: 9,662	ATF Form 1: 7,886
ATF Form 4: 65,085	ATF Form 4: 52,490
ATF Form 5: 9,688	ATF Form 5: 170,561
Total: 84,435	Total: 230,937

This commenter stated that ATF has not explained why it excluded over 146,500 legal entity applications in its basis for rationalizing the proposed rule change, as well as its cost and economic impact analyses. As a result, this commenter stated that ATF’s inaction called into question the “validity and integrity of the assumptions, arguments, analyses, and conclusions” in the proposed rule. Therefore, this commenter asked ATF to clarify and revise, if needed, its statistical methodology.

## **Department Response**

The Department has carefully considered all commenters' concerns relating to the number of legal entities that file Form 1, 4, and 5 applications. For purposes of the NPRM, ATF conducted an analysis of all applications actually received in the NFA Branch in CY 2012.

The total number of transfers to trusts, corporations, governmental entities, and individuals cited in the NPRM were taken from the total number of all applications received. When an application is received in the NFA Branch it is counted one time. Additionally, each application covers the transfer of a separate firearm with a separate and unique serial number. Thus, the transfer or making of an NFA firearm is counted each and every time an application is submitted. There is no system in place that counts the number of applications received at different times from the same applicant. However, such a system would have been irrelevant for purposes of the NPRM. The key fact is the number of transfers made by legal entities without a background check. The fact that legal entities may have made more than one transfer does not lessen the concern. Also, for purposes of the final rule, new numbers for CY 2014 have been compiled. Those new numbers will cover only those applications that have been processed with a final determination, as opposed to all applications received regardless of a final determination.

The Department did not prepare an analytical impact statement concerning non-legal entities as the definition of "Person" in section 479.11 does not use the term. Applicants who submit Forms 1, 4, and 5 are identified as trusts, legal entities, governmental entities, FFLs and individuals. Further, as some commenters noted, the NPRM did not reflect any increase or decrease in the number of individuals (natural persons), government entities, or FFLs who submitted Form 1, 4, or 5 applications for CY 2000 or 2009 because the NPRM in part was a response to inquiries on legal entities as identified in the petition from NFATCA. The NPRM in

Table A does reflect a breakdown of the type of forms received by corresponding categories in order to compare the costs to those applicants who are currently required to submit fingerprints, photographs, and CLEO certifications with the costs reflected in the final rule that will require each responsible persons of a trust or legal entity to submit the same personal information to ATF before a trust or legal entity is allowed to make or have transferred to it an NFA firearm.

Some comments noted a possible discrepancy between ATF's 2013 Statistical Update and Table A of the 2012 NPRM. The difference appears to be attributable to the fact that the NPRM counted the number of applications received in CY 2012, whereas the Statistical Update counted the number of firearms processed in CY 2012. ATF processed fewer Forms 1 and 4 than it received in CY 2012, which is why there are fewer firearms processed than applications received in those categories. The 170,561 number used in relation to Form 5 in ATF's 2013 Statistical Update reflects the total number of firearms processed on Form 5 applications for CY 2012 from all applicants to make or transfer firearms, i.e., trusts, individuals, government entities, etc. The total does not reflect an actual number of separate and distinct legal entities or "non-legal entities"; however, the NFRTR contains each registered NFA firearm by serial number. As an example, the NFA Branch may receive one Form 5 from a transferor (FFL) to transfer 20-40 NFA firearms at one time to a large governmental entity, i.e., a police department, at one time. Each individual firearm that is transferred is counted. See section VI.A.2 for additional details about the numbers of persons who submit ATF Forms 1, 4, and 5.

#### c. Alternative Approach to Legal Entities

#### **Comments Received**

Several commenters stated that ATF's "one-size-fits-all solution" failed to consider that trusts and legal entities vary widely and differ in purposes and structure. These commenters

asserted that ATF should engage in a proactive assessment of each trust and legal entity, first reviewing the documentation establishing each trust or legal entity and determine whether the creators and operators of a particular trust or legal entity have taken appropriate safeguards to prevent prohibited persons from using the trust or legal entity to acquire NFA firearms. If ATF finds that the particular trust or legal entity did not take appropriate safeguards, only then should ATF subject that trust or legal entity to additional scrutiny and impose default requirements such as “specially designed provisions addressing firearms issues.”

Another commenter recommended excluding specific trust roles from the “responsible person” definition, including successor trustees, beneficiaries, and contingent beneficiaries and that successor trustees should be expressly excluded until they become a trustee. Another commenter described the types of individuals who are generally trust beneficiaries (e.g., children), which, although not specifically stated by the commenter, leads one to the conclusion that beneficiaries should not be deemed responsible persons.

Some commenters recommended exemptions or clarifications for trust members and executors. For instance, a commenter suggested exempting members of the trust that are related by lawful marriage and adoption, and through the commonplace definitions of family. Another commenter suggested that if ATF removes the option for a trust that ATF “amend the classification of individual to include immediate family” as he would “love to pass down [his] NFA items to [his] children.” Another commenter suggested clarifying wording to allow the executor or an estate temporary possession and that would not be considered a transfer, which according to the commenter is much needed for those with trusts.

Another commenter suggested requiring that trust members include their Social Security numbers when submitting a Form 1 or Form 4. In addition, when a new member is added to a

trust, the trust must include that new member's Social Security number when a new Form 1 or Form 4 is submitted.

Another commenter believes that only the main person in the trust should be held responsible for the others named in the trust. This same commenter also supported doing a background check on the main person in the trust when the trust is formed but was against having to recheck background checks every single time they get an NFA item. Another commenter suggested only requiring photographs and fingerprints for the settlor/grantor of the trust. This commenter stated that the settlor/grantor is the person who completes the Form 4473, undergoes the background check at the time of transfer, and is ultimately responsible for how the trust items are disposed of and used.

A few commenters suggested other alternative processes for legal entities. A commenter suggested that ATF automate Form 1 and Form 4 transactions to tie them into the Form 4473 background check process, and that all listed trustees or legal entities be included in this process. Another commenter suggested that if the issue is with trusts and having all trust members submit their information to ATF, that ATF create a new FFL classification and follow the "well established and functioning process" of the FFL system. Another commenter suggested that ATF could achieve its goals through establishing an NFA equivalent of U.S. Customs and Border Protection's Global Entry System. Such a system would enable ATF to perform a "single extensive" background check on each trust member and would simplify background checks for future trust purchases.

Another commenter suggested that ATF allow corporations or trusts to file the necessary information separately, and not be included in the Form 1 or Form 4 submission. The legal entity could then electronically file (e-file) the tax stamp request. Another commenter suggested



that, for any NFA item that a trust or legal entity purchases, the transaction include either a NICS check or the presentation of a State-issued carry permit to complete a Form 4473.

Another commenter recommended that for trust applications, ATF accept the Affidavit of Trust instead of requiring the full trust document be submitted. This commenter contended that the full trust document is not relevant for firearm approval, and would lessen the paperwork for the applicant and improve the processing times and reduce the burden for ATF. Another commenter asked that ATF consider requiring members of trusts to be issued a license similar to the process for a concealed carry weapon license.

Another commenter suggested that ATF permit trusts, partnerships, and other corporate entities to transfer any NFA items to an individual on a tax-free basis for a one year period.

### **Department Response**

The Department is aware that there are differences in purpose and structure among various trusts and legal entities; these differences, however, do not provide an appropriate basis to apply different standards when applying the provisions of the NFA.

The Department rejects the suggestion that it review the documentation establishing each trust or legal entity and determine whether the creators and operators of that trust or legal entity took appropriate safeguards to prevent prohibited persons from using the trust or legal entity to acquire NFA firearms. The Department believes that it is more efficient and effective to ensure, at a minimum, that all trusts and legal entities do not have any responsible persons who are prohibited from possessing NFA firearms. The Department believes that it is the responsibility of those trusts and legal entities to take all other appropriate measures to ensure that they comply with State and Federal law. Additionally, requiring that the Department determine whether trusts

and legal entities had sufficient safeguards in place to prevent NFA firearms from coming into the possession of prohibited persons would be costly and time consuming.

The Department does not agree with the suggestion that it should require only the acting trustee to submit fingerprints and photographs and receive a CLEO signature. Depending on the terms of the trust, additional people beyond the acting trustee may have the power and authority, directly or indirectly, to direct the management and policies of the entity insofar as they pertain to firearms.

The Department also does not agree with performing the background check at the time of the NFA transfer, as this would necessarily take place after the application is approved. Such a process is not consistent with the statutory requirements of section 5812(a) (providing that applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of the law) and section 5822 (providing that applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law). Prior to approving the application, ATF must verify that the person is not prohibited from making, receiving, or possessing the firearm. This cannot be accomplished by having the FFL conduct the background check at the time of the transfer. See section IV.C.4 for responses relating to the definition of “responsible persons.”

The Department rejects the suggestion that it exempt family members from the definition of “responsible persons” as these are the individuals most likely to be named as grantors, trustees, or beneficiaries in the trust, and family members may be prohibited persons. However, the Department agrees that certain individuals associated with trusts should not generally be considered responsible persons, including beneficiaries. As previously stated, the final rule

includes an amended definition of responsible person to make clear that beneficiaries and certain other individuals typically fall outside the definition.

The Department has chosen not to require Social Security numbers on the Form 5320.23 for responsible persons, nor on Forms 1, 4, and 5. The Department believes such information is not necessary to be included on these forms because the information is already requested on the FBI Form FD-258 (fingerprint card) used for conducting the necessary background checks.

The Department rejects the suggestion that it only require the Affidavit of Trust to verify that an applicant is a genuine trust. That document does not contain all the information necessary to verify that it is a valid trust and may not contain all the information necessary to verify who is a responsible person for the trust.

Regarding alternate means of conducting background checks, the Department believes that using NICS in conjunction with a fingerprint-based background check provides the best option. The NICS has access to several Federal databases that contain information relevant to determining whether a person is prohibited from possessing a firearm, and since its inception has identified over two million prohibited persons attempting to purchase firearms and denied transfers to those individuals. Additionally, the fingerprint-based background check may identify a disqualifying criminal record under another name.

The transfer tax is fixed by statute, *see* 26 U.S.C. 5811(a), and ATF does not have the authority to waive transfer taxes except in very limited circumstances not applicable to the types of transfers commenters wish to see exempted.

#### 4. Definition of “Responsible Person”

##### a. Ambiguous and Poorly Reasoned Definition

##### i. Definition is Overly Broad and Includes, By Title, Many Individuals Associated with Trusts and Legal Entities That May Have No Power or Authority

#### **Comments Received**

A few commenters stated that the interpretation of the definition of responsible person could mean that any person who has possession of a firearm could be required to get CLEO certification. The commenters also stated that “nowhere in the law is every member of an organization held accountable for every action of the organization.” A few other commenters stated that every employee of an FFL is not required to be listed as a responsible person on the license, so there is no reason to require everyone associated with a legal entity to be designated as a responsible person. Two other commenters stated that by requiring fingerprints, photographs, and CLEO signature for each responsible person, it increases the burden to both applicants and CLEOs, and could become an administrative nightmare. One of the two commenters also asked, since ATF anticipates a requirement for notification in changes of responsible persons, “[w]ill trustees be aware of such a requirement and practically be able to comply?” Another commenter, an attorney, stated that every corporation has shareholders and that extending the definition of responsible person to include all shareholders defeats the purpose of the corporation and “overrides well developed statutory case law relating to corporate governance and property ownership rights.” The commenter also stated that the proposed rule eliminates the advantages of corporations and their ability to exercise their right to own property. Another commenter asked whether beneficiaries who are under the age of 21 years old, who may live in different States, and who do not have any authority to possess, transport, or acquire NFA

firearms, would be required to obtain photographs, fingerprints, and the CLEO signature.

Another commenter, a licensed NFA dealer, stated that given the broad definition of responsible person as related to trusts, and the possible criminal consequence of non-compliance, entities have no choice but to err on the side of over-inclusion, which places a burden on both the entity and ATF. The commenter suggested that there might be hundreds or thousands of responsible persons for a single entity, and gave the example of a corporation with headquarters in Maryland with over 4000 employees located in 38 States. A few commenters, including a licensed manufacturer, stated that the definition is too broad and exceeds both what is reasonable and the definition of responsible person currently used for FFLs.

Other commenters noted that the definition for responsible person appears to extend to beneficiaries of a trust holding NFA firearms, and even to successor trustees, remainder beneficiaries, and trust protectors. The commenter noted, however, that in a typical trust document, the trustee is the only person with legal title to any items in such a trust, and that the “beneficial interest” of the beneficiary does not vest until the time specified in the trust.

Another commenter stated that the proposed definition for responsible person exceeds the definition of responsible person used for handling explosives. This commenter asked if ATF intended to extend the CLEO’s “veto” to explosives workers. Another commenter stated that the proposed definition was very vague on which “entity” could decide who would be a responsible person. This commenter expressed concern that any government agency could be capable of making that decision. Another commenter recognized the need to define responsible person; however, this commenter expressed concern that if the government alone defined the term that it might allow them more power over which persons could exercise their right to bear arms.

## Department Response

The Department has reviewed the definition in the proposed rule and amended it to address concerns about its breadth while maintaining the important objective of ensuring background checks for relevant parties associated with a trust or legal entity. As in the definition of “responsible person” in the NPRM, the definition of “responsible person” in this final rule applies to those who possess the power or authority to direct the management and policies of an entity insofar as they pertain to firearms. This addresses commenters’ concerns that shareholders and others who are associated with an entity are not always in a position to possess the entity’s firearms. It should be noted that if an individual has the power or authority to direct the management and policies for a legal entity, that individual would fall within the definition of “responsible person.” Trusts differ from legal entities in that those possessing the trust property—trustees—are also the individuals who possess the power and authority to direct the management and policies of the trust insofar as they pertain to trust property, including firearms.<sup>9</sup> As it applies to trusts, the definition of “responsible person” in this final rule serves the dual purpose of requiring these individuals to undergo background checks while also addressing the commenters’ concerns about unnecessarily requiring background checks of individuals who would not, or could not, possess the firearms. Depending on how the trust is set up, the identity of trust beneficiaries may remain uncertain for a period of time or may include individuals who will not possess the firearms. Therefore, the Department believes that it is not necessary to positively identify a beneficiary as a “responsible person” within the definition.<sup>10</sup> However, under the amended definition, beneficiaries and other individuals will be considered responsible

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<sup>9</sup> Restatement (Third) of Trusts § 3 (2003) (defining “trustee” as “the person who holds property in trust”).

<sup>10</sup> *See id.* (defining beneficiary as “a person for whose benefit property is held in trust”).

persons if they meet the criteria for designation as responsible persons because of their capacity to control the management or disposition of a relevant firearm on behalf of a trust or legal entity.

The Department believes that the definition of “responsible person” in this final rule appropriately addresses concerns that the necessary individuals receive background checks before receiving NFA firearms, and that the potentially large number of individuals who are merely associated with the trust or legal entity, but will not possess firearms, are not required to submit applications. Further, the Department notes that under 18 U.S.C. 922(g), it remains unlawful for a prohibited person to possess firearms. Similarly, under section 922(d) it remains unlawful for any person to sell or deliver a firearm to any prohibited person if that person knows or has reasonable cause to believe the person is prohibited. For responses to comments on CLEO certification see section IV.C.1. As noted previously, ATF Forms 1, 4, and 5 will be updated to reflect the definition of responsible persons in the final rule.

The Department does not agree that including shareholders in the definition of “responsible person” defeats the purpose of a corporation, as a shareholder will only be a responsible person if the shareholder possesses, directly or indirectly, the power or authority to direct the management and policies of the entity insofar as they pertain to firearms.

ii. Beneficiaries are Often Minors or Not Yet Born, Presenting a Challenge to Proposal That Beneficiaries Submit Fingerprints, Photographs and a CLEO Certification

### **Comments Received**

Many commenters stated in a form letter that the proposed rule interferes with the lawful use of trusts for estate planning. These same commenters stated that the overly broad definition of a responsible person means contemplating the “absurd possibility of fingerprinting, photographing, and securing CLEO sign-offs for unborn children.” Another commenter, who

holds a trust, stated that the proposed rule places a hardship on his family and trust by possibly requiring fingerprints of his elderly grandmother and his two-year-old and five-year-old children. Another commenter, a trust holder, asked how the definition of responsible persons applies to minor beneficiaries in a trust, and asked if ATF is proposing the fingerprinting and photographing of minor children who lawfully cannot possess a firearm. Other commenters also asked about the need for CLEO certification, as well as fingerprints and photographs, for children and minors. At least one commenter specifically argued that his CLEO would not provide a certification for beneficiaries. Many commenters questioned the practicality of requiring fingerprints and photographs for minors, and wondered how this would be done, in particular on babies and young children. Many commenters stated that a background check for beneficiaries is more appropriately conducted at the time an item in the NFA trust is actually transferred to them from the trust. Another commenter questioned whether doing a background check on a minor beneficiary would have any benefit, and asked if a background check would show the chances of committing a felony or domestic violence in the future. Another commenter asked if the requirements for photographs, fingerprints, and CLEO certification do not apply to minors, would the minor upon turning 18 need to submit these required items?

### **Department Response**

As noted, the Department agrees that beneficiaries should not generally be included in the definition of responsible person. The definition of responsible person has been amended and no longer includes beneficiaries as a typical example of a “responsible person.”

### **iii. Challenge in Determining Who Qualifies as a Responsible Person**



## **Comments Received**

Many commenters, most of whom have trusts, and an FFL, noted in a form letter that the Department's definition of responsible persons is different for different types of entities. They stated that based on the Department's general definition of a responsible person, and the complexity of trust laws, they would need to speak to a lawyer to determine who in their trust would be considered a responsible person. Ninety-eight of the same commenters, all of whom have trusts, also stated that their trust includes beneficiaries who are under 18 years old and that they would need to speak to a lawyer to get a clear answer about whether they fall under the responsible person definition.

Other commenters asked various questions concerning companies that own NFA firearms and how they are to determine who counts as responsible persons. A commenter asked if such companies would have to "photograph, fingerprint, and complete a favorable background check" on each individual before accepting that individual as an employee or partner. This commenter also asked if a stockholder would be viewed as having ownership of the corporate assets such that they would need to be fingerprinted. Another commenter stated that the proposed rule left many unanswered questions concerning its definition of a responsible person, including whether and when minor trust beneficiaries would qualify.

## **Department Response**

The final rule incorporates a new definition of "responsible person" that addresses many of the questions and concerns raised by these comments, including the concerns about trust beneficiaries who are minors. That said, the Department agrees that in some cases persons may need to seek legal counsel to determine who is a responsible person for purposes of this rule. The Department notes, however, that many of the trust applications it currently reviews were

prepared with the advice or assistance of a lawyer. As a result, it is not clear whether the overall need for legal counsel will increase or decrease because of this rule. The Department anticipates, for example, that persons who have used a trust in the past to avoid the CLEO certification requirement may well choose to acquire future NFA firearms as individuals once the CLEO certification requirement has been modified to a notification requirement, thereby diminishing the overall need for legal counsel among makers and transferees.

#### b. Proof of Citizenship for Responsible Persons

##### **Comments Received**

Several hundred commenters objected to the proposed requirement that any responsible person of a legal entity prove citizenship as part of submitting an application to transfer or possess NFA items. The bases for this objection varied from an ideological opposition to ever having to prove citizenship to an observation that not all aliens are prohibited from possessing firearms under Federal law. Other commenters approved of the requirement to demonstrate citizenship, even though they were otherwise opposed to the rule.

##### **Department Response**

Under Federal law (18 U.S.C. 922(g)(5)(B)) it is generally unlawful for any alien admitted to the United States under a nonimmigrant visa to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. This prohibition extends to NFA firearms. Federal law (18 U.S.C. 922(y)(2)) also provides certain exceptions to this prohibition. As a result, before ATF can approve an NFA registration request it must determine if the applicant or transferee is a U.S. citizen, and if the applicant or transferee is not a citizen, whether the applicant or transferee falls within the

prohibition or exceptions described above. This requirement is not unique to NFA transfers. For example, the ATF Form 4473 requires the transferee or buyer to respond to questions to determine if the transferee or buyer is an alien admitted under a nonimmigrant visa, and if so, whether the transferee or buyer qualifies for an exception to the section 922(g)(5)(B) prohibition. On the ATF Form 7 (5310.12), *Application for Federal Firearms License*, the applicant is required to provide the applicant's country of citizenship and nonimmigrant aliens are required to certify compliance with 18 U.S.C. 922(g)(5)(B). This rule simply applies the same requirement to NFA registration documents in order to assure compliance with Federal law.

#### c. General Applicability Questions

##### **Comments Received**

Many commenters stated that the proposed rule gave rise to many unanswered questions, especially about the operation of the CLEO certification requirement in jurisdictions where CLEOs were reluctant or refused to provide the certification, regardless of the applicant's background. Another commenter asked how the rule would apply when, following the transfer, some or all of the responsible persons are replaced, and whether the answer would be different based upon the type of legal entity involved.

##### **Department Response**

As indicated in section IV.C.1 the Department has replaced the CLEO certification requirement with a CLEO notification requirement. This change renders moot many of the hypothetical questions submitted by commenters, including those that focus on jurisdictions in which obtaining CLEO certification is hindered for "political" reasons.

With respect to issues raised by the prospect of a post-transfer change in responsible parties, this rule does not require that ATF be notified of such changes. In the NPRM, the

Department indicated that it was considering a requirement that new responsible persons submit Form 5320.23 within 30 days of a change in responsible persons at a trust or legal entity. After receiving several public comments on this issue, the Department is not requiring in this final rule that new responsible persons submit a Form 5320.23 within 30 days of any change in responsible persons.

#### d. Alternatives to Definition

##### **Comments Received**

A number of commenters took issue with the proposed definition of “responsible person.” Some found it vague and overly broad. Others argued for a more finite definition, with some suggesting specific alternative definitions. Quite a few argued that, depending on the nature of the trust or legal entity, and the roles performed by persons associated with the trust or legal entity, ATF should permit designation of a sole or primary responsible person, thereby minimizing the burden associated with processing the application.

##### **Department Response**

The Department acknowledges that whether an individual meets the definition of a responsible person will depend on the structure of the trust or legal entity acquiring the firearm and who within that structure has the power and authority to direct the management or policy of the trust or legal entity pertaining to firearms. The final rule provides guidance to persons seeking to acquire an NFA firearm for a trust or legal entity about who qualifies as a responsible person under most routine circumstances. For example, under the terms of a trust, if a minor child does not have the power and authority to direct the management and policy of the trust, and is not authorized under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust, the

minor child would not meet the definition of a responsible person. Additionally, beneficiaries do not appear in the non-exclusive list of possible “responsible persons” in the definition and will not be considered responsible persons unless they meet the definition set out in the final rule.

The Department agrees that trusts and legal entities may have complex structures. However it is the responsibility of each trust, association, partnership, LLC, or corporation to determine which individuals within its structure are responsible persons under this rule. The Department does not agree with comments limiting the responsible person to only one individual per trust or legal entity because multiple individuals may have the power and authority to make decisions for the trust or legal entity, or otherwise meet the definition of “responsible person.” This includes co-trustees, members of the board of directors, or controlling members of an LLC.

The Department has amended the originally proposed definition of “responsible person,” *see supra* section IV.C.4.a, and the Department believes those revisions provide the clarity that many of the commenters requested, albeit without accepting some of their specific suggestions.

The Department further believes that it is the duty of individuals having the power or authority to direct the management and policies of the trust or legal entity to ensure that prohibited persons do not have access to firearms.

#### *D. Comments on Proposed Rule’s Statutory and Executive Order Reviews*

##### 1. Executive Order 12866

Several commenters argued that the proposed rule violated or failed to comply with Executive Order 12866, an order which a few of these commenters noted was “revived by” Executive Order 13497. In general, these commenters took issue with ATF’s cost-benefit analysis of the rule, finding that analysis to be lacking for a host of reasons including that ATF (1) failed to identify the existence of a problem the proposed rule was intended to solve; (2)

failed to credibly assess costs and benefits of the proposed rule or consider more cost effective alternatives; (3) failed to properly estimate the full economic costs; (4) failed to properly weigh those costs against the expected benefits; (5) relied upon “spurious and anecdotal incidents” and “speculative logic” to justify the proposed rule; and, (6) by failing to conduct a proper cost-benefit analysis, improperly considered the rule not to be a significant regulatory action. Several commenters requested that ATF conduct an “in-depth,” “detailed” financial impact study to assess the rule’s costs and “actual, tangible benefits.”

In addition, a few commenters argued that, in particular, the rule’s extension of the CLEO certification requirement violated sections 1(b)(9) and (11) of Executive Order 12866 by failing to adopt the least burdensome effective alternative.

A commenter supported the estimates in the proposed rule, and concluded that the public safety benefits—expanding background checks to legal entities and ensuring fewer firearms would be possessed by prohibited persons—were “massive” and far outweighed any minor monetary or time costs to potential makers or acquirers of NFA firearms.

Another commenter stated that the proposed regulations extending the CLEO certification requirements would increase the processing workload for the NFA Branch by nine times, and that this would further add to the NFA Branch’s backlog of one year. The commenter thus concluded that wait times would approach a decade.

### **Department Response**

The Department believes it has thoroughly considered the costs and benefits of the rule. Commenters have not provided the Department with data or information that would alter or refine the Department’s estimates of the rule’s costs and benefits. The Department has done its best to consider all relevant costs and benefits traceable to the rule, including, among other

things, the benefits to public safety that will stem from the rule; the increased operational cost for the Government and industry members; the increased cost associated with additional fingerprint cards and photographs for responsible persons; and the increased labor cost associated with the time it takes for applicants and industry members to complete the required forms. Having considered all of the reasonably foreseeable costs and benefits, the Department has determined that the benefits of ensuring NFA weapons are less easily obtained by persons prohibited from possessing them outweighs the cost of implementing the rule.

The Department acknowledges the commenters' concerns with the Department's assessment of costs and benefits of the proposed rule in the NPRM. The final rule reflects that after careful consideration of all comments, the Department has elected to eliminate the CLEO certification and replace it with a CLEO notification that will lessen the burden to CLEOs and applicants for registration. See section IV.C.1 for the in-depth discussion of the Department's decision to adopt a CLEO notification requirement in lieu of CLEO certification.

This final rule also identifies important benefits to public safety and security that will be achieved by the rule. For example, by conducting background checks on persons who meet the new definition of a "responsible person," ATF will be better able to ensure that responsible persons within trusts and legal entities are not prohibited from possessing NFA firearms. Presently, only individuals are required to submit fingerprint cards and undergo background checks to ensure that they are allowed to possess and receive an NFA firearm.

Further, the CLEO notification will ensure that CLEOs are aware of NFA firearm acquisitions in their jurisdictions and have an opportunity to provide input to ATF, but will reduce costs because they will no longer be responsible for signing certifications or conducting background checks for individual applicants. This final rule will require all applicants and

responsible persons within trusts and legal entities to notify their local CLEO by either forwarding a completed copy of Form 1, 4, or 5, or a completed copy of Form 5320.23, if applicable. ATF estimates that the time for a CLEO to review the notification is 15 minutes per applicant/responsible person. Because not all responsible persons within a trust or legal entity may live in the same location as the applicant trust or legal entity, a different CLEO may review the ATF Form 1, 4, or 5 from the CLEO that reviews a Form 5320.23 for each responsible person. However, if a CLEO determines that there is any reason why an applicant or transferee should not have an NFA firearm, the CLEO should notify ATF. While there will be additional costs to ATF, the Department has determined that the benefits will significantly outweigh any costs.

The NPRM identified a few instances when a prohibited person nearly erroneously acquired an NFA firearm; however, the transaction did not occur because the responsible person within the particular trust or legal entity had undergone a background check. Those examples show that there is a tangible risk of a prohibited person acquiring an NFA firearm through a trust or legal entity. The Department has not relied on those instances to conclude that there are presently a large number of erroneous transfers. However, the fact that some individuals have been prevented from obtaining firearms supports the Department's position that a risk exists that should be addressed.

The Department stands by its determination that this rule will neither have a significant annual effect on the economy of \$100 million or more, nor adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.



The Department recognizes that the final rule will affect processing times and is implementing processes to keep the impact to a minimum.

## 2. Executive Order 13132

A commenter quoted text that ATF used in section IV.B of the NPRM (78 FR at 55023), from which the Attorney General concluded that the NRPM did not have sufficient federalism implications to warrant ATF's preparing a federalism summary impact statement, and accordingly complied with section 6 of Executive Order 13132 (Federalism). This commenter noted that ATF acknowledged that the proposed expansion of the CLEO certification requirement to all responsible persons of a legal entity had the potential for increased utilization of State and local agencies' resources for processing CLEO certifications. This commenter questioned ATF's statement that such utilization would be "voluntary" and was "expected to be minimal." This commenter stated ATF needs to further clarify this "voluntary" utilization, and perform proper cost-benefit analyses to clarify its "claim" of minimal impact, or else abandon its proposal to extend the CLEO certification requirement to responsible persons of a legal entity.

### **Department Response**

After considering the objections of numerous commenters concerning the extension of the CLEO certification requirement to trusts and legal entities, the Department has decided not to expand the CLEO certification requirement to include responsible persons of trusts and legal entities. Instead, the Department has elected to remove the CLEO certification requirement entirely—for both responsible persons and individuals—and adopt CLEO notification in its place. This decision will lessen the burden on State and local agencies' resources in preparation and review of applications for responsible persons and individuals. Regardless of whether the rule might have required a federalism summary impact statement before, the decision to

eliminate the CLEO certification requirement means that there is no need for one now. Because CLEOs will continue to be informed about the NFA firearms present within their jurisdictions, the Department also believes that this change will not materially degrade public safety.

The Department continues to maintain that the proposed rule did not have sufficient federalism implications to warrant a federalism summary impact statement. The Department noted in the proposed rule that the impact on resources used by State and local agencies would be “voluntary” and was “expected to be minimal.” As many commenters have observed, CLEOs voluntarily decide to sign or not to sign off on any particular application, and would have continued to be able to do so under the proposed rule.

### 3. Regulatory Flexibility Act

Numerous commenters stated that ATF did not comply with the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. According to most of these commenters, there was no indication in the proposed rule that ATF adequately considered the needs of small businesses and the costs that were likely to be associated with the rule, especially the costs imposed on small businesses directly and indirectly associated with the manufacture, distribution, purchase, and use of NFA firearms. Numerous commenters suggested that the proposed rule would dramatically increase the cost of acquiring NFA firearms, especially silencers. They also suggested that the proposed rule would likely force a number of small businesses out of business, resulting in job loss and economic turmoil. Many of these commenters focused on the proposed requirement that CLEO certification be obtained for all acquisitions, regardless of the nature of the trust or legal entity, but some also identified the burden that would be imposed by requiring responsible persons for trusts and legal entities to have background checks run as part of the acquisition process. In addition, many commenters argued that ATF’s estimated increased costs to legal entities were

too low, as ATF estimated the number of responsible persons as two, a figure commenters regarded as an underestimate. Further, a commenter requested that ATF clarify the research and methodology it used to determine that the proposed rule complied with the RFA and perform further research, analyses, and clarification before implementing the final rule.

A few commenters explained that under the RFA and (as amended by) SBREFA, when “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.” *Nat’l Mining Assoc. v. Mine Safety and Health Admin.*, 512 F.3d 696, 701 (D.C. Cir. 2008). According to these commenters, the regulatory flexibility analysis must “describe the impact of the proposed rule on small entities” and, among other things, must contain (1) “a description of the reasons why action by the agency is being considered;” (2) “a succinct statement of the objectives of, and legal basis for, the proposed rule;” (3) “a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;” and (4) “identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.” 5 U.S.C. 603. The commenters continued that the “analysis must also include discussion of alternatives to the proposed rule,” and, although 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.” 5 U.S.C. 605. Using this legal framework, these commenters argued that ATF did not follow its obligations under the RFA.

Another commenter stated that ATF should clarify the research and methodology it used to determine that the NPRM complied with RFA, and that further research, analyses, and clarification is required regarding the proposed rule’s economic impact. Another commenter

disagreed with ATF's estimated cost increase per legal entity being only \$293.93, and believed this was far too low. The commenter attributed that result to ATF underestimating the average number of responsible persons as two.

### **Department Response**

The Department believes it has thoroughly considered whether the rule will have a significant impact on small businesses and has reasonably concluded that it will not have such an impact. Commenters have pointed to no flaws in the Department's analysis that would call into question the reasonableness of its conclusion that the rule will minimally impact small businesses. Commenters have identified only two specific issues with the Department's analysis—namely, (1) that the Department underestimated the average number of responsible persons for trusts and legal entities, and (2) that the Department failed to consider potential secondary market impacts on small businesses that sell NFA firearms to trusts and legal entities covered by the rule. As to the first objection, the Department disagrees that its estimate of two responsible persons per entity was unreasonable. As to the second, the Department believes that any secondary market impacts will be negligible. The Department thus rejects the suggestion that it failed to give careful consideration to the full effect the proposed rule would have had on small businesses. In any event, this final rule has been revised to eliminate or ameliorate many of the concerns reflected in the comments about the RFA, and the rule remains fully compliant with that Act.

This final rule primarily affects trusts and legal entities that seek to make or acquire NFA firearms and are not making or acquiring them as qualified FFLs. The Department believes that the increased cost of implementing the regulations will not be significant on trusts or legal entities. ATF has estimated that the cost of implementing the regulation will increase the cost

for 115,829 trusts and legal entities with an average of two responsible persons by \$25,333,317 (identification costs for background checks: \$23,846,679; CLEO notification costs: \$1,487,244) per year.<sup>11</sup> Accordingly, the estimated cost increase per trust or legal entity is \$218.71 (cost of increase (\$25,333,317) ÷ number of trusts and legal entities (115,829)).

In reaching this estimate the Department was quite specific in the proposed rule in allowing 10 minutes for each responsible person to complete Form 5320.23 and considered this a reasonable amount of time for responsible persons at any business, large or small, to allocate for compliance with regulatory requirements. However, after further consideration, the Department has adjusted this time estimate to 15 minutes. See section IV.E.1.f for additional discussion. Similarly, ATF projected that it would take only 50 minutes to procure needed photographs—a generous allocation considering the range of photo-taking technology available in this era of mobile and virtual technologies. See also section IV.C.1 for details concerning the shift from CLEO certification requirements to CLEO notification requirements.

By developing Table B(1)—Cost Estimates of the Time to Comply with the Proposed Rule’s Requirements and Table B(2)—Cost Estimates of Procuring Photographs, Fingerprints, and Documentation, the Department complied with the requirement that it analyze the impact of the rule on small businesses and documented the anticipated effect of the regulation.

In section IV.A.2 of the proposed rule, ATF reported that “[i]n calendar year (CY) 2012, ATF received 84,435 applications that were either ATF Forms 1, 4, or 5. Of these, 40,700 applications were for unlicensed trusts or legal entities (e.g., corporations, companies) to make or receive an NFA firearm; 29,448 were for individuals to make or receive an NFA firearm; and

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<sup>11</sup> This total does not include the cost of agency processing time for notification, but is instead based upon the costs to entities for notification. Based on 115,829 trusts and legal entities, the notification cost is \$1,487,244 (\$5,330,450 less \$3,843,206).

14,287 were for government agencies or qualified Federal firearms licensees (Gov/FFLs) to make or receive an NFA firearm.” 78 FR at 55020-21. This data taken from actual applications received provided accurate data as to the number of trusts and legal entities to which the rule applies. Further, the Department believes that an average of two responsible persons per trust or legal entity is appropriate, especially in light of modifications to the responsible person definition in the final rule. *See infra* section IV.E.1.a. As explained there, ATF’s estimate that each trust or legal entity has an average of two responsible persons is based on ATF’s review of 454 randomly selected applications for corporations, LLCs, and trusts processed during CY 2014.

The Department disagrees with the comments indicating that the proposed rule would impose substantial recordkeeping obligations and increase the costs to ensure regulatory compliance, thereby resulting in small businesses being driven from the field. This final rule incorporates information required on ATF Form 5330.20 into the existing Forms 1, 4, and 5 that will reduce the burden upon the applicant or transferee by eliminating an additional form to be completed and filed. The current estimated time to complete the form is 3 minutes. Because the information requested on the forms is the same, savings will result from the applicant not having to attach a separate form. Further, these forms are not kept by the FFL and therefore will result in no increase in small business recordkeeping obligations.

Several commenters argued that ATF’s RFA statement considered only the NFA purchasers and their estimated additional costs of compliance, but ignored the proposed rule’s significant effect on manufacturers and distributors/sellers, and the fact that business’ customers would have a difficult time obtaining certification via a CLEO, therefore hurting sales. The Department notes again that it has changed the certification requirement to a notification requirement. *See supra* section IV.C.1. Further, the Department notes that the rule’s primary

focus relates to those responsible persons who have authority to direct firearms policy. The Department believes that because the rule is unlikely to significantly burden trusts and legal entities that wish to acquire NFA firearms, small businesses that sell or distribute NFA firearms and components to such trusts or legal entities will see a negligible or non-existent impact on their sales.

Finally, the Department emphasizes that this rule will primarily affect trusts and legal entities that are seeking to make or acquire NFA firearms and are not making or acquiring them as qualified FFLs. Many commenters have observed that the increased use of trusts during the last decade has been in response to increased CLEO refusals to provide the certification required for individual NFA acquisition applications. If that is true, the Department's revision of that requirement can be expected to dramatically decrease the use of trusts to acquire NFA firearms in the future, meaning that the rule's impact on small businesses may be even less than it estimates. In any event, the increased cost of implementing the rule will not be significant on trusts or legal entities, even if the number of trusts and legal entities remains the same. The Department has estimated that the cost of implementing the regulation will increase the cost for 115,829 entities with an average of 2 responsible persons by \$25,333,317 per year (identification costs: \$23,846,679; notification costs: \$1,487,244).<sup>12</sup> Accordingly, the estimated cost increase per trust or legal entity is \$218.71 (cost of increase (\$25,333,317) ÷ number of trusts and legal entities (115,829)).

#### 4. Small Business Regulatory Enforcement Fairness Act of 1996

Although the proposed rule stated that it did not constitute a "major rule" as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),

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<sup>12</sup> This increased cost total does not include the cost of agency processing time for notification. Based on 115,829 trusts and legal entities, the notification cost is \$1,487,244 (\$5,330,450 less \$3,843,206).

5 U.S.C. 804, several commenters disagreed. In addition, while the proposal stated that it would not result in “an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effect on . . . employment . . .,” 78 FR at 55024, several commenters disagreed with these assertions as well. One commenter requested that ATF clarify the research and methodology it used to determine that the proposed rule complied with SBREFA.

One commenter asserted that extending the CLEO certification requirement to responsible persons of trusts and legal entities would effectively destroy the market for NFA firearms because “99% of ‘legal entity’ transfers” stemmed from the CLEO’s refusal to sign an individual application. According to the commenter, the proposed rule would thus eliminate “approximately \$54 million dollars of tax generating commerce,” with a corresponding impact on jobs, with zero value gained in terms of public safety, and, thus would constitute a “major rule” under SBREFA. Other commenters made similar points concerning the proposed rule’s impact under the assumption that CLEO certification would be a larger hindrance to conducting commerce in NFA firearms. Several commenters noted that this would also collaterally impact the Federal fiscal budget through a decreased payment of the Special Occupational Tax. Another commenter proposed that the economic impact of the proposed rule would have a “chilling” effect on NFA items’ sales (especially lower-cost sound suppressors) due to the cost increase incurred by transferees under the proposed rule.

### **Department Response**

The Department maintains that it complied with the SBREFA in the proposed rule. Nonetheless, for this final rule, the Department has reassessed burdens and costs to applicants, responsible persons, and CLEOs.



In preparing this final rule, the Department looked at the additional impact on licensed manufacturers, dealers, legal entities, applicants, and responsible persons and determined that the changes would not exceed a threshold greater than \$100 million or more on the economy. The impact on small businesses should remain minimal.

Based upon concerns from commenters that the Department underestimated the number of responsible persons in the NPRM, the Department revisited the definition of “responsible person” and has amended it in this final rule. *See supra* section IV.C.4.a.i. Beneficiaries are no longer specified as typical responsible persons in the definition, though they may still be required to submit to a background check if they otherwise meet the definition of “responsible person.” ATF has also reassessed the number of responsible persons and the number of pages of supporting documentation per legal entity. See section IV.E.1.b for the methodology used. This reassessment reflects that the estimated number of responsible persons per trust or legal entity application remains at two, and the number of pages for the supporting documentation is averaged at 16 pages. See section IV.E.1.a and IV.E.1.b. See section VI.A.3 for additional details about the cost to State and local entities.

As discussed in section IV.C.1, the Department is eliminating the CLEO certification requirement and implementing a CLEO notification requirement; this will lessen the burden to CLEOs. The CLEOs will have the discretion and flexibility to review, manage, and maintain this information in the manner that they believe is most appropriate to the public safety concerns in their respective jurisdictions.

In addressing commenters’ concerns that the CLEO extension requirement could force many FFLs out of business, ATF did not assess the indirect costs to FFLs, such as manufacturers or dealers, but concentrated on the direct costs to applicants, responsible persons and CLEOs,

who have the greatest investment in the making or transfer process. However, as stated, CLEO notification will diminish, if not eliminate, the economic impact on small businesses, including FFLs, that CLEO certification may have imposed.

#### 5. Unfunded Mandates Reform Act of 1995

A few commenters expressed concerns that the proposed rule did not comply with the Unfunded Mandates Reform Act of 1995 (UMRA), with two commenters identifying certain areas that they contended called for additional study and justification by ATF to ensure compliance with UMRA. One commenter stated that the proposal to extend the CLEO certification requirement shifts a “significant regulatory burden” onto State and local agencies, causing them to have to undertake additional expenditures, hire new staff, and engage in additional training. This commenter stated that UMRA (2 U.S.C. 1532) requires that an analysis be performed to determine whether additional government funding is needed for State and local agencies to comply with the mandate. Many other commenters questioned or disagreed with ATF’s statement that the proposed rule did not impose any “unfunded mandates,” again focusing on the proposal to extend the CLEO certification requirement to responsible persons of trusts and legal entities, which, they noted, would significantly burden CLEOs and divert local law enforcement resources from other criminal justice priorities. Numerous commenters referenced the U.S. Supreme Court case, *Printz v. United States*, 521 U.S. 898 (1997), which articulated an “anti-commandeering principle” and held invalid a Federal regulatory regime that mandated that CLEOs perform background checks for handgun transfers. These commenters stated that the proposed rule effectively imposed on CLEOs the burden of conducting background investigations as part of a Federal regulatory regime, in violation of *Printz*. These commenters also reiterated their view that ATF’s estimate of the costs imposed by its proposed rule,

especially the costs imposed on CLEOs, were too low, both with respect to the time it would take to perform a certification and the direct costs associated with the process. For example, one commenter calculated that for an average legal entity with four responsible persons, certification would involve four hours of CLEO time, equating to \$123.20 per entity (4 x \$30.80 = \$123.20). Extrapolating further, this commenter calculated that the total costs to CLEOs around the country would be at least \$5,014,240.

### **Department Response**

The Department acknowledges commenters' concerns that the proposed extension of the CLEO certification would place additional burdens on CLEOs for processing and reviewing additional responsible persons' forms, and for taking and reviewing fingerprints. The Department, however, complied with UMRA in the proposed rule. In any event, for this final rule, the Department reexamined the burdens and costs to CLEOs.

In preparing this final rule, the Department based the costs and expenditures upon direct costs to State and local agencies, licensees, and ATF. While it acknowledges that there may be several indirect costs or resources that may be associated with complying with the rule, the Department believes that the amount would still not be greater than \$100 million or more.

For this final rule, the Department prepared an additional analysis of approved applications in response to several comments that it provided a "low estimate" of the number of responsible persons per applicant, and the number of pages of chartering documents at those entities, which directly affects the time and resources required by the CLEO to review applications. As discussed in section IV.C.1, the Department is eliminating the CLEO certification requirement and replacing it with a CLEO notification requirement that will significantly lessen the burden to CLEOs. The CLEOs will have the flexibility and discretion to

review and maintain the information they obtain as a result of this rule in the manner that best enhances public safety in their respective jurisdictions.

Regarding the commenters who referenced *Printz v. United States*, 521 U.S. 898 (1997), the Department notes that current Federal regulations do not require CLEOs to provide a CLEO certification for an applicant, a fact that many commenters pointed out as the primary reason for the proliferation of the use of NFA trusts. Unlike in *Printz*, this final rule imposes no obligations on CLEOs but does provide them with the ability to obtain information that is potentially useful to accomplishing their missions and the opportunity to provide relevant information to ATF. Historically, the CLEO certification was designed to assist in maintaining public safety and was established to gather any information on the local level that might require denial of an application to make or receive an NFA firearm. Prior to the advent of comprehensive criminal history databases, CLEO certification was critically important. That role is less important today, and public safety concerns can still be addressed with CLEO notification without imposing unnecessary burdens upon local CLEOs.

As a result of ATF's review of public comments received in response to the proposed rule, the Department will remove the CLEO certification and replace it with a notification obligation upon the applicant/transferee, including responsible persons of a trust or legal entity. This notification will reduce the burden on State and local agencies because notification does not involve signing off on applications. This will also simplify the process for CLEOs as the same criteria will apply to both unlicensed trust, legal entity, and individual applicants/transferees. Finally, ATF will continue to receive fingerprint cards along with applications for the purpose of conducting background checks to ensure that responsible persons of an applicant or transferee

are not prohibited from possessing an NFA firearm. ATF will continue to conduct these activities and therefore these activities will impose no additional costs on CLEOs.

Because CLEO notifications will require only those resources that the CLEOs themselves decide to devote to notification management, additional funding to assist State, local, and tribal governments in complying with this rule is unnecessary.

The Department has determined that this rule is not an unfunded mandate because it does not meet the criteria under UMRA. Specifically, it does not result in the expenditure of funds by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. See section VI.A.3 for additional details about the Department's estimate of costs to State and local entities.

#### 6. Paperwork Reduction Act

Many commenters stated that the proposed rule, with its proposal to expand the CLEO certification requirement to responsible persons, imposed an increased information collection burden (i.e., additional paperwork) on the public, and violated the Paperwork Reduction Act (PRA). Some commenters mentioned the impact in terms of the PRA generally; others focused on the PRA of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. 3501-3521) as an Act designed to reduce the "total amount" of the paperwork burden the Federal Government imposes on private businesses and citizens. Others mentioned the PRA of 1995, which confirmed that the authority of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) "extended over not only agency orders to provide information to the government, but also agency orders to provide information to the public." A few commenters argued that the CLEO certification requirement, regardless of the proposed expansion, places an "unnecessary burden" of paperwork on the public as there is no "just

reason” for CLEO certification given ATF’s access to the FBI’s national criminal history databases. Others observed that the rule would complicate and perhaps degrade applicants’ opportunities to submit their NFA applications by electronic means, thereby increasing the paperwork burden. Some commenters observed, however, that eliminating the CLEO certification requirement for individuals and legal entities, and instead requiring a NICS check with a Form 4473 at the time of physical transfer of the NFA firearm, would enable applicants to e-file all NFA transfer forms, greatly reducing paperwork and streamlining the approval process at ATF. A number of commenters offered additional suggestions designed to increase application processing efficiency and speed; for example, having ATF maintain a database of approved applicants, having ATF permit electronic payments, and reducing the redundancy in ATF’s processing system associated with multiple applications.

One commenter suggested further ways to decrease paperwork and reduce the redundancy in ATF’s processing system associated with multiple applications submitted by the same person or legal entity. This commenter suggested that ATF consolidate applications from repeat applicants, maintain and use a database of approved applicants, and perform background checks on new applications from the date of the last approval. In this way, the commenter contended, the process would be shortened but maintain its integrity.

### **Department Response**

The Department acknowledges the commenters’ concerns that the proposed expansion of the CLEO certification requirement, as well as the CLEO certification requirement for individuals, imposed paperwork burdens on the public and on ATF. The Department also acknowledges that the proposed expansion may have limited the use of the ATF eForms system for many NFA applications because of the manual submission of fingerprint cards, etc. As

discussed in section IV.C.1, the Department is removing the CLEO certification requirement for individuals, and replacing it with a notification requirement for both individuals and trusts or legal entities. This change will help reduce paperwork and increase efficiency for the public and ATF. Section VI.G of this rule fully discusses the paperwork burdens.

Regarding commenters' other suggestions for streamlining the process (e.g., permitting electronic payments and reducing redundancy with multiple applications), the Department addresses those comments in section IV.G. The Department continues to maintain that requiring background checks for responsible persons, which includes a requirement that they submit photographs and fingerprint cards to ATF, increases public safety. See section IV.C.4 for discussion of benefits.

*E. Comments on Costs and Benefits*

1. Implementation Costs of Rule are Underestimated
  - a. Number of Responsible Persons per Legal Entity

**Comments Received**

In the proposed rule, ATF estimated an average of two responsible persons associated with a legal entity. Many commenters stated that ATF grossly underestimated this number and that having more than two responsible persons was not calculated into the cost. A number of objections were raised as to the sample size ATF used to obtain its estimate, which commenters argued was too small and not determined through statistically rigorous analysis. One of these commenters stated that if ATF's estimate of two responsible persons was inaccurate, it should propose another comment period with a revised number of responsible persons and associated costs.

Numerous commenters also noted that given the breadth of the definition of “responsible person” in the proposed rule, it was likely that the average number per legal entity was much higher than two. Commenters, including persons with experience preparing NFA trusts, opined that two was more likely to be the minimum number per legal entity, not the average. For corporations or LLCs, in particular, commenters observed that the number could be higher still, potentially in the “hundreds to thousands.”

Commenters noted that if, as they believed, ATF’s estimated average number of responsible persons was unreasonably low, its cost estimate was equally unreliable. One commenter opined that the total annual direct implementation costs to citizens involved in NFA transactions should be at least three times higher than ATF’s estimate (i.e., \$35,889,261 instead of \$11,963,087). This commenter stated that the estimated annual costs to ATF and local law enforcement agencies also should be adjusted (i.e., ATF annual costs: \$5,423,682 instead of \$1,807,894; local law enforcement annual costs: \$3,790,680 instead of \$1,263,560). Therefore, this commenter estimated the total implementation costs at \$45,103,623 ( $\$35,889,261 + \$5,423,682 + \$3,790,680 = \$45,103,623$ ), three times higher than ATF’s total implementation costs of \$15,007,541 ( $\$11,963,087 + \$1,807,894 + \$1,263,560 = \$15,007,541$ ).

### **Department Response**

For this final rule, the Department reviewed a random sampling of 454 forms to determine the average number of responsible persons per legal entity. The random sample was pulled from the 115,825 Forms 1, 4, and 5 processed in CY 2014. The forms to be reviewed were generated using established sampling methods based on ATF criteria of a 95 percent confidence level with a 2 percent sampling error, and represented a mixture of legal entities including trusts, corporations, and LLCs. The random sample showed that the average number



of responsible persons was approximately two. Additionally, the random sample showed that the most frequent number of responsible persons was one (with 226 instances), followed by two (with 124 instances). This represents 78 percent of the forms reviewed. The highest number of responsible persons in the sample was 11. Based on its random sample, the Department continues to estimate that each trust or legal entity has an average of two responsible persons. Moreover, the criteria used for determining who would be a responsible person in the most recent random sample review was based on a definition of “responsible person” materially similar to the revised definition of responsible person in this rule. *See supra* section IV.C.4.a. The Department acknowledges that the cost estimates for this final rule are based on an estimated average number of two responsible persons, but that individual experiences may vary.

To be considered a responsible person, the individual must possess, directly or indirectly, the power or authority to direct the management and policies of the entity insofar as they pertain to firearms. This power or authority will be limited by the terms of the trust or the structure of a legal entity. Therefore, not every individual named in a trust document will be considered a responsible person, but any person who has the capability to exercise such power and possesses, directly or indirectly, the power or authority under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust, will be considered a responsible person of the trust.

With respect to the definition of responsible person that was used to determine the average number of responsible persons at trusts and legal entities, the definition used was materially similar to the definition that appears in this final rule. The Department has thus concluded that, under the definition of responsible person that appears in this final rule, the best estimate of the average number of responsible persons at trusts and legal entities is two. The

Department notes that none of the trust documents reviewed in the sampling gave beneficiaries the power or authority to direct the management and policies of the trust, including the capability to exercise such power and possess, directly or indirectly, the power or authority under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust.

b. Number of Pages of Supporting Documents

**Comments Received**

A few commentators questioned the sampling methodology ATF used to determine that the documents chartering a legal entity averaged 15 pages in length and thought it was “highly suspect.” These commenters noted that ATF reviewed a different sample size to determine the average length of documentation than it used to compute the average number of responsible persons per legal entity (i.e., ATF reviewed 50 applications to determine the average number of constitutive documents for trusts and legal entities and 39 applications to determine the average number of responsible persons). Without access to ATF’s methodology, these commenters believe that the unexplained difference strongly suggests sampling or selection bias. One of these commenters stated that ATF has not addressed his request—through counsel—for information about the methodology used. In addition, these commenters, and a few others, alleged that the sample size was too small. Another commenter stated that for the average length to be 15 pages, that would mean, statistically, that half of the trusts have fewer than 15 pages of trust documents, which the commenter did not consider believable.

Another commenter stated that his own experiences as the owner and founder of Gun Trust Lawyer®, a nationwide network of lawyers, confirm what many other commenters observed, namely, that ATF underestimated the document length and other costs associated with

the proposed rule. This commenter and several other commenters stated that the document length of a sample revocable trust used by Gun Trust Lawyer®, including exhibits and attachments, is almost double the length that ATF estimated when the trust has four to six trustees, a typical number of trustees. These commenters stated that the sample revocable trust, used by this network includes a 19-page trust document, with additional pages for assignment of property and recording contributions, witnessed statements from each trustee and the settlor, and the signed “Trustee Declaration” and notarized signature page. Another commenter stated that documents associated with sophisticated estate plans or complicated trusts can be quite lengthy with trust instruments and entity formation documents ranging from a few pages to hundreds of pages when their schedules, exhibits, and attachments—all of which must be filed with ATF—are included. Another commenter stated that the gun trusts he creates are at least 65 pages long, and that he knows a substantial number of other attorneys who also create trusts of this length. Another commenter stated that his trust comprises 18 articles and over 70 pages. This commenter stated that ATF needed to reevaluate the sample and revise the cost assumptions.

Another commenter stated that ATF did not consider corporations and LLCs when estimating the average document length, and asked about the average length of document pages that a corporate entity and its shareholders would submit. Another commenter stated that the type of documents needed to evidence the existence and validity of partnerships, companies, associations, corporations, and trusts is governed by “formation and continuation” rules, which vary among the 50 States and are “complex, state-specific, and diverse in purpose.” This commenter stated that it is highly unlikely that ATF will be able to examine “hundreds or perhaps thousands of pages of trust or entity documents” due to lack of time and expertise.

## **Department Response**

For this final rule, the Department reviewed a random sampling of 454 applications to determine the average number of pages in the corporate or trust documents. The random sample was derived from 115,825 Forms 1, 4, and 5 processed in CY 2014. The forms to be reviewed were generated using established sampling methods based on criteria of a 95 percent confidence level with a 2 percent sampling error and represented a mixture of trusts and corporations, LLCs, and other legal entities. Based on its review of the random sample, ATF now estimates an average length of sixteen pages. Thirty-eight percent of the random sample had between six and ten pages. Twenty-nine percent of the random sample had between eleven and twenty pages. The highest number of pages in the random sample was fifty-five. Only two percent of the random sample had more than 50 pages and only three percent of the random sample had more than 40 pages. The Department acknowledges that the cost estimates are based on an average number of pages, including attachments, and that individual experiences may vary.

The Department acknowledges that each State is specific in the documentation required for partnerships, companies, associations, corporations, and trusts. ATF examines all submitted documents when trusts and legal entities apply for a Federal firearms license.

### **c. Costs for Photographs and Fingerprints**

#### **Comments Received**

ATF estimated that photographs would cost \$8.00 and take an average of 50 minutes to obtain, and that fingerprints would cost \$24.00 and take 60 minutes to obtain. Many commenters stated that ATF's estimates for photographs and fingerprints were unrealistically low, and, in their experiences, the costs and times were "higher" and even "significantly higher." The costs and times provided by the commenters for photographs ranged from \$8.00 to \$125 and 5 minutes

to two weeks, respectively. The costs and times provided by the commenters for fingerprints ranged from no cost—complimentary service—to \$120, and from 10 minutes to three weeks. A commenter stated that since ATF did not provide any supporting documentation for the estimated costs and times, it was not clear whether ATF surveyed only service providers in “highly-competitive, urban markets.” This commenter referenced the experiences of another commenter, who lived in a rural area and had to contact six police departments, taking several hours, before finding someone willing to fingerprint him. Other commenters mentioned additional costs in obtaining photographs and fingerprints that they believed ATF did not take into consideration such as work time missed, drive time, “fuel, wear and tear on my personal vehicle,” and “value of my time.” Another commenter stated that the stores offering in-house photography are dwindling and that applicants will spend 15 minutes locating a store, an average of at least 40 minutes for travel to and from the store, 20 minutes waiting for copy machines to warm up at the store, and additional time getting pictures taken and printed, totaling 75 minutes. This commenter referenced a nationwide chain’s price for passport photographs at \$11.99 plus tax, totaling \$12.71, plus an \$11.30 cost of driving to the store, computed by estimating an average roundtrip of 20 miles at the Federal mileage rate. This commenter summed up costs and time at \$24.01 and 75 minutes, respectively, to obtain photographs. This commenter accepted ATF’s estimate of \$24.00 to obtain fingerprints but considered ATF’s estimate of the associated time as 60 minutes to be low. This commenter estimated the time at 100 minutes (70 minutes total travel time plus 30 minutes on site to obtain fingerprints) plus an average round trip of 40 miles costing \$22.60, determined at the Federal mileage rate. This commenter tallied the fingerprint costs and time at \$46.60 ( $\$24.00 + 22.60 = 46.60$ ) and 100 minutes, equating to \$97.93 per responsible person. As support for his position that ATF underestimated the

fingerprint costs, another commenter provided a link to the Department of Homeland Security's Transportation Security Administration webpage<sup>13</sup> to show listed fingerprint service costs.

### **Department Response**

Fingerprints may be taken by anyone who is properly equipped to take them (see instructions on ATF Form 1, Form 4, Form 5, and Form 5320.23). Therefore, applicants may utilize the service of any business or government agency that is properly equipped to take fingerprints. Depending on where the fingerprints are taken, the service may require an appointment, and appointment availability may be limited. Some businesses provide evening and weekend appointments and a number of private companies provide mobile fingerprinting services at a location chosen by the customer to be fingerprinted. Additionally, some mobile fingerprinting services offer special pricing to groups of individuals who need to be fingerprinted.

ATF reviewed 254 websites that published the cost of fingerprint service. Information was obtained from businesses and government agencies located throughout the United States, in both urban and rural areas. The review disclosed a cost from zero to \$75.00 for two fingerprint cards. One hundred thirty-eight of the websites listed a cost between \$10.00 and \$20.00. Based on its review, ATF estimates the average cost to be \$18.66.

The estimated time to obtain fingerprints set forth in the proposed rule was 60 minutes. This estimate was derived from information ATF submitted to OMB as part of the renewal approval process for ATF Forms 1, 4, and 5. The time estimate has been accepted by OMB as an appropriate estimate of the time needed to obtain fingerprints. A review of twenty-two websites that published an approximate amount of time to obtain fingerprints disclosed time estimates

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<sup>13</sup> The Department notes that this link was a nonfunctioning link.

ranging from 5 minutes to 120 minutes, with the average time being 22 minutes. As not all the website estimates include wait time to obtain fingerprints, the Department believes the estimate of 60 minutes is a reasonable time approximation. The Department recognizes that individual experiences may vary from the estimated time.

Photographs must be a size of 2 inches x 2 inches of a frontal view taken within one year of the date of the application (see 27 CFR 479.63 and 479.85). There is no requirement that the applicant/transferee use a professional photographer to acquire the photographs, provided that they meet the stated requirements. The photographs may be taken at home with a digital camera and printed out in the required size using a color printer or the applicant/transferee may use a website that provides this service. In addition, the applicant/transferee may choose to obtain passport photographs, which meet the required specifications.

Numerous businesses offer passport photograph services including national chain stores. Generally, there is no appointment necessary to obtain passport photographs from these types of businesses.

ATF reviewed 57 websites that published the cost of passport photographs. Information was obtained from businesses located throughout the United States, in both urban and rural areas. The review disclosed a cost for two passport photographs that ranged from zero to \$25.00. Thirty-five of the websites listed a cost between \$10.00 and \$15.00. Based on its review, ATF estimates the average cost is \$11.32. The Department recognizes that the costs associated with individual experiences may vary from the estimated cost.

The estimated time of 50 minutes to obtain photographs was obtained from information ATF submitted to the OMB as part of the renewal approval process for ATF Forms 1, 4, and 5. The time estimate has been accepted by OMB as an appropriate estimate of time to obtain

photographs. A review of fifteen websites that published an approximate amount of time to obtain photographs disclosed time estimates ranging from 5 to 15 minutes with the average time being 10 minutes. As the website estimates include only the time necessary to have the photograph taken and printed, ATF believes the estimate of 50 minutes (accounting for travel time and possible wait time) is a more accurate time approximation. The Department recognizes that individual experiences may vary from the estimated time.

d. Time to Obtain CLEO Certification

**Comments Received**

ATF estimated that the time needed for a responsible person to procure the CLEO certification was 100 minutes (70 minutes travel time and 30 minutes review time with the CLEO). Several commentators stated that in their experiences, ATF's estimate was inaccurate, too low, "way off-base," and did not include additional associated costs. A few of those commenters stated that ATF did not consider the large number of instances where multiple CLEOs were unwilling to sign and an applicant needed additional time to "hunt" for a CLEO willing to sign the certification, which may have included visiting several different government offices, making appointments with multiple CLEOs, and educating and persuading the CLEO to sign the certification. A commenter stated that his CLEO would not review the form with him, and instead advised the commenter to mail in the form with an estimated wait of over 30 days for the CLEO to decide whether to sign the form. Another commenter expressed knowledge of many CLEOs who require that the applicant leave the form with their offices, and return later to pick it up, doubling ATF's estimated travel time of 70 minutes to 140 minutes. This commenter also stated that a typical process is for the CLEO's assistant to first review the form—taking 30 minutes—and then for the CLEO to review the form—taking 15 minutes—so that the total



CLEO review time is 45 minutes. This commenter also estimated applicants' drive time to average 40 miles, twice, to obtain the CLEO certification with a total mileage cost of \$45.20 at the Federal mileage rate. This commenter tallied the costs at \$140.17 per responsible person. Another commenter estimated that he spent over 240 minutes calling and writing letters to try and obtain CLEO certification to no avail, far exceeding ATF's estimated 100 minutes.

Another commenter stated that ATF did not justify or substantiate its estimate of 100 minutes. This commenter requested that ATF sample a statistically relevant number of NFA item owners to determine how long it actually takes to obtain CLEO certification. This commenter also requested that ATF consider the additional costs that some CLEOs arbitrarily impose on applicants as a condition to providing certification. According to the commenter, these conditions may include acquisition of an FFL03 Curio and Relic license or Concealed Weapons Permit, attendance at police fundraisers, volunteer service with the CLEO's department, or contributions to political campaigns.

### **Department Response**

The Department acknowledges that individual experiences to obtain CLEO certification have varied from the time estimate. However, the time estimate is no longer relevant as the CLEO certification has been replaced with a CLEO notification requirement. *See supra* section IV.C.1.

#### **e. Time Valuation Costs on Civilian Workers**

### **Comments Received**

A trade organization commenter stated that by basing all of its time valuations on \$30.80—the current average hourly compensation for all civilian workers in the United States—ATF failed to consider that NFA firearms are often very costly, and that even the least expensive

ones are discretionary purchases and unlikely to be made by low-income individuals. This commenter also noted that these items typically have a \$200 making or transfer tax, and that people using legal entities to make or acquire NFA firearms will already have incurred other expenses to create the legal entities, such as legal fees and corporate filing fees. This commenter suggested that ATF base its cost burden estimates on the actual characteristics of those who would be considered responsible persons. Other commenters stated that an individual purchasing NFA firearms would have higher than average disposable income and is not an average civilian worker.

### **Department Response**

The Department does not have access to confidential information such as the salary or disposable income for individuals purchasing NFA firearms. Commenters have not suggested a methodology or dataset that would permit the Department to more accurately estimate the time-value of responsible persons than the one it has adopted. The Department thus continues to believe that it is appropriate to base the time valuations for individuals and responsible persons of trusts and legal entities on the civilian hourly rate, as determined by the U.S. Department of Labor, Bureau of Labor Statistics. In June 2015, the hourly earnings for civilians was \$33.19. See section VI.A.1 of this rule for further discussion and the U.S. Department of Labor, Bureau of Labor, website at <http://www.bls.gov/news.release/pdf/ecec.pdf>.

#### **f. Other Incorrect Costs**

A commenter stated that ATF's time estimate of 10 minutes for a responsible person to complete Form 5320.23 was too optimistic. This commenter thought that ten minutes might be reasonable if the person completing it was familiar with the form, but that additional costs would be incurred to learn how to complete the form. This commenter asserted 15 minutes would be a

more accurate estimate, equating to \$7.70 per responsible person. Another commenter asked how ATF could accurately estimate a “mere” 10 minutes, on average, per responsible person to complete Form 5320.23, when the form had not yet been created. This commenter disagreed with ATF’s statement that there would be no increased costs associated with mailing the application package to ATF, and called such a statement “either willfully false, or woefully ignorant.” This commenter argued that the proposed rule would add weight and increased cost to mail an application, which now must contain a “significant” number of paper pages (i.e., forms 5320.23, fingerprint samples, photograph samples, and CLEO certifications). This commenter also noted that the U.S. Postal Service recently announced a rate increase, which ATF did not factor into its cost calculations. This commenter also questioned how ATF could maintain that it would incur no additional costs to review this new paperwork when the proposed rule would result in more CLEO certifications, fingerprints, and photographs with each application.

Another commenter considered ATF’s estimate of cost to copy documents, associated with a legal entity, at \$0.10 per page, a fair estimate; however, this commenter stated that the average trust, if properly drafted, would have 20 pages, not the estimated 15 pages. Additionally, this commenter stated that ATF’s time estimate of 5 minutes to make copies was low. This commenter stated that many legal entities do not have a copy machine on site and would need to travel to a commercial facility to make copies. This commenter estimated such a round trip to be 30 minutes and cover 15 miles on average, costing the applicant \$8.48 (using the Federal mileage rate). This commenter stated that making copies and paying for those copies would take 10 minutes. Tallying the total times and costs, this commenter estimated that the entity would spend “\$16.95 to travel, \$2.00 on copies, and 40 minutes to travel and acquire the copies. In dollars, this equates to \$39.48 per entity.”

A commenter questioned ATF's estimated cost of \$14.50 to process fingerprints. This commenter stated that \$14.50 is the cost ATF pays but may not be the actual cost to the FBI. This commenter expressed interest in hearing from the FBI on the "true" cost transfer from ATF to the FBI.

### **Department Response**

The Department agrees with the suggestion that allowing 15 minutes to complete Form 5320.23, 5 minutes more than the estimate in the proposed rule (78 FR at 55022), is a fair estimate. With respect to mailing costs, the addition of a CLEO notification requirement will result in the mailing of an additional form to the CLEO (if the applicant/transferee or responsible person(s) opts to use mail delivery) but the associated costs are minimal. Moreover, any additional mailing costs will be offset by cost and time savings resulting from the elimination of the CLEO certification requirement. Further, postage costs are already included in the costs of completing and mailing Forms 1, 4, or 5 to ATF. As discussed in the proposed rule (78 FR at 55022), individuals, trusts, and legal entities must complete and mail Forms 1, 4, or 5 to ATF. This final rule should not change the costs associated with that process. Even if there are multiple responsible persons associated with a trust or legal entity, the trust or legal entity still will be completing and mailing one Form 1, 4, or 5. Similarly, because CLEO notifications have replaced CLEO certifications, ATF's internal costs will remain as discussed in the proposed rule (78 FR at 55022).

The Department agrees with the commenter who referenced ATF's estimate of cost to copy documents "at \$0.10 per page a fair estimate." Further, a more recent analysis of 454 random samples available to ATF suggests that 16 pages approximates the mean length for properly drafted trust documentation. In addition, the Department concurs with the estimate of

ten minutes to make and pay for copies. Current data indicates that ATF pays the FBI \$12.75 to process fingerprints, which is the appropriate cost for inclusion in this final rule.

g. Costs Not Considered

i. Lost Tax Revenue

**Comments Received**

Many commenters stated that ATF failed to account for the significant loss of tax revenue by ATF from fewer NFA transfers, and on the income tax lost on the sale of NFA firearms by manufacturers, distributors, and dealers. Several of these commenters noted that ATF estimated 40,565 ATF Forms 1 or 4 were submitted in 2012 for non-FFL legal entities (78 FR at 55021). Several commenters stated that the proposed rule would “discourage” or “scare off” individuals from purchasing or making NFA firearms because the rule will make the application process for legal entities more difficult. These commenters stated that for every Form 1 and Form 4 that is not submitted to ATF, a \$200 tax payment loss will result (unless the application is submitted for an “Any Other Weapons” weapon, in which case the tax payment loss would only be \$5). Several commenters provided estimates of the decreased volume in NFA applications that they asserted would result from implementation of the proposed rule, and corresponding losses in NFA tax stamp revenue. These estimates of reduced applications ranged from a 50 percent reduction (attributed primarily to predicted refusal of CLEOs to sign certifications for legal entity responsible persons) to a 75 percent reduction (attributed primarily to a decrease in legal entity applications), with corresponding estimated losses in NFA tax stamp revenue of \$6.1 to \$8.1 million. Several commenters stated that the proposed rule would make it harder for people to legally purchase silencers, and asked, “is ATF trying to eliminate \$12,000,000+ in annual tax revenue?” Several commenters asserted tax revenue losses would occur in addition to lost NFA

tax stamp revenue. They stated that if the business of selling NFA firearms declined and caused small FFL dealers and custom manufacturers to cease dealing in NFA firearms, such dealers and manufacturers would surrender their SOT status and stop paying at least \$500 annually to the U.S. Treasury. If small custom manufacturers determined it was no longer profitable to stay in business and were forced to shut their doors, such manufacturers would stop annual payments of at least \$2,400 to the U.S. Treasury under the International Traffic in Arms Regulations. *See* 22 CFR 122.3. There would also be a less direct effect, as the entity operating the FFL, as well as the individual owners and employees, would lose income, which would result in a reduction in income tax revenue.

#### **Department Response**

As noted, the final rule eliminates the CLEO certification requirement. Consequently, comments asserting tax revenue losses resulting from the refusal of CLEOs to sign certifications for legal entities are now moot. Moreover, the Department does not anticipate a decline in Form 4 applications. The Department has not observed, and does not anticipate, reduced demand for NFA firearms or a decline in the filing of applications (Forms 1 and 4). Applications have generally increased each year and the Department expects this trend to continue as more States loosen restrictions on the use, in particular, of silencers for hunting or target shooting.

Moreover, because the CLEO notification requirement and the requirements for fingerprint and photograph submission will be the same under the final rule for individual applicants and trusts and legal entities, applicants may choose to forgo the formation of a trust or legal entity and acquire firearms as individuals. A number of commenters have observed that the proliferation of NFA trusts is a direct result of the CLEO certification requirement for individual applicants. It is therefore fair to predict that eliminating the certification requirement will

reverse that trend. Applications submitted by an individual are less complex because they do not require documentation evidencing the existence and validity of a trust or legal entity, such as articles of incorporation.

Contrary to the assertions of several commenters, the Department does not anticipate that implementation of the final rule will result in an increase in the number of FFLs or FFL/SOTs going out of business. The number of FFLs that also paid SOT to manufacture, import, or deal in NFA firearms increased 117 percent between 2009 and 2014. The Department estimates that the number of FFLs that also pay SOT will increase an additional 30 percent by the end of 2015.

## ii. Hearing Loss

### **Comments Received**

Many commenters stated that the proposed rule completely overlooked the cost of hearing loss due to the unavailability of silencers. Many commenters stated that many citizens desire to make or acquire silencers to protect their hearing while engaged in lawful, recreational shooting, as well as in self-defense situations. These commenters stated that the proposed rule imposed obstacles to making and acquiring silencers, and a significant number of shooters who desire to use silencers will be unable to do so. Several commenters provided data and statistics showing: the level of impulse noise generated from unsuppressed firearm discharge; that firearm discharge is a leading cause of noise induced hearing loss; the efficacy of silencers at protecting hearing; and the impracticality of using means other than silencers in certain situations (e.g., ear protectors in a home-defense situation). These commenters also provided data estimating that a 7 percent hearing loss may result for every five years spent hunting. These commenters stated that over time many recreational shooters, who are continually exposed to the noise, will have permanent hearing loss. A few commenters stated that those impacted hunters will bear

“substantial medical costs and partial disability resulting in lost productivity.” Another commenter provided data from a specialist who put a specific dollar estimate on firearm related hearing-loss costs (the commenter stated the estimate was supported by the “Value of a Statistical Life” method). This specialist estimated a minimum cost of \$15 million, considering only the direct costs of medical care, testing, and hearing aids, and stated that the estimate is likely to exceed \$100 million when one adds disability to the direct medical costs. A few commenters generally mentioned a National Shooting Sports Foundation study that showed that in 2011 there were 14,630,000 paid hunting license holders and that total recreational shooters exceeded 30 million.

### **Department Response**

The Department recognizes that the use of a silencer while shooting a firearm may help to reduce hearing loss. Neither the proposed rule nor the final rule prohibit the manufacture or sale of silencers; the primary premise of the comments is that silencers will become less available as a result of the proposed rule, thereby increasing societal costs from shooting related hearing loss. The Department disagrees that the final rule will significantly reduce the availability of silencers. The final rule no longer requires CLEO certification, the aspect of the proposed rule most commonly cited by commenters as an impediment to consumers obtaining silencers and other NFA weapons (from either retailers or private transfers). With the elimination of the CLEO certification requirement for all NFA applications, including individuals, the process for individuals who wish to purchase a silencer to protect from hearing loss becomes less, not more, burdensome. Moreover, as is noted in several sections of this final rule, the silencer industry has experienced significant growth largely as the result of several States legalizing the ownership of silencers for hunting and other purposes under State law. This



legalization trend among the States is likely to continue, strengthening demand for silencers, thus driving additional industry growth and increased product availability. Finally, with respect to assessing the societal costs of firearms-related hearing loss, the Department is unaware of any peer reviewed study calculating an average value for hearing loss attributable only to the use of firearms without silencers.

iii. Attorney Costs

**Comments Received**

Many commenters stated that ATF failed to consider the costs that individuals associated with trusts or legal entities would incur to consult with attorneys to accurately determine the number of individuals associated with their trusts or legal entities that would fall under the proposed “responsible person” definition. Another commenter stated that the proposed rule did not address the interstate nature of corporations, and that an individual would need to consult an attorney—at \$150 per hour—to determine what jurisdiction the CLEO certification would be required to be obtained in. A few commenters provided their total attorney fees to consult with lawyers specializing in NFA legal matters and to form an NFA trust that complied with all the relevant laws; these fees ranged from \$200 to over \$1,500. Another commenter stated that if the proposed rule were implemented, applicants would need to obtain revised trust documents from a licensed attorney. This commenter, a licensed attorney, conservatively estimated the average cost and time at \$200 per trust and at least two hours of the applicant’s time, respectively. After assuming that 20 percent of the approximately 100,000 NFA related trusts or other entities would require revision, this commenter estimated the costs to trusts for legal fees to be \$4,000,000 plus 40,000 client hours.

This same commenter stated that ATF did not estimate the costs for attorneys to revise forms, attend continuing legal education, and perform other uncompensated work needed to comply with the proposed changes. This commenter estimated five hours for each attorney to perform these activities. After assuming 1000 attorneys are involved nationwide in NFA matters and a conservative hourly rate of \$200, this commenter estimated the total cost at \$1 million.

Another commenter stated that ATF did not estimate the cost to ATF for a State licensed attorney to review the submitted trust documentation to ensure the trust's validity and that all responsible persons are included. This commenter estimated the annual cost to ATF at \$1,628,000 after assuming 40,700 trust documents, half an hour of the attorney's time to review each trust, and an \$80 hourly rate.

### **Department Response**

There is no requirement to form a trust or legal entity to acquire an NFA firearm. In fact, all of the legal fees included in the comments may be avoided if the NFA firearm is acquired by an individual. Therefore, when an applicant voluntarily decides to register a firearm to a trust or legal entity, the applicant assumes all responsibilities for determining the responsible persons—including legal fees associated with making that determination. Additionally, as noted, the final rule no longer requires CLEO certification; the final rule requires only CLEO notification. Moreover, both the text of the final rule (when incorporated into a regulation) and instructions on revised ATF forms will provide specific directions as to who must provide notification to the CLEO. Therefore, it may not be necessary to consult an attorney to determine this information.

As the attorney-commenter did not specify why trust documents would need to be revised, the Department cannot directly address this concern. There is no requirement, existing

or proposed, to form a trust or legal entity to acquire an NFA firearm or to satisfy any CLE requirement. The cost of CLE is therefore outside the scope of the cost of this final rule.

#### iv. Costs to Update Publications/Resources

##### **Comments Received**

A commenter stated that ATF did not estimate the costs to revise various publications, informational brochures, industry web pages, and other miscellaneous resources relied upon by NFA applicants and potential applicants for NFA information such as those published by hobbyists, industry, retailers, local law enforcement, and Federal agencies. The commenter could not estimate such costs but imagined that such costs could easily be \$1,000,000 or more nationally.

Another commenter stated that ATF's cost analysis did not address the cost of implementing the forms and applications in the NFA Branch that have a "pending" status when the rule changes are implemented.

##### **Department Response**

ATF updates its publications, website, and forms on an ongoing basis and will continue to do so each time there are changes to Federal firearms laws or regulations. FFLs, other law enforcement agencies, trade associations, and other entities are not required under Federal law or regulation to provide information on the NFA or on how to acquire an NFA firearm. Therefore, these comments are outside the scope of this rulemaking. Additionally, such costs are difficult to estimate, and informational resources provided by other entities are routinely updated as a matter of course, making it difficult to trace what update costs are specifically attributable to ATF's new rule. The commenter did not suggest a methodology by which ATF could readily quantify such

costs, and ATF believes any such costs directly traceable to the promulgation of this final rule will be negligible.

With regard to the comment regarding applications that have a “pending” status when the rule is implemented, all applications postmarked prior to the effective date of the rule will be processed under the current regulations. The same is the case for any applications that have a pending status at the time the rule is implemented. Consequently, no additional costs will be incurred by ATF to process pending applications.

#### v. Litigation Costs

#### **Comments Received**

Several commenters stated that ATF omitted the costs to ATF, DOJ, and local law enforcement of litigation that could potentially arise if the proposed rule were implemented. These commenters stated that ATF must expect significant judicial challenges to the proposed CLEO certification requirements for responsible persons as many law abiding citizens will no longer have a “work-around” or mechanism to avoid CLEO certification, will consequently face arbitrary refusal by CLEOs, and will be unable to own or possess otherwise legal NFA items. A few of these commenters stated that citizens who live in jurisdictions where every local CLEO refuses to sign off on the NFA paperwork would have no recourse other than to sue ATF or DOJ. Another commenter referenced *Lomont*, 285 F.3d 9, and stated that ATF’s proposal to extend the CLEO certification would survive a “facial challenge” under the Administrative Procedure Act. However, this commenter predicted that in cases where every qualified CLEO refuses to provide the certification even though the applicant is not prohibited by State or local law from making or receiving the firearm, such an applicant could bring an “as-applied challenge” and win.

Another commenter expressed the opinion that the rule was too vague to withstand legal scrutiny and would result in expensive litigation. Another commenter stated that DOJ will spend millions of taxpayer dollars “in vain” trying to defend this rule in various courts. Another commenter agreed that taxpayers would “foot the bill” for the litigation that citizens allegedly denied their constitutional rights would bring against local and State governments, and the Federal Government, and that this would place a huge burden on local departments and agencies.

### **Department Response**

The change from CLEO certification to notification addresses the substance of the concerns expressed in these comments and will reduce the likelihood of litigation.

Additionally, the Department regards the possible costs of potential future legal challenges as difficult to quantify. Commenters did not suggest a methodology by which the Department could accurately measure such costs. Moreover, the Department already must maintain a legal staff to defend its rules that it must fund whether or not any particular legal challenge is brought. It would thus be difficult to determine the extent to which litigation about the rule would add to the Department’s legal costs.

Finally, the Department does not regard the potential cost of defending the lawfulness of its rule as appropriate to include in an assessment of the costs and benefits of the rule. Such costs are imposed by third parties that choose to file suit regardless of the potential legal merit of their claims. If the costs of defending suits formed part of the cost of a rule, opponents could claim that they would file suit, regardless of the merits of their claims, and thereby drive up the estimated cost of the rule. If an agency were required to factor litigation threats into the cost of a rule, opponents threatening litigation could exercise a sort of veto over agency rulemaking by artificially increasing the rule’s costs.

## vi. Miscellaneous Costs

### **Comments Received**

A commenter stated that ATF severely underestimated the time and costs to trust participants arising from the rule. This commenter stated that the proposed rule would take trust participants an additional 30 days to properly coordinate and submit the required documentation for each NFA item requiring approval by the NFA Branch.

Another commenter stated that neither ATF nor any other component within DOJ provided “credible information, studies, or analysis” showing details of the estimated annual fiscal costs and the feasibility of implementing the proposed rule. This commenter asked that the Government Accountability Office (GAO) perform an “independent, non-partisan review” of the proposed rule and its current and potential fiscal impact, as well as its feasibility, and submit the findings to Congress so Congress could review to determine if the proposed rule complied with the “policies, rules, and standards” governing ATF.

One commenter noted that ATF calculated the costs of the proposed rule based on the number of legal entity applications from previous years, and further noted that ATF listed a large increase in legal entity applications from 2000 to 2012 as evidence, in the commenter’s words, that these applications “are serving as a mask for individuals who otherwise would be prohibited from owning guns.” This commenter stated that if the proposed rule’s purpose is to target and reduce such activity, then ATF’s cost calculations should reflect a reduction in the number of applications by legal entities.

### **Department Response**

The Department does not agree with the commenter that the proposed rule would add an additional 30 days to the process of acquiring an NFA firearm. The commenter provided no

empirical evidence or analysis supporting this assertion, and the Department is unaware of any aspect of the final rule that would lead to an increase in time expended by applicants on this scale. Under the revised definition of responsible person, the average number of responsible persons is estimated at two. Those two responsible persons may reside in the same household (e.g., husband and wife) or work in close proximity to each other, which would ease coordination of the collection of fingerprints and photographs required for the application. Furthermore, because responsible persons are no longer required to obtain CLEO certification, no delay will result from that issue.

Proposed changes to ATF regulations, including the proposals set forth in the NPRM and this final rule, undergo a rigorous review process by both the Department and the Office of Management and Budget. These reviews include close scrutiny of the estimated annual fiscal costs associated with the proposed and final rules. Finally, the proposed rule and this final rule have been published for public comment and scrutiny. In light of all these review procedures, the Department does not believe additional review of this rule by the GAO, as requested by a commenter, is necessary or warranted.

The Department also does not agree with the commenter who asserts that the purpose of the proposed rule is to target and reduce NFA applications filed by trusts. The objective of the final rule is instead to ensure all applicants, regardless of whether they are an individual applying in an individual capacity or applying in a representative capacity on behalf of a trust or legal entity, are subject to the same approval process to help ensure that prohibited persons do not obtain NFA firearms.

Moreover, the Department's decision to base its estimate of the costs of the rule on the number of trusts and legal entities that currently apply to make and transfer NFA firearms is

appropriate because it likely accurately estimates the overall number of background checks and information submissions that will need to be undertaken as a result of the rule. To the extent individuals presently create single-person trusts and legal entities to circumvent background check requirements, they may now choose simply to submit individual applications. To be sure, that would result in a decrease in the number of applications from trusts and legal entities. But it would be accompanied by a concomitant increase in the average number of responsible persons at the trusts and legal entities that remain. The overall number of information submissions and background checks is therefore likely to remain roughly equivalent to the Department's estimate. Commenters have not suggested a method of estimating the costs of the final rule that is superior to the methodology the Department has chosen.

## 2. Financial Impact on Firearms Industry

### a. Impact on the NFA and General Firearm Industry, Specific Types of NFA Manufacturers, and Related Businesses (Including Law Firms)

#### **Comments Received**

A large percentage of commenters asserted that the proposed rule will negatively impact NFA industry participants (including manufacturers, dealers, and employees) as well as related businesses such as suppliers. The commenters characterized their assessments of the financial impact on business in a number of different ways: the impact on NFA manufactures; the impact on specific NFA manufacturers such as silencer manufacturers; the impact on firearm dealers; the impact on related industries such as suppliers to manufacturers; the impact on general lawful commerce in firearms; the impact on "small businesses;" the impact on employees of various businesses in the form of lost jobs and wages; and general claims of "reduced revenue" for industry and affiliated business.



Most of the commenters focused their assessment of the proposed rule's negative impact on the provision in the proposed rule extending the CLEO certification requirement to trusts and legal entities. These commenters emphasized that, for numerous reasons, some CLEOs will not sign the NFA certifications even if the applicant is not prohibited by law from acquiring a firearm, freezing the application approval process. Because no process exists to override a CLEO's refusal to sign a certification, the refusal to sign functions as a denial of the application, preventing the applicant from purchasing the NFA item, and thereby depriving NFA manufacturers and dealers of law-abiding customers. A second recurring theme in the comments was that the proposed rule would decrease demand for NFA firearms, and thereby negatively impact businesses, because the rule will require a greater number of NFA applicants to undergo background checks (i.e., individuals affiliated with trusts and legal entities who fall within the proposed rule's definition of "responsible persons").

Examples of comments from the various categories of characterization used by the commenters include the following:

i. Manufacturers and Dealers

Several commenters reasoned that the proposed rule would make it more difficult to obtain NFA items and as a result would drive manufacturers out of business; one such commenter characterized the impact as jeopardizing the entire, booming "cottage industry" of NFA manufacturers. Similarly, an employee of a silencer manufacturer, that has been in business for more than 20 years, commented that the proposed rule would "cripple" his employer's business. One commenter listed multiple negative impacts he predicted the proposed rule would have on NFA manufacturers: (1) lost investment in machines; (2) lost investment in unsellable inventory; (3) lay-offs of manufacturing and sales staff; and (4) no market for their

product. Several commenters argued that the proposed regulation would make wait times for customers to obtain ATF approval even longer, resulting in frustrated customers and reduced sales.

Many commenters directly linked predictions that the proposed rule would negatively impact NFA manufacturers and dealers to the CLEO certification requirement. They asserted that extending the certification requirement to legal entities will drastically inhibit sales of NFA items, particularly silencers, causing reductions in business, business closure, and loss of employees. Several FFL commenters asserted that the proposed rule would “destroy” their businesses because CLEO certification was difficult or impossible to obtain in their counties. One of these FFLs stated he had researched the impact of CLEO certification in his State, Texas, and determined that approximately “70% of Texans” will not be able to obtain a CLEO signature; therefore, he predicted, “70% of his customer base” would be eliminated by the proposed rule. Another FFL asserted that he anticipated a 75 percent loss in sales due to the CLEO requirement, and two other FFLs stated that they anticipated a 20 percent loss in revenue due to the CLEO certification requirement.

Several commenters opined that the proposed rule would place significant financial burdens on firearm dealers by prolonging the transfer process for trusts and legal entities because under the responsible person definition the trust or legal entity will need to obtain the fingerprints and photographs of all members of the trust or legal entity. These commenters maintained that the proposed rule will require dealers to reserve inventory without payment until the transfer process is complete—which currently takes in excess of nine months. Several other commenters stated that further delays encountered in the transfer process place NFA dealers at a significant financial disadvantage, noting that by the time a transfer is approved, often the item

being transferred is a previous production model. Finally, a number of commenters focused on their belief that the proposed rule would negatively impact employment in the firearms industry, causing lay-offs and increased unemployment among employees of firearm manufacturers and sellers.

ii. Small Businesses

Many commenters stated generally that the proposed rule will hurt, hinder, or make it harder for small business owners, particularly firearm related businesses, by increasing transaction costs and transaction times. Several commenters emphasized that small firearms related businesses are engaged in lawful commerce, and expressed the view the government was seeking to unfairly target such businesses with regulations increasing the cost of doing business. Other commenters hypothesized that the proposed rule will destroy small businesses because it would limit or prevent law-abiding citizens from acquiring NFA items.

iii. Specific Types of NFA Manufacturers and Markets

Several commenters focused on the proposed rule's negative effect on specific NFA market segments such as the markets for silencers, short-barreled rifles, machineguns, and military surplus firearms. A large number of commenters claimed the proposed rule would significantly reduce the sale of silencers, driving silencer manufacturers out of business and potentially causing the entire silencer industry segment to collapse. Another commenter predicted the proposed rule would cause the collapse of the military surplus firearms market. Some commenters expressed concerns that the proposed rule could harm technical innovations for silencers, with one commenter asserting that advancements in silencer technology will grind to a halt, affecting the military firearms supplied to "our troops overseas who deserve and require the best we have to offer." One commenter reasoned that the proposed rule will limit the

availability of NFA items, thus making the value of silencers, machineguns, and short-barreled rifles increase for those who own them. This commenter anticipated that this effect would make current owners “happy.”

#### iv. Impact on Related Businesses (Including Law Firms)

Several commenters expressed concerns that the proposed rule will negatively impact firearms related-industries, not only those businesses directly involved in the sale and manufacture of firearms. Many of these commenters asserted that the proposed rule’s CLEO certification requirement will have the effect of halting the sale of all NFA items in many areas (because, they assert, certain CLEOs will not sign certifications), which, they assert, will have a cascading effect: reduced sales will result in substantial losses for NFA manufacturers and dealers (particularly those involved in the silencer market), which, in turn, will negatively impact businesses that contribute to the manufacturing process or derive business from firearms dealers and manufacturers. One commenter stated that the proposed regulation will cause well paying, American jobs to be lost in machining, manufacturing, marketing, and retail sales. Examples provided of related businesses that commenters believe would be negatively impacted also included: ranges, materials suppliers, computer numerical control and milling operations and manufacturers, third party processors (such as Cerakote coating, powder-coating, anodizing, black oxide, metal sales, tooling, laser marking, and engraving), office supply stores, trade shows, and various NFA shooting events (such as machinegun shoots).

Other commenters asserted that the proposed rule will negatively impact law firms that handle trust matters involving NFA items because demand for creation of trusts solely used to obtain and hold NFA firearms will decrease as a result of the proposed rule’s provision defining responsible persons for legal entities and requiring such persons to undergo background checks.

These commenters asserted that the decreased demand for firearm trusts will cause a loss of revenue to law firms and layoffs of law firm employees.

### **Department Response**

The Department acknowledges that this rulemaking will have some modest impact on the firearms industry; the Department does not agree, however, with the assessment of the many commenters who assert that this rulemaking will have a substantial negative economic impact on NFA industry participants (including manufacturers, dealers, and employees), and on related businesses such as suppliers. The comments asserting that the proposed rule will have substantial negative (and even catastrophic) impacts on the industry are primarily premised on two conclusions, neither of which, in the Department's view, are supported by the facts and circumstances underlying this final rule. The first conclusion is that the CLEO certification requirement in the proposed rule will deter potential purchasers who previously would have chosen to obtain an NFA firearm through a trust or legal entity because they could do so without the need for CLEO certification. This conclusion is largely based on assertions that many CLEOs (1) refuse to sign NFA certifications even when the applicant is not prohibited from possessing a firearm; (2) too slowly process certification requests due to resource constraints; or (3) seek to extract political or economic favors from applicants in exchange for signing a certification. As a result of the impediments posed by CLEO certification, the commenters assert, the proposed rule would have resulted in a drastic reduction in the sale of NFA weapons (particularly silencers), thus decimating the NFA industry and greatly harming related industries. The second conclusion is that the demand for NFA firearms will dramatically decrease if a greater number of NFA applicants are required to undergo background checks and to submit fingerprints and photographs. This conclusion is directly linked to the rule's definition of

“responsible persons” affiliated with trusts and legal entities; persons meeting that definition will be required under this final rule to undergo background checks and submit fingerprints and photographs when the trust or legal entity they are affiliated with files an NFA application or is a transferee.

The conclusion regarding the impact of CLEO certification has been rendered moot by this final rule. In response to the concerns expressed by commenters relating to CLEO certification, the Department has eliminated that requirement, and replaced it with a less burdensome CLEO notification requirement. Hence, obtaining CLEO certification is no longer a hurdle for individuals, trusts, or legal entities acquiring an NFA firearm, and therefore the problems identified by the commenters with respect to the CLEO certification process are no longer a factor threatening the economic health of NFA manufacturers, dealers, and related businesses.

With respect to the commenters’ conclusion regarding background checks, the Department believes the reality of the firearms marketplace refutes the conclusion that background checks will deter individuals from acquiring NFA firearms. Background checks, a vital law enforcement tool that ensures prohibited persons will not unlawfully obtain firearms, are already conducted on virtually all non-licensed individual persons who purchase either a GCA or NFA firearm from an FFL or FFL/SOTs. Notwithstanding these checks, both the GCA and NFA firearms markets are flourishing. Background checks do not significantly deter non-prohibited individuals from purchasing firearms from licensed dealers, including NFA dealers and manufacturers.

Other market conditions also refute the concerns about the proposed or final rule threatening the viability of NFA dealers and manufactures. Many States have been relaxing

prohibitions on ownership of silencers, SBRs, and SBSs, thus expanding the market for these NFA firearms. In addition, the firearms industry is constantly introducing new and improved models. As evidence of this, the Shooting, Hunting and Outdoor Trade (SHOT) Show is attended annually by more than 62,000 industry professionals from the United States and many foreign countries, seeking information on new firearms and shooting products. This is a clear market signal that demand for innovation and development of new firearms and shooting products, including NFA products, is strong, and will continue to support NFA manufacturers and dealers regardless of whether or when the final rule is implemented. Additionally, demand for silencers has continued to increase as several States have recently legalized ownership of silencers for hunting and self-defense; the trend of States legalizing silencer ownership appears likely to continue. Consequently, the Department anticipates demand for silencers will continue to rise. Finally, some States have recently relaxed laws restricting the possession of SBRs and SBSs, thereby increasing the potential market and demand for these NFA items.

The Department also disagrees with comments that FFLs will be hurt because they reserve inventory without payment during the application process. An FFL may choose, as part of its business practice, to require payment in full on an NFA firearm before an application may be submitted. Additionally, ATF posts the processing time for NFA items on its website so a purchaser may determine the approximate time necessary to process the application. Due to the nature of the application process, some risk that a new model will be introduced prior to the approval of a customer's purchase is inherent; the new rule, however, does not materially increase that risk.

The Department also rejects comments asserting that this rulemaking is intended to limit or prevent ownership of NFA items by persons who are not prohibited from receiving or

possessing them. This final rule is intended to ensure only that persons acquiring and having access to NFA firearms are not prohibited from receiving or possessing them. Furthermore, in response to commenters who asserted that the decreased demand for firearm trusts will cause a loss of revenue to law firms and layoffs of law firm employees, a formation of a trust or other legal entity is not required to acquire an NFA firearm. Therefore, comments on the loss of income for attorneys who draft these documents is outside the scope of this rulemaking.

b. Burden of Implementation

**Comments Received**

Several commenters took issue with ATF's assertion that the proposed rule would cause only a minimal burden to industry. In sum, these commenters explained that the proposed rule will be more than minimally financially burdensome to the industry because it will cause customers to stop buying NFA items due to the extended wait times and increased regulatory burdens created by the rule, thus making it less profitable for licensees to hold their SOT status.

According to some commenters, as a result of the proposed regulation, some retailers are facing shutdowns, others face employee lay-offs, and all licensees and related-industries are bracing for revenue reduction. Some commenters stated the proposed rule unreasonably burdens commerce because of the cost of fingerprinting and passport photographs for every purchase. A commenter stated the proposed rule will make it more difficult for local businesses to sell items that are already difficult to obtain. Finally, a commenter argued that the proposed rule is so burdensome it will deter citizens from acquiring NFA items through the approved government process, and encourage the rise of a black market in NFA items. Several commenters claimed it will take about two or three additional hours of customer service assistance per transaction to handle the additional fingerprint cards, photographs, and application paperwork should the



NPRM be implemented. One commenter estimated three additional customer service hours would be needed while others estimated two hours would be needed.

### **Department Response**

Applicants who purchase NFA firearms in an individual capacity have long paid the costs of fingerprints and photographs; the final rule equitably extends these costs to trust and legal entity applicants, and reasonably limits the photograph and fingerprint requirements to responsible persons of the trust and legal entity applicants. The Office of Management and Budget, when granting the renewal of the ATF Forms 1, 4, and 5, has determined that the cost of fingerprints and photographs is not an unreasonable burden. To the extent commenters have asserted that requiring responsible persons to submit fingerprints and photographs is more burdensome than the requirement for individuals because a trust or legal entity may have multiple responsible persons, the option exists for the applicants who have formed trusts or legal entities for the express purpose of acquiring NFA firearms to forego use of a trust or legal entity and acquire the NFA firearm in an individual capacity. The formation of a trust or legal entity is not required to purchase an NFA firearm. For corporate applicants, the costs associated with submitting fingerprints and photographs for responsible persons is a reasonable cost of doing business; for trusts or legal entities that acquire NFA firearms to allow multiple individuals to possess and use the same firearm (each of whom will therefore be a responsible person), the cost of submitting fingerprints and photographs for each of those persons is directly related to the statutory goal of ensuring prohibited persons do not possess and use NFA firearms.

The Department also notes that, as has been explained elsewhere, the Department predicts that the rule's impacts on demand for NFA firearms will be minimal and the costs to trusts and legal entities will be low.

The final rule also simplifies the process of acquiring an NFA firearm by eliminating the CLEO certification requirement for all applicants or transferees and replacing it with a less burdensome notification requirement. Similarly, the final rule has clarified the “responsible person” definition to ensure it does not extend to all members of a trust or legal entity (e.g., by excluding from the definition corporate shareholders who do not control the management or policies of the entity with respect to firearms).

c. Assessment of the NPRM Implementation Cost

**Comments Received**

A commenter observed that the proposed rule will be expensive to implement for the firearms industry. Another commenter warned that ATF failed to take into account the fact that the proposed rule will also have an adverse financial impact on those who manufacture and sell or transfer NFA firearms. At least one commenter stated ATF failed to consider the significant revenue losses the proposed rule would impose on small businesses. Another commenter disagreed with ATF’s assertion that the proposed rule will not affect small businesses. A commenter who works for a firearms business stated, “[I] manage a small business that holds an FFL and deals in NFA devices. . . . All (100%) of our customers utilize legal entities to lawfully obtain NFA firearms. Since the proposed rule change our business in selling NFA firearms has dropped to zero as our customers do not want to spend money with the risk that they may not be able to take delivery of the NFA item. That drop translates into loss of revenue for my small business, distributors I buy from, manufacturers of the devices and manufacturers of related equipment.” A commenter who is an employee of a silencer manufacturer stated that the proposed regulation will “surely cripple if not disable our business.” Finally, another commenter asked the question, “what about the manufacturers and vendor of these controlled items who

would inevitably lose a substantial amount of business?” That commenter argued that it is foreseeable that businesses involved in the manufacturing and selling of NFA items will suffer from the implementation of the proposed regulation.

### **Department Response**

The Department believes that any impact on the firearms industry arising from the proposed rule will be insignificant. As noted, the CLEO certification requirement has been changed to a notification requirement; and the definition of responsible person has been clarified. These changes will ensure that the impact on the firearms industry is minimal. Applications postmarked prior to the implementation of the final rule will be processed under the current regulations. Only those applications postmarked on or after the implementation of the final rule will be subject to the new regulations. Therefore, individuals who refuse to purchase NFA items on the basis of their belief that the rule will interfere with their ability to complete the transfer process are mistaken.

#### **d. Commenters’ Assessments of Implementation Cost**

### **Comments Received**

A commenter challenged ATF’s assessment of the implementation cost of the proposed regulation, saying that ATF failed to assess the loss of revenue from several sources; this commenter continued that ATF failed to consider all of the monetary loss manufacturers, wholesalers, dealers, individuals, and “corporate/trust” entities will incur as a result of the proposed rule. This commenter argued that there will be “perceptual monetary loss” as well. According to this commenter, when law abiding buyers perceive that the transaction will require CLEO certification that cannot be obtained in their area, the potential buyers will not attempt to buy the NFA items because they will believe the CLEO will not approve the sale. The

commenter continued that this perception will ultimately lower the number of purchasers, thus creating a monetary loss for the NFA industry.

A commenter stated that the proposed regulation does not adequately address the economic impact to small and medium businesses. This commenter stated that no assessment of this type could be valid without conservative assumptions on the number of lost sales due to these increased restrictions; these restrictions will have a significant and material impact on the number of silencers and other NFA items sold in the United States. This commenter stated that this is likely to cause many businesses (including large, medium, and small businesses) to close and would have a “downstream ripple effect to their suppliers and local communities.” At least one commenter asked the following questions: “can you imagine the damage this will cause to the NFA market? What happens to the value of our items when you indirectly prohibit 90 percent of potential customers from obtaining the item? What happens to the R&D budget for our arms manufacturers when they don’t sell anywhere near the volume to their most abundant customer base?”

Another commenter noted that ATF failed to identify the cost associated with lost time from the backlog of applications for both existing and future employees of any company. Another commenter stated the proposed rule will have a considerable and obvious negative impact on the industry by stifling sales and adding significant burdens relating to long term secure storage of pending NFA items. Another commenter stated that the proposed rule will decimate the industry that makes these NFA products for the military and the police because the NPRM will put these companies out of business, making product warranties that the military and police rely on invalid.

## **Department Response**

The Department agrees that CLEO certification for all responsible persons of trusts or legal entities is not necessary; consequently that requirement has been eliminated in this final rule and replaced with a less burdensome notification requirement. The change from certification to notification will reduce the impact on the firearms industry. The Department believes that the impact on demand for NFA firearms arising from the rule will be slight. Please see section IV.E.2.a above for additional detail regarding the Department's response to claims this rule will negatively impact NFA manufacturers, dealers, and related businesses.

The Department does not agree with the commenters who assert that the proposed rule would have a negative effect on NFA firearms suppliers to the military and police. Government entities are exempt from the requirements in the rule and therefore neither the NPRM nor the final rule affects this industry. Moreover, because the impact of the rule on the market for NFA firearms will be slight, the Department does not anticipate that military and police suppliers will go out of business as a result of the rule.

The Department recognizes that the final rule will affect processing times and is implementing processes to keep the impact to a minimum. However, processing times do not appear to reduce the demand for NFA firearms. ATF received more than ninety thousand applications in 2014 when processing times were approximately nine months.

### **3. Quantification of the Rule's Expected Benefits**

#### **Comments Received**

Several commenters noted that the proposed rule provided only three "anecdotal" examples occurring over the 80-year life of the NFA to support the need for the proposed rule; they asserted that these examples failed to quantify any expected benefits, raised many questions,

and could just as strongly justify a claim that the current procedures are working. Two commenters stated that ATF likely did not quantify any benefits or assign an economic value to such benefits because the NPRM predominantly addressed conduct already criminalized and prohibited by statute and regulations, and also noted that none of ATF's examples illustrated or supported the problem that ATF speculated existed. Many commenters stated that the proposed rule presented no benefit to public safety or to ATF's ability to execute its responsibilities relating to the NFA. Several commenters stated that the overall benefits were inconclusive, nonexistent, and insignificant. A few commenters stated that simply speculating as to some "marginal" benefit without estimating the size or value of that benefit made a "charade" of the rulemaking process, and asserted that a "rather unlikely combination of circumstances" would need to exist for the rule to produce any benefits at all. Another commenter believed changes were needed to the current regulations; however, this commenter stated that the changes should actually balance implementation costs with the desired effect. Another commenter wanted more specifics, and asked, "[w]hat are the metrics of success for this proposed rule? How many lives will it save for the cost of actual implementation using the numbers I provided [for responsible persons] rather than the (no offense) ludicrous number of '2' propounded by ATF?" Another commenter asked if ATF could show how these proposed changes would improve public safety, and how the NFA's current rules are unsafe.

Other commenters stated that the problems with the proposed rule far outweigh any perceived benefits. One commenter acknowledged the benefit of increasing public safety by preventing prohibited persons from obtaining firearms, but requested that ATF expand its explanation of the benefits the proposed revisions would deliver. This commenter stated that this

additional information on benefits would be useful when considering and offsetting the increase in costs from the proposed rule.

Several commenters stated that ATF's assumptions lacked statistical validity. Other commenters stated that the proposed rule lacked evidence to support the proposition that the proposed changes were needed to enhance safety by preventing criminal use of highly regulated NFA items. A commenter asked ATF to provide statistical evidence that the proposed rule would reduce violent crime, and to provide a list of all violent crimes committed with registered NFA weapons by the actual owner of the firearm where these proposed changes would have deterred the crime. Another commenter similarly asked for current statistics on crimes committed by NFA weapons, and how the proposed rule would make citizens safer. This commenter also asked for the studies that ATF did "in conjunction with this legislation," and asked ATF to provide the studies and specific statistics that support the proposed regulations. Another commenter asked if ATF's three provided examples represent the only examples that ATF has identified since the origin of the NFA in 1934. This commenter requested that ATF clarify its analyses used to support a public safety benefit for the proposed rule since this commenter, and many others, contend that there is no documented violent criminal activity associated with NFA firearms. These commenters noted that the proposed rule would not have applied to the few rare occurrences of violent crime with legally owned NFA registered firearms, as those activities were committed by a non-prohibited person in possession of a properly registered NFA item. Another commenter asked ATF to have "an unbiased third party" show a real risk to public safety through past harms from the use of NFA items acquired via a living trust or legal entity, as well as project future risk trends from the use of such items.

Another commenter referenced a 2001 survey of inmates that showed that less than two percent of inmates used semi-automatic or fully automatic rifles to commit their crimes. This commenter contended that the proposed rule's effect of "tightening restrictions on law abiding citizens" would not reduce this rate, and that ATF did not need to "pass greater legislation to reduce the access of law abiding citizens to weapons and accessories which are registered, carefully monitored, and taxed."

### **Department Response**

Between 2006 and 2014, there were over 260,000 NFA firearms acquired by trusts or legal entities where no individual associated with the trust or legal entity was subject to a NFA background check as part of the application process. NFA firearms have been singled out for special regulation by Congress because they are particularly dangerous weapons that can be used by a single individual to inflict mass harm. The Department does not agree that a mass shooting involving an NFA firearm obtained by a prohibited person through a legal entity must occur before these persons must be subject to a background check.

The GCA, at 18 U.S.C. 922(t)(1), requires FFLs to run a NICS check "before the completion of the transfer" of a firearm, and verify the identity of the transferee. There is a limited exception under 18 U.S.C. 922(t)(3)(B) when a firearm is transferred "between a licensee and another person . . . if the Attorney General has approved the transfer under section 5812 of the Internal Revenue Code of 1986." The purpose of this exception is to avoid multiple background checks on the same individual by exempting a person from a NICS check at the point of transfer when that same person has already been the subject of a background check during the NFA registration process. Congress did not intend for NFA firearms to be transferred to individuals who avoided the background check process altogether. Between November 30,



1998, and August 31, 2015, the FBI's Criminal Justice Information Services Division conducted 216,349,007 background checks using NICS. Of the background checks conducted during this time period, 1,229,653 resulted in a denial. The 99.4 percent "proceed" rate does not negate the public safety associated with the 0.6 percent denied. While the number of NFA applications that are denied due to the background check is small, because even one prohibited individual with an NFA firearm poses an enormous risk to the lives of others, that small number does not negate the public safety associated with denying a prohibited person access to an NFA firearm. Furthermore, requiring a background check on responsible persons of trusts and legal entities during the application process is consistent with Congressional intent for these individuals to undergo a background check to be eligible for the limited exception under 18 U.S.C. 922(t)(3)(B).

Additionally, even though 70 percent of all crime gun traces are on handguns, Federal law (18 U.S.C. 922(t)) requires FFLs to conduct background checks prior to the transfer of long guns (rifles and shotguns) as well as handguns (pistols and revolvers) to unlicensed persons. Thus, Congress did not intend to exclude certain types of firearms from background checks simply because those firearms may be less frequently involved in criminal activity. The Department does not agree that further research is needed to show that a responsible person for a legal entity purchasing a machinegun should be subject to a background check. There is a tangible risk to public safety whenever a prohibited individual has the power to exercise control over an NFA firearm. For additional responses to comments on public safety see section IV.B.1, which specifically addresses the sufficiency of current regulations.

See sections IV.E.1.a and E.1.b for responses to comments on the methodology for determining the number of responsible persons and number of pages of supporting documents. See section IV.D.1 regarding responses to comments on Executive Order 12866.

*F. Comments on Rulemaking Process*

1. Availability of Background Information

**Comments Received**

A commenter stated that ATF did not make the NFATCA petition available for public inspection at any time before or during the public comment period for ATF 41P. This commenter noted that ATF cited the NFATCA petition as its basis for the NPRM, and that the petition formed the “central and critical foundation” of ATF’s argument for the proposed changes. Noting that ATF did not explain why it withheld this vital information, this commenter called ATF’s lack of transparency inexcusable, and stated this inaction warrants further investigation and clarification by ATF.

Another commenter stated that the NPRM indicated that the proposal rested on certain studies and other underlying information, but that such underlying documents (seven categories, including the rulemaking petition; alleged “numerous statements” from CLEOs that ATF received regarding “purported reasons” for denying CLEO certifications, details regarding the instances that prompted the decision that the regulation was needed; and the methodology employed in random samples to estimate the number of responsible persons and the documentation pages) were not placed in the rulemaking docket and, thus, the commenter had requested such documents (and any other documents that ATF relied upon when preparing the NPRM) “[i]n order to ensure an adequate opportunity to comment on the ATF proposal.” The commenter asserted that ATF declined to make public the requested information, and that ATF

neither posted materials to the eRulemaking site, nor made them available in ATF's reading room. The commenter also requested the documents via a Freedom of Information Act (FOIA) request without receiving such documents. The commenter stated its concern that omitting these items raised the question of what other pertinent materials may have been excluded. The commenter quoted several legal cases explaining that interested parties should be able to participate in a meaningful way in the final formulation of rules, which would require an accurate picture of the agency's reasoning, which should be done with the agency providing the data used and the methodology of tests and surveys relied upon to develop the NPRM. The commenter continued that case law provides that an agency commits serious procedural error when it fails to reveal the basis for a proposed rule in time to allow for meaningful commentary. Thus, the commenter reasoned that providing access to materials like those it requested has long been recognized as essential to a meaningful opportunity to participate in the rulemaking process. The commenter concluded that the lack of access to the requested materials hindered the ability of interested persons to address the assertions in the NPRM, and that if ATF intends to revise part 479 in the manner proposed, ATF should first lay the foundation for a proposal and then expose that foundation to meaningful critique.

### **Department Response**

In response to the assertion that the Department withheld the NFATCA petition, the Department references section II of the NPRM that details each of NFATCA's four categories of concern—amending §§ 479.63 and 479.85; certifying citizenship; providing instructions for ATF Forms, 1, 4, and 5; and eliminating the CLEO certification requirement. 78 FR at 55016-55017.

The NPRM explained those aspects of the NFATCA petition that were relevant to the rulemaking. The Department provides the following excerpt from section II.A of the NPRM:

The NFATCA expressed concern that persons who are prohibited by law from possessing or receiving firearms may acquire NFA firearms through the establishment of a legal entity such as a corporation, trust, or partnership. It contends that the number of applications to acquire NFA firearms via a corporation, partnership, trust, or other legal entity has increased significantly over the years. ATF has researched the issue and has determined 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 2012.

This passage illustrates, with complete transparency, how ATF approached and researched the rulemaking process. Such detail not only lays “the foundation for a proposal” but also exposes “that foundation to meaningful critique.” Moreover, the NFATCA petition was readily available through the internet. Thus, all relevant aspects of the NFATCA petition that were used in the development of the proposed rule were available to commenters and clearly discussed in the NPRM.

In response to the commenter who indicated that ATF did not provide certain documents related to seven categories of information that the commenter deemed essential to meaningfully commenting on the rule, the Department acknowledges that ATF received requests for disclosure of the information from the commenter. Those requests were processed by ATF’s Disclosure Division and a copy of the NPRM was provided to the commenter in response to the commenter’s request. The response did not include the requested seven categories of information. The Department believes, however, that all of the requested information was discussed and addressed in the NPRM to a degree sufficient to provide the commenter with the opportunity to participate in a meaningful way in the discussion and final formulation of the final rule. The Department did not rely on any data, methodologies, predictions, or analysis that it did not clearly explain in the NPRM. The Department provided commenters “an accurate picture of the reasoning that . . . led the agency to the proposed rule” and “identif[ied] and ma[de] available

technical studies and data that it . . . employed in reaching” its decisions. *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

For example, the Department explained the source and number of samples it used to determine the average number of constitutive documents and responsible persons at trusts and legal entities. The Department cited and relied upon the NFATCA petition that prompted the rulemaking. The Department gave examples of instances in which background check requirements were nearly evaded to show that a risk of circumvention existed. The Department openly discussed the benefits and drawbacks of the CLEO certification requirement and its proposed expansion. Further, specific details about public safety concerns, including specific instances, were included in the NPRM. The Department believes that the details provided in the NPRM were sufficient and, as such, no additional information needed to be placed in the docket.

With respect to CLEO certification specifically, the Department believes that the NPRM amply conveyed ATF’s knowledge of various reasons that CLEOs deny CLEO certifications. This is knowledge gained from the field and interactions that the NFA Branch has had with CLEOs, as well as with applicants and transferees, during the application process and at other times. In any event, the Department notes that any failure in this regard caused commenters’ no prejudice, as the Department was persuaded to change the CLEO certification requirement to a notice requirement. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008).

Finally, the Department emphasizes that it remained open to persuasion throughout the rulemaking. In response to comments critical of the CLEO certification requirement, the Department adopted a CLEO notification requirement. In response to comments critical of various aspects of its statutory and regulatory review and its cost-benefit analysis, the

Department expanded and strengthened its analysis and revised its estimates where appropriate. The Department believes that the analysis and responses to comments in this preamble conclusively show that commenters were provided a meaningful opportunity to support, challenge, and critique the proposed rule and help to shape the Department's decision.

## 2. Public Submissions

### a. ATF Posted Unrelated Materials to the Docket During the Public Comment Period

#### **Comments Received**

A commenter noted that ATF posted an unrelated final rule in the docket for this NPRM at [www.regulations.gov](http://www.regulations.gov), and asked ATF to remove it. This same commenter noted that two weeks after the comment period opened for this NPRM, ATF's website entitled "ATF Submissions for Public Comments" also contained references to two unrelated matters, and requested this be clarified. This commenter expressed concern that this "extraneous material" confused the public to think that the comment period for ATF 41P had ended, and referenced *MCI Telecommunications Corp v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995).

#### **Department Response**

The Department is unaware of any "extraneous material" in the docket. A Department review of the [www.regulations.gov](http://www.regulations.gov) site reveals that there are no documents to support this comment included in this docket. The only document available is the subject NPRM. The Department also notes that on its public website, ATF's link to "ATF's Submissions for Public Comment" directs users to the Bureau's FOIA library, with resources appropriate to a full array of regulatory and policy issues.

b. ATF Failed to Accept or Post Public Comments

i. ATF Failed to Include “Pertinent” Submissions to the Docket

**Comments Received**

A commenter stated that “ATF has a statutory duty to provide public access to members of the public and where . . . access is denied during the very period when the public are supposed to be able to investigate matters as a basis for submitting comments on a proposed rule, ATF has denied a meaningful opportunity to participate in the notice and comment rulemaking process.” The commenter expressed concern regarding the closure of the reading room from November 8, 2013, until November 15, 2013, while ATF was open. The commenter questioned how such a closing was consistent with ATF’s duty under FOIA. The commenter also expressed concern that ATF mandated that counsel for commenter submit documentation regarding race, ethnicity, employment history, and other matters before ATF would permit access to its reading room.

This same commenter stated that it physically inspected the docket at ATF’s reading room, but that it appeared that only the public comments were available for review. The commenter expressed concern that the physical inspection of the docket also revealed that ATF had “selectively excluded correspondence clearly related to the rulemaking proceeding.” The commenter stated that it identified six items that had not been entered into the docket and requested that all pertinent material be placed in the docket. One such item was posted, but the other five referenced items were not added to the docket prior to commenter’s second physical inspection of the docket. The commenter stressed concern that ATF either delayed posting items or ignored its requests.

## **Department Response**

The Department notes that on September 12, 2013, ATF posted the first comment relative to this NPRM on [www.regulations.gov](http://www.regulations.gov). ATF posted the final comment on February 7, 2014. In total, ATF posted 8,433 comments out of 9,479 received. Given the volume of comments and the resources available to ATF, the Department contends that ATF strived to post all comments that met the criteria in the Public Participation section of the NPRM (78 FR at 55025) in the order they were received and reviewed. For this final rule, all comments received are included in the final rule's administrative record.

Regarding the commenter's portrayal of ATF's reading room being closed November 8, 2013, until November 15, 2013, this is not accurate. The Department acknowledges that a few days elapsed between the commenter's request and his counsel gaining access to ATF's reading room. Regarding the commenter's concern that ATF requested that his counsel provide certain documentation before gaining access to the reading room, ATF notes that this documentation is part of its standard procedures that have been implemented to address public safety concerns and does not meaningfully interfere with access to all of the materials available in the ATF reading room.

### **ii. ATF Failed to Permit a 90-Day Public Comment Period**

#### **Comments Received**

A commenter pointed out problems inhibiting access to public to public comments through, for example, (1) the reading room being unavailable, (2) the [www.regulations.gov](http://www.regulations.gov) site malfunctioning, (3) the government closure, (4) ATF's slowness to post submitted comments, and (5) ATF's staffing. This commenter previously requested that ATF extend the comment period, and noted that other commenters made similar requests to ATF. This same commenter



also noted that others raised concerns about ATF's delay in posting comments to the docket. This same commenter stated that other agencies granted extensions of comment periods due to the government shutdown. Several commenters requested an extension for public comment by at least one day for each day that either ATF was closed or the [www.regulations.gov](http://www.regulations.gov) site was inaccessible.

### **Department Response**

The Department determined that an extension of the 90-day comment period was not warranted because it had received a large volume of diverse comments and additional time was unlikely to result in the submission of comments identifying new concerns. Many of the comments ATF received were a repetition or duplication of previous comments. Further, using all resources available, ATF followed the guidelines for public participation that appeared in the NPRM and posted "All comments [that referenced] the docket number (ATF 41P), [were] legible, and [included] the commenter's name and complete mailing address." The [www.regulations.gov](http://www.regulations.gov) website is maintained by the Environmental Protection Agency. Neither the Department nor ATF has control of the functionality of an external agency's website.

### **iii. ATF Selectively Delayed Reviewing and Posting Comments Received**

#### **Comments Received**

A commenter noted ATF's delays in posting comments and that the delays were not uniform. This commenter contended that ATF "conveniently" delayed the posting of the comment the commenter prepared for another individual, which critiqued flaws in the NPRM, while ATF simultaneously "apparently seeded the docket with submissions from proxies." The commenter stated that once the comment it prepared for another individual was posted, the cause for delays in posting comments, in general, was ameliorated and that comments were continually

posted. This commenter also expressed concern that ATF continued to exclude its submissions or delayed posting them to the docket while processing correspondence and comments from other interested persons, which raised a question regarding “what other material submitted for the docket by other interested persons was not properly posted.” The commenter stated that its communications to ATF regarding the rulemaking only occasionally received a reply, only sometimes were placed in the docket, and only sometimes were posted promptly. Despite commenter’s inquiries, ATF declined to provide any explanation for the “seemingly arbitrary management of the docket.”

Another commenter stated that ATF repeatedly delayed posting comments, and that this significantly impacted his ability to meaningfully participate in the comment process. This commenter observed that well past the government shutdown, 25-50 percent of the comments received had not been posted; during other periods when the government was not shutdown, four or five days passed without ATF posting any comments even though the total comments received increased every day.

### **Department Response**

The Department stresses that it posted all comments that followed the public participation guidelines in the NPRM. ATF followed its processes for reviewing and posting comments.

iv. ATF “Distorted” the Public Comment Process By “Apparently Submitting Hearsay Information via Proxies”

### **Comments Received**

A commenter stated that ATF had proxies submit comments “in an effort to bolster the suggestion of prior misuse of legal entities” and listed examples of comments from ATF Special Agent Gregory Alvarez and John Brown, President of NFATCA. This commenter stated that

ATF did not disclose its relationship with John Brown or reveal that the only information John Brown offered in his public comment is “what ATF leaked to him.”

### **Department Response**

Neither the Department nor ATF uses or recruits “proxies.” Both the Department and ATF are committed to a robust, candid rulemaking process and have an interest only in authentic public comments.

v. ATF’s Previous “Lack of Candor” Shows a Heightened Need for Procedural Regularity

### **Comments Received**

A commenter stated that ATF has a well-documented record of “spinning” facts and engaging in outright deception of the courts, Congress, and the public. As a result, this commenter believes there is even more reason for ATF to provide the documentation showing its basis for characterizing the issues in the NPRM, that it fairly considered alternatives, that it only inadvertently provided potentially misleading information or omitted pertinent information from the docket, that it only accidentally failed to consider requests for extension of the comment period, and that it had no knowledge that commenters with a connection to ATF would act to bolster “ATF’s unsupported assertions.”

The commenter purported to provide instances where: (1) ATF committed blatant “institutional perjury” in the context of criminal prosecutions and in support of probable cause showings for search warrants; (2) ATF delayed answering questions or provided deceptive answers to congressional inquiries about NFRTR inaccuracies and the “Fast and Furious” gun-walking operation, for example, and published proposed rules in flagrant disregard to limitations on appropriations; and (3) ATF misled the public about the accuracy of the NFRTR.

## **Department Response**

The Department notes that ATF has committed available resources to develop this NPRM and respond to comments as part of the rulemaking process. In developing this rulemaking and responding to comments, ATF has followed all established regulatory procedures and complied with all relevant policies and requirements.

### **3. Timetable for Final Rule**

#### **Comments Received**

A commenter identified prior communications with ATF employees in August 2013, prior to the proposed rule's publication in September 2013, regarding whether a rule finalizing the proposed changes in the NPRM would only apply to applications submitted after the effective date of the regulation, and stated that these communications indicated that such would be the case. However, this commenter stated that the text of the proposed rule was not clear on this matter and ATF had "needlessly confused the public" and potentially falsely reassured persons interested in filing comments. This commenter noted that several commenters expressed concern with the "grandfathering" or transition issues. A few commenters specifically asked whether ATF would grandfather any trusts or legal entities where the applications have been sent in, the \$200 tax stamp check has been cashed, and the application is "pending" prior to the effective date of the final rule. A few commenters asked what would happen to pending or "in limbo" applications, and if the applications would be sent back to the applicants. Several commenters suggested—or would want to ensure—that ATF "grandfather in" (i.e. not apply the requirements of the final rule to) all applications already submitted. A commenter stated that ATF could just as likely grandfather the pending applications as reject them on the grounds that they were not submitted on a new form. If ATF does not grandfather these applications, another

commenter asked how ATF would handle them, and about the involved costs. Another commenter asked if the pending applications would have to be resubmitted, and if so, whether they would go to the back of the line for processing. Another commenter specifically asked whether ATF would refund the transfer tax for the applications pending approval. A few commenters asked about retroactive changes to previously completed transfers. Another commenter urged ATF to publish a notice clarifying that ATF has no intent to return pending applications to applicants for resubmission to conform with any new regulation.

A few commenters asked if existing legal entities and trusts holding NFA items must submit to ATF fingerprints, photographs, and CLEO certifications for each responsible person or if they would be grandfathered. Another commenter pointed out that the proposed rule did not provide a cost estimate to bring the “many thousands” of existing trusts and corporations into compliance with the new rule, and therefore surmised that past transfers would be grandfathered. If this is not the case, this commenter suggested that ATF publicly disclose such a cost estimate. This commenter stated that it could take months for a large corporation, which routinely purchases and sells NFA weapons, to establish policies and bring the entire workforce into compliance. This commenter asked whether employees who have been approved as responsible persons could continue conducting business while other employees were pending approval as responsible persons, and presumed that ATF would answer affirmatively. Finally, this commenter asked if ATF has estimated, even internally, the ATF staffing level and expansion of staff required to implement these new rules considering that the current wait time for Form 4 transfers and Form 3 (dealer to dealer) transfers is six to nine months, and three months, respectively, and the proposed rule, if finalized, would result in a “likely substantial” additional workload for ATF.

## **Department Response**

The final rule is not retroactive and therefore the final rule will not apply to applications that are in “pending” status, or to previously approved applications for existing legal entities and trusts holding NFA items. The Department has considered the additional costs to ATF as a result of this rule, which are detailed in section VI.A below.

### **4. Commenters Urge ATF to Withdraw Proposed Rule and Request a Public Hearing**

Several trade association commenters, as well as individuals, encouraged ATF to withdraw the proposal. One of these commenters, a trade association, suggested that ATF work with makers, sellers, and users of NFA firearms to develop a rule that is more realistic and addresses the real needs of all those concerned. Another trade association urged ATF to withdraw or substantially rewrite the rule. Both trade associations requested that ATF hold a public hearing to ensure that all views and comments are fully heard. An individual commenter requested a hearing, or series of hearings around the country. In addition, another of these commenters advised ATF to focus on streamlining the NFA application process and reducing the stress on local law enforcement.

## **Department Response**

The Department does not believe that soliciting additional information and views from the public, either through informal meetings to further refine the scope of the rulemaking, or through public hearings, are necessary or appropriate.

The Department notes that the proposed rule included four direct, clear objectives:

1. Defining the term “responsible person,” as used in reference to a trust, partnership, association, company, or corporation;

2. Requiring responsible persons of such legal entities to submit, *inter alia*, photographs and fingerprints, as well as a law enforcement certification, when filing an application to make an NFA firearm or function as the transferee on an application to transfer an NFA firearm;
3. Modifying the information required in a law enforcement certification to relieve the certifying official from certifying that the official has no information indicating that the maker or transferee of the NFA firearm will use the firearm for other than lawful purposes; and
4. Adding a new section to ATF's regulations stipulating that the executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate may possess a firearm registered to a decedent during the term of probate without such possession being treated as a "transfer" under the NFA, and specifying that the transfer of the firearm to any estate beneficiary may be made on a tax-exempt basis.

ATF received nearly 9,500 responses from diverse public commenters, including professional associations, lobbying groups, and individuals, and the Department has afforded full consideration to these comments in formulating this final rule. Further, the Department's receipt and review of this volume of comments provides the Department with a complete array of comments likely to arise in a public hearing, making additional public events redundant. A public hearing, or even a series of them, will only serve to provide the Department information it has already collected without delivering new insights.

## *G. Comments on NFA Registration and Processing*

### **Comments Received**

Many commenters stated that there is nothing wrong with the current system, and believed that the only change needed is to speed up the NFA approval process. Many remarked on the huge backlog of pending NFA applications and that it takes months to well over a year for the NFA Branch to process Form 1 and Form 4 applications. A commenter thought that speeding up the process was especially essential for a person trying to register a second item. Several commenters stated that if ATF and the Department really wanted to improve the NFA process, they should modernize the current process and upgrade their systems to permit electronic forms that need to be filled out only once, and “upgrade systems” and utilize technology so that after the initial NFA approval, ATF could access and use “data” and “background checks” already on file to further speed up the process for subsequent transfer requests.

Several commenters stated that ATF needed to hire more people (e.g., agents, inspectors, examiners, processors) to process the applications more efficiently. A few other commenters requested that more funding be given to ATF to hire additional staff; another commenter suggested that ATF figure out how to use the tax stamp money for this purpose. Several commenters believed that the NFA Branch is already overworked and understaffed, and that the proposed rule change would exponentially increase its workload and cause approval wait times to further increase. A commenter stated that the proposed rule’s requirements would cause a “912% increase in the number of papers and forms” the NFA Branch has to process, and that increasing its workload more than nine times translates to wait times approaching a decade. One of these commenters stated that, at one time, Form 1 and Form 4 applications took less than 3



months from submission to approval; however, in the past several years, the workload has increased resulting in dramatically slower approval times. Another of these commenters noted that ATF's own website shows that "NFA applications increased 250% from 2005 to 2011, while the number of NFA examiners decreased 25%." This commenter contended that ATF is not meeting its "customer service" goals. Another commenter stated that ATF should address and correct its internal deficiencies before proposing regulatory changes that will only exacerbate administrative challenges, without enhancing public safety at all.

Another commenter stated that the process should only take a few days at most to process instead of the current "months" processing time. Another commenter suggested that ATF implement a maximum approval time of 30 days, and that if ATF has taken no action in that time, the application should be automatically approved. Another commenter suggested that the process be no longer than three months by default.

In addition to their suggestions on speeding up the process, a few commenters suggested that ATF decrease the tax stamp costs. A commenter asked, "if I have an individual tax stamp why do I have to pay again to move it to a trust that I set up?" Another commenter suggested that ATF draft new regulations to change the tax stamp costs for all NFA items from \$200 to \$5. Another commenter suggested that ATF either reduce the \$200 tax stamp cost to \$50 or eliminate it altogether. Another commenter added that a reduction of the tax stamp cost would increase ATF's revenues and the "tax basis" of the firearms industry.

### **Department Response**

The Department and ATF are committed to processing NFA forms as efficiently and expediently as possible considering that an ever-increasing number of forms are submitted. In FY 2010, ATF's NFA Branch processed almost 92,000 forms (Forms 1, 2, 3, 4, 5, 9, 10, and

5320.20). In FY 2014, the number of forms processed increased to over 236,000, an increase of 250 percent. As a result of this increase, ATF has dedicated more staffing to the NFA Branch, increasing the number of legal instruments examiners from 9 to 27. Research assistants were provided to the examiners to research and resolve problems. Data entry staffing has been increased. Similarly, customer service representative staffing has been increased so that examiners are not pulled away from their tasks, and can respond quickly to the public and industry.

ATF has approved overtime in an effort to increase the forms processing rate and has brought in staffing on detail to process forms. In February 2014, the forms backlog was over 81,000 forms. As of October 7, 2015, the backlog has been reduced to just over 51,000. The time frame for the processing of each type of form has also decreased (note: since each form has a different purpose, the processing times vary). Processing times for Forms 1 and 4, for example, have been reduced from nine months to approximately five months.

ATF has used technology to help make the process quicker and more efficient. In 2013, ATF introduced an electronic filing system (eForms) designed to allow forms to be filed more accurately, and more quickly, with immediate submission into the NFA system for processing. This reduces data entry demands otherwise required with paper forms. The eForms system, however, was not designed to allow the filing of forms where fingerprints, photographs, and the law enforcement certification were required. However, it did allow the filing of forms by trusts or legal entities, such as LLCs. After several months of operation, the system encountered complications. It was taken out of service for a brief period and then brought back up over a period of time. To preclude further complications, the highest volume forms submitted, Forms 3 and 4, have been kept out of service while ATF seeks to implement a new system with a more

robust platform to process these forms and others in the existing eForms system. This process continues at the present time.

Some commenters stated that ATF should modernize the process and utilize technology so that data and background checks can be used for subsequent transfer requests. The Department agrees and, resources permitting, will look to design systems that will utilize information on file.

Budget allowing, the Department and ATF anticipate a staffing increase for the NFA Branch in FY 2016. As stated above, over the past two years, ATF has committed additional resources to address the increase in applications submitted to the NFA Branch. The legal instrument examiner staffing has been tripled to 27 positions. However, the rate of submission continues to increase from almost 164,000 forms in CY 2013, to 236,000 in CY 2014 and a projected total of 322,000 in CY 2015.

Because the tax rate is set by statute, ATF has no authority to change it. The NFA provides very limited authority to permit exemptions from the transfer tax, but commenters' requested exemptions do not fall within that authority. ATF is also precluded by law from utilizing the taxes generated, as the making, transfer, and special (occupational) tax revenues are deposited into a general Treasury fund. In regard to a transfer between an individual and a trust, the NFA imposes a tax on the transfer of an NFA firearm. A trust is a separate "person" and, thus, the transfer from the individual to a trust is a taxable "transfer" under the statute and is subject to tax.

## *H. Comments on Efficiencies and Priorities*

### **Comments Received**

The majority of commenters thought that the proposed rule would do nothing to lessen crime and gun violence and suggested that ATF first focus its efforts in other directions. A few commenters stressed educating children about gun safety, and stated that this could be done by parents and not on a Federal level. A few commenters urged the reduction or elimination of gun-free zones. A few commenters suggested that gangs are a problem for gun violence and crime, and that more time be spent addressing the causes of gang violence. Other commenters mentioned “Operation Fast and Furious” and suggested that ATF focus on “clean[ing] up [its] own house before attacking lawful gun owners.”

Several commenters believed that mental health issues greatly needed more attention, including more accessible and affordable resources and better screening, with commenters calling the mental health system “crippled” and a “failure.” A few commenters noted that the problem in the most recent mass gun murders has been mental health, and that the focus of prevention efforts should be on the “unrestricted mental capacity” of citizens who cannot understand and obey laws, not the tool (firearms) used in the crime. A commenter suggested that the Department devote time and efforts to enact regulations for mental health; another commenter suggested working on the “mental health aspect” of people obtaining firearms. Another commenter suggested that gun purchasers take a mental exam. Another commenter suggested spending money to educate people about the signs of severe mental illness. Another commenter desired a national database, consisting of criminal offenders and mental health patients, released to each State’s police force and the FBI.

Many commenters also stated that the administration, the Department, and ATF should better enforce the laws already on the books, modify the current NICS instant check system to include mental health mandatory reporting, stiffen penalties, and stop handing out plea deals to people who violate the laws. Another commenter noted the items listed in the NFA constitute less than one percent of all firearm felonies, and questioned why ATF would go after the “smallest portion of a problem.” This commenter suggested that ATF go after the criminals and not law-abiding citizens. Another commenter suggested that ATF focus on repeated felonies. Another commenter questioned where ATF would obtain the funding for the additional checks of NFA applications, and suggested applying this funding source toward improving efficiency and reducing the six- to eight-months-plus backlog of existing applications.

Another commenter suggested that an NFA passport book be issued to each individual or trust that has completed an NFA background check. This passport book would be presented after paying the tax, at the time of the item’s purchase. A stamp would immediately be placed in the passport book and the customer could leave with the purchased item. This commenter added that the check would then be mailed to ATF, and ATF could conduct yearly audits to regulate the passport books.

### **Department Response**

The Department’s ultimate objective in the promulgation of this final rule is to enhance public safety by ensuring prohibited persons do not possess and use NFA weapons—the primary statutory goal of the NFA. Contrary to the comments submitted suggesting otherwise, the objective of this final rule complements, rather than detracts from, the numerous other public safety efforts that the Department and ATF engage in every day.

With the numbers of transactions involving trusts or legal entities increasing, the Department believes the possibility of a prohibited person obtaining an NFA firearm also increases. For example, currently, it is possible that one or more responsible persons at a trust or legal entity are prohibited persons, yet that person could obtain access to an NFA firearm by having someone at the trust or legal entity who is not a prohibited person serve as the subject of the point-of-transfer background check. As noted above, the costs to ATF are detailed in section VI.A, below. ATF is dedicating resources to the processing of the forms currently submitted, and will continue to apply resources to ensure improvements in the process.

The Department considered alternatives, such as the implementation of “passport books” or similar systems, but determined that implementing them would require a statutory change.

#### *I. New Responsible Persons and Form 5320.23*

##### **Comments Received**

In the NPRM, ATF stated that it was considering a requirement that new responsible persons submit Form 5320.23 within 30 days of a change in responsible persons at the trust or legal entity, and sought opinions and recommendations. *See* 78 FR at 55020. A commenter provided three reasons why this change is unnecessary, unworkable, and would lead to chaos within legal entities. First, ATF only has authority under the NFA to identify applicants, which applies to responsible persons before the transfer has occurred, and is not an ongoing obligation once the transfer has occurred. Second, companies today face many situations that would make it very difficult and overly burdensome to determine who is a responsible person and submit the required information (e.g., high employee turnover, shifting management responsibilities and roles, temporary management changes, overlaps in manager authority). In addition, many small legal entities would not have the administrative personnel to handle this required process. Third,

this requirement would create much confusion and raise many questions if a potential new responsible person could not obtain the CLEO certification.

This commenter further stated that a continuing obligation to obtain approval from ATF to add each new responsible person would magnify the burdens related to the proposed CLEO certification requirement and the “responsible person” definition, particularly because legal entities have less control over managerial structure changes than they do over a decision about whether and when to acquire or make a new NFA firearm. This commenter believes that non-firearm related factors overwhelmingly dictate changes in personnel and managerial structure, and that complications relating to ensuring compliance with an ongoing designation obligation under the implementing regulations should not impact the personnel and managerial structure of a legal entity.

A few commenters did not recognize that ATF was only considering this change, and thought that this change was being proposed; they included their comments on the issue with comments on the proposed change to CLEO certification for responsible persons. For example, a few commenters stated that the NPRM would impact trustees’ abilities to manage trusts because of the proposed requirement that new responsible persons submit a Form 5320.23 and obtain a CLEO sign-off within 30 days of their appointment. A few other commenters stated that, by proposing that any new responsible person submit a Form 5320.23 and obtain a CLEO signoff within 30 days of the new responsible person’s appointment, the proposed rule intruded upon the traditional uses of trusts and upon the rights of settlors to manage their estate plans.

Another commenter, noting ATF’s long-held position that certain activities, such as the sale of a company, hiring new employees, or adding new trustees are not “transfers” of firearms, stated that the rule change would improperly extend ATF’s authority. This commenter stated

that ATF and DOJ incorrectly relied on their authority under 26 U.S.C. 5812(a) for the proposed change, because that section only authorizes ATF to collect information on the transferee during a transfer, not to continue collecting information on the transferee (or persons who act on behalf of the transferee) after the application is approved. This commenter asserted that the 30-day rule requirement would enable CLEOs and ATF to veto private decisions that are not the business of the government, and that Congress has not authorized such veto rights. This commenter asked ATF to consider the negative unintended consequences of the 30-day rule requirement, because its imposition would effectively mean a CLEO has to approve the sale of a company where buyers reside, the addition of trustees where trustees reside, the hiring of employees where employees reside, and the membership of an association. Further, this commenter stated that if ATF implemented this change, ATF would be violating First and Second Amendment rights, as well as rights of privacy, when ATF's objective could be achieved by any licensed FFL performing a "discreet, confidential NICS check." Further, this commenter stated that requiring a legal entity to request and receive permission for all personnel changes would be cumbersome, impacting personnel decisions and greatly increasing hiring costs.

Another commenter stated that a requirement for all responsible persons to submit Form 5320.23 and comply with the CLEO certification within 30 days would be a "radical" departure from trust law and estate planning. As a result, this commenter cautioned ATF to expect long and costly court battles, that ATF would lose, as the proposed requirements would infringe property rights and the ability to pass trust property to legal heirs.

### **Department Response**

The Department notes that it did not propose to make any changes on this issue in the proposed rule. Rather the Department requested input and guidance relative to identification of



new responsible persons who receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, an entity. The Department is not requiring, in this final rule, that new responsible persons submit a Form 5320.23 within 30 days of any change of responsible persons at a trust or legal entity.

The Department further notes that nothing in this rulemaking has altered the requirement for trusts and legal entities to submit new applications to make or transfer (as applicable) if the trust or legal entity intends to possess additional NFA items, or if there is a sufficient change in control or ownership of the trust or legal entity such that it is considered a new or different entity under relevant law. In either case, at the time of such application, the trust or legal entity will need to identify current responsible persons, who will submit photographs and fingerprints, and undergo a background check.

Refer to section IV.C.1 in this document to review ATF's shift from CLEO certification to CLEO notification—a process that alleviates the potential for administrative backlogs as a result of personnel changes, and any concerns that a CLEO may dictate the operation of an entity.

## **V. Final Rule**

For the reasons discussed above, this final rule has been revised from the proposed rule to eliminate the requirement for a certification signed by a CLEO and instead add a CLEO notification requirement. The final rule also clarifies that the term “responsible person” for a trust or legal entity includes those persons who possess the power or authority to direct the management and policies of an entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or entity. In the case of a trust, those with the power or authority to direct the management and policies of the trust includes any

person who has the capability to exercise such power and possesses, directly or indirectly, the power or authority under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust. The Department has removed “beneficiaries” from the final non-exclusive list in the definition of “responsible person.” However, a beneficiary or any other individual actually meeting the definition of a “responsible person” in the final rule shall be considered one.

Accordingly, because the law enforcement certification will no longer be required, the regulations in §§ 479.63 and 479.85 are being revised to require the applicant maker or transferee, as well as each responsible person, to provide a notice to the appropriate State or local official that an application is being submitted to ATF. The Department also agrees that a change from a CLEO certification to CLEO notification will require a change to the Forms 1, 4, and 5.

This final rule clarifies proposed § 479.62(b)(2) to denote that the required employer identification number for an applicant, other than an individual, may be “if any.” This final rule makes a minor change to proposed §§ 479.63(b)(2)(ii) and 479.85(b)(2)(ii) by removing “Social Security number (optional)” and “place of birth” from the “certain identifying information” required to be submitted on the Form 5320.23 in both of these sections, and clarifying that the “country of citizenship” must only be provided if other than the United States. In addition, this final rule removes “place of birth” from proposed § 479.62(b)(2) for the required Form 1 applicant identity information. This final rule adopts all other proposed changes in the NPRM.

## **VI. Statutory and Executive Order Review**

### *A. Executive Order 12866 and 13563—Regulatory Review*

This regulation has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 (“Regulatory Planning and Review”) and with section 1(b) of Executive

Order 13563 (“Improving Regulation and Regulatory Review”). The Department of Justice has determined that this final rule is a significant regulatory action under section 3(f) of Executive Order 12866, and, accordingly, this final rule has been reviewed by the Office of Management and Budget.

This final rule will not have an annual effect on the economy of \$100 million or more; nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Accordingly, the final rule is not an economically significant rulemaking under Executive Order 12866. The estimated costs and benefits of the final rule are discussed below.

#### 1. Summary of Costs and Benefits

This rule requires certain trusts and legal entities (partnerships, companies, associations, and corporations) applying to make or receive an NFA firearm to submit information for each of its responsible persons to ATF in order for ATF to ensure that such persons are not prohibited from possessing or receiving firearms. ATF estimates a total additional cost of approximately \$29.4 million annually for trusts and legal entities to gather, procure, and submit such information to ATF and for ATF to process the information and conduct a background check on responsible persons. These provisions have public safety benefits in that they will enable ATF to ensure that the estimated 231,658 responsible persons within trusts or legal entities that request to make or receive NFA firearms each year are not prohibited from possessing such firearms.

The Department acknowledges that this final rule may increase the time required to process applications received from trusts and legal entities, as well as for individuals, as an increased number of applications undergo more complete checks. The Department estimates that this final rule initially will increase processing times of these applications from four months to

six to eight months. However, the Department anticipates that this time will be reduced once the NFA Branch adjusts to the new process. In addition, ATF will work to increase its resources and staffing to process the applications. Of course, continued increases in the numbers of applications submitted may correspondingly continue to place pressure on processing times.

This final rule eliminates the current requirement that all individual applicants obtain a certification from the CLEO for the locality. Instead, under the final rule, applicants seeking to make or receive an NFA firearm are required to notify their local CLEO before they submit the ATF application to make or receive an NFA firearm. Similarly, the final rule does not adopt a requirement that responsible persons obtain a CLEO certification, as was discussed in the proposed rule; instead, the final rule extends the same notification requirement to all responsible persons for each trust and legal entity applicant. ATF estimates the total cost of the CLEO notification requirement in this final rule to be approximately \$5.8 million annually (\$0.5 million for individuals; \$5.3 million for legal entities), as compared to the approximate costs of \$2.26 million annually for the current requirement that individuals obtain a certification from their local CLEO. Therefore, the estimated net cost increase of this final rule relating to CLEO notification is approximately \$3.6 million annually. However, the final rule's estimated cost reduction for individual applicants is approximately \$1.8 million annually.

## 2. Costs and Benefits of Ensuring Responsible Persons Within Trusts and Legal Entities Are Not Prohibited from Possessing NFA Firearms

### a. Methodology for Determining Costs

ATF estimated the cost of the provisions to ensure responsible persons within trusts and legal entities are not prohibited from possessing NFA firearms by: (1) estimating the time and other resources that would be expended by legal entities to complete paperwork, obtain

photographs and fingerprints, and send this information to ATF; and (2) estimating the time and other resources that would be expended by ATF to process and review the materials provided by the trusts and legal entities and to conduct background checks of responsible persons.

ATF estimated the cost of the time for trusts and legal entities to complete these tasks using employee compensation data for June 2015 as determined by the U.S. Department of Labor, Bureau of Labor Statistics (BLS). *See* <http://www.bls.gov/news.release/pdf/ecec.pdf>.<sup>14</sup> The BLS determined the hourly compensation (which includes wages, salaries, and benefits) for civilian workers to be \$33.19, and for State and local government workers to be \$44.22. In addition, ATF estimates that each trust or legal entity has an average of two responsible persons, an estimate that is based on ATF's review of 454 randomly selected applications for corporations, LLCs, and trusts processed during calendar year CY 2014.

ATF used data from CY 2014 to estimate the number of trusts, legal entities, and individuals that would be affected by the final rule. In CY 2014, ATF processed 159,646 applications that were either ATF Forms 1, 4, or 5. Of these, 115,829 applications were for unlicensed trusts or legal entities (e.g., corporations, companies) to make or receive an NFA firearm; 29,191 were for individuals to make or receive an NFA firearm; and 14,626 were for government agencies or qualified Federal Firearms Licensees (Gov/FFLs) to make or receive an NFA firearm. The numbers of applications, by Form and submitting individual or entity, are set forth in Table A.

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<sup>14</sup> In the 2013 NPRM, the Department relied on BLS employee compensation data from September 2012. In this final rule, the Department has used the more recent BLS data from June 2015 because it believes that the more recent data more accurately reflects the actual benefits and costs of the final rule. The more recent BLS data does not meaningfully change the Department's estimates of the rule's costs and benefits.

Table A—Numbers of Applications Processed

CY 2014	Trust & Legal Entity	Individual	Gov/FFL	Total
Form 1	21,879	3,360	477	25,716
Form 4	93,739	25,343	4,257	123,339
Form 5	211	488	9,892	10,591
Total	115,829	29,191	14,626	159,646

ATF estimated the cost of complying with the final rule’s requirements by estimating the cost of undertaking each of the steps necessary to complete an application. Under this final rule, a trust or legal entity is required to complete the following steps in addition to completing the applicable Form 1, 4, or 5 before it is permitted to make or receive an NFA firearm:

1. Complete and submit Form 5320.23 for each responsible person;
2. Submit fingerprints and photographs for each responsible person; and
3. Submit a copy of the documentation that establishes the legal existence of the legal entity.

In addition, under the final rule, information required on the existing ATF Form 5330.20 would be incorporated into the ATF Forms 1, 4, and 5.

b. Cost to Trusts and Legal Entities of Applying to Make or Transfer

i. Time Cost of Completing a Responsible Person Form

The final rule requires trusts and legal entities to complete and submit to ATF a new form (Form 5320.23), photographs, and fingerprint cards for each responsible person before the trust or legal entity is permitted to make or receive an NFA firearm. The information required on Form 5320.23 includes the responsible person’s name, position, home address, and date of birth. The identifying information for each responsible person is necessary for ATF to conduct a

background check on each individual to ensure the individual is not prohibited from possessing an NFA firearm under Federal, State, or local law.

ATF estimates the time for each responsible person to complete Form 5320.23 to be 15 minutes. Based on an estimate of 2 responsible persons per trust or legal entity and 115,829 entities, the estimated time cost to complete Form 5320.23 is \$1,922,182 (15 minutes at \$33.19 per hour x 115,829 x 2).

ii. Cost of Photographs

ATF estimates that:

- The cost of the photographs is \$11.32 (based on the average of the costs determined for 60 websites); and
- The time needed to procure photographs is 50 minutes.

Currently, only individuals must obtain and submit photographs to ATF. Based on an estimate of 29,191 individuals, the current estimated cost is \$1,137,816 (Cost of Photographs =  $\$11.32 \times 29,191 = \$330,442$ ; Cost to Procure Photographs = 50 minutes at \$33.19 per hour x 29,191 = \$807,374). Under the final rule, costs for individuals would remain the same, but trusts and legal entities would incur new costs. Each responsible person of a trust or legal entity would be required to obtain and submit photographs. Based on an estimate of 2 responsible persons per entity and 115,829 entities, the estimated cost for trusts and legal entities to obtain and submit photographs is \$9,029,642 (Cost of Photographs =  $\$11.32 \times 115,829 \times 2 = \$2,622,368$ ; Cost to Procure Photographs = 50 minutes at \$33.19 per hour x 115,829 x 2 = \$6,407,274).

### iii. Cost of Fingerprints

ATF has reviewed various fingerprinting services. At the present time, ATF is only able to accept fingerprints on hard copy fingerprint cards. Thus, the cost estimates are based on the submission of two hard copy fingerprint cards for each responsible person.

- The estimated cost of the fingerprints is \$18.66 (cost based on the average of the costs determined for 275 websites); and
- The estimated time needed to procure the fingerprints is 60 minutes.

Currently, only individuals must obtain and submit fingerprints. Based on an estimate of 29,191 individuals, the current estimated cost is \$1,513,553 (Cost of Fingerprints = \$18.66 x 29,191 = \$544,704; Cost to Procure Fingerprints = 60 minutes at \$33.19 per hour x 29,191 = \$968,849). Under the final rule, costs for individuals would remain the same, but trusts and legal entities would incur new costs. Each responsible person of a trust or legal entity would be required to obtain and submit fingerprints to ATF. Based on an estimate of 2 responsible persons per entity and 115,829 entities, the estimated cost for trusts and legal entities to obtain and submit fingerprints is \$12,011,467 (Cost of Fingerprints = \$18.66 x 115,829 x 2 = \$4,322,738; Cost to Procure Fingerprints = 60 minutes at \$33.19 per hour x 115,829 x 2 = \$7,688,729).

### iv. Cost of Documents to Establish Existence of Trust or Legal Entity

A trust or legal entity that is applying to make or receive an NFA firearm must provide to ATF documentation evidencing the existence and validity of the entity—e.g., copies of partnership agreements, articles of incorporation, corporate registration, declarations of trust with any trust schedules, attachments, exhibits, and enclosures. Currently, trusts and legal entities may submit this documentation with their application package, although they are not required to



do so. Therefore, ATF is treating the costs for documentation as new costs. ATF accepts, and will continue to accept, photocopies of the documents without notarization. ATF made the cost estimate by determining the average number of pages in the corporate or trust documents for 454 recent randomly selected submissions processed during CY 2014, which was 16 pages.

ATF estimates that:

- The cost of the copied documentation is \$1.60 (\$.10 per page at 16 pages); and
- The time needed to copy attachments is 10 minutes.

Assuming 115,829 entities would provide ATF this documentation each year, the estimated annual cost to submit the documentation is \$826,053 (Cost of documentation = \$1.60 x 115,829 = \$185,326; Cost to copy attachments = 10 minutes at \$33.19 per hour x 115,829 = \$640,727). This cost is not dependent on the number of responsible persons associated with a legal entity. ATF notes that the estimated cost is likely to be lower if the entity has already filed the documents with ATF as part of a recent making or transfer application and the information previously provided has not changed. Under these circumstances, the entity can certify to ATF that the documentation is on file and is unchanged.

#### v. Cost of Completing and Mailing Form 1, 4, or 5

Currently, individuals, trusts, and legal entities must complete and mail Form 1, 4, or 5. This final rule should not change the costs to individuals, trusts, or legal entities to complete such forms. Even if there are multiple responsible persons associated with a trust or legal entity, the trust or legal entity still will be completing and mailing one Form 1, 4, or 5. However, ATF estimates that trusts and legal entities will incur increased postage costs to mail Forms 1, 4, and 5 applications to ATF. Currently, for trusts and legal entities, these applications only contain the completed form itself; ATF estimates postage costs at \$56,756 (115,829 x \$.49). However,

under the final rule, trusts and legal entities must also include Form 5320.23, photographs, and fingerprint cards for each responsible person, as well as documentation evidencing the existence and validity of the trust or entity. ATF estimates postage costs for this complete application package at \$113,512 ( $115,829 \times \$0.98$ ). Therefore, ATF estimates the new mailing costs for trusts and legal entities, under this final rule, to be \$56,756 ( $113,512 - 56,756$ ).

The estimated costs to legal entities that are discussed above are summarized in Tables B(1) and B(2). The total estimated new cost of the final rule for legal entities to provide to ATF identification information for each of its responsible persons is \$23,846,679 annually.

Table B(1)—Cost Estimates of the Time to Comply with the Final Rule’s Requirements

<b>Process</b>	<b>Estimated Time</b>	<b>Number of Entities</b>	<b><sup>2</sup> Responsible Persons</b>
<b>Completion of Form 5320.23</b>	15 minutes	115,829	\$1,922,182
<b>Procure Photographs</b>	50 minutes	115,829	\$6,407,274
<b>Procure Fingerprints</b>	60 minutes	115,829	\$7,688,729
<b>Copy Attachments</b>	10 minutes	115,829	\$640,727
		<b>Total</b>	<b>\$16,658,885</b>

Table B(2)—Cost Estimates of Procuring Photographs, Fingerprints, Documentation, and Mailing

<b>Process-related item</b>	<b>Estimated Cost</b>	<b>Number of Entities</b>	<b>2 Responsible Persons</b>
<b>Photographs</b>	\$11.32	115,829	\$2,622,368
<b>Fingerprints</b>	\$18.84	115,829	\$4,322,738
<b>Documentation of Legal Entity</b>	\$1.60	115,829	\$185,326
<b>Increased Application Postage</b>	\$.49	115,829	\$56,756
		<b>Total</b>	<b>\$7,187,188</b>

c. Cost to ATF

ATF incurs costs to process forms, fingerprint cards, photographs, and to conduct and review background checks. Currently, ATF incurs these costs for the 29,191 applications for individuals to make or receive NFA firearms. Under the final rule, ATF would incur these costs for applications for trusts and legal entities to make or receive NFA firearms. ATF estimates that:

- ATF’s cost for the FBI to process a set of fingerprints is \$12.75. (The cost is based on the FBI’s current fee, which is set by statute on a cost recovery basis.)
- The estimated cost for an examiner at ATF’s NFA Branch to conduct and review the results of a background check is \$11.06 (15 minutes at \$44.22 per hour); and
- The estimated cost to print the new 5320.23 forms is \$.0747 per form.

Based on an estimate of 2 responsible persons per legal entity and 115,829 entities, the estimated cost for ATF to process forms, fingerprint cards, photographs, and to conduct and review background checks for applications for legal entities to make or receive firearms is

\$5,533,082 annually (Cost for processing fingerprints =  $\$12.75 \times 115,829 \times 2 = \$2,953,640$ ; Cost for background checks =  $\$11.06 \times 115,829 \times 2 = \$2,562,137$ ; Cost to print forms =  $\$.0747 \times 115,829 \times 2 = \$17,305$ ).

Table C—Costs to ATF under Final Rule

<b>Process</b>	<b>Estimated Cost or Time</b>	<b>Number of Entities</b>	<b>2 Responsible Persons</b>
<b>ATF's costs for Processing Fingerprints</b>	\$12.75	115,829	\$2,953,640
<b>Time Needed to Conduct and Review Background Check by ATF</b>	15 minutes	115,829	\$2,562,137
<b>Cost of Form 5320.23</b>	\$.0747	115,829	\$17,305
		<b>Total</b>	<b>\$5,533,082</b>

The estimated total additional cost of the final rule for trusts and legal entities to gather, procure, and submit to ATF responsible person forms, fingerprints, photographs, documents to establish existence of trust or legal entity, and Form 1, 4, or 5, and for ATF to process the information and conduct a background check on responsible persons is \$29,379,155 annually (Sum of tables B(1), B(2), and C:  $\$16,658,885 + \$7,187,188 + \$5,533,082 = \$29,379,761$ ).

d. Benefits of Background Checks for Responsible Persons

The background check requirement for responsible persons provides at least two important benefits. First, it provides important public safety and security benefits by helping ATF to prevent individuals who are prohibited from possessing firearms from obtaining them. Second, by requiring responsible persons to submit the same information and meet same requirements as individuals who seek permission to make or transfer a firearm, the final rule

closes a potential loophole that might otherwise allow individuals to form trusts or legal entities for the purpose of obtaining a firearm they are prohibited from possessing.

This final rule provides important public safety and security benefits by enabling ATF to ensure that individuals who are prohibited from possessing firearms do not obtain them. Existing regulations do not require the identification of responsible persons of a trust or legal entity. Therefore, ATF lacks the necessary information to perform a background check on a person who meets the rule's definition of "responsible person" to determine if that person is prohibited from possessing an NFA firearm. This final rule provides important public safety and security benefits by enabling ATF to identify and perform background checks on such persons.

For example, there may be a number of responsible persons associated with a corporation, LLC, or trust. As noted above, based on a recent review of applications for corporations, LLCs, and trusts, ATF estimates that there are 2 responsible persons associated with such legal entities. One or more of these persons could be a prohibited person, e.g., a convicted felon. These prohibited persons could be establishing trusts or legal entities as a means of avoiding a fingerprint-based background check. Therefore, requiring the responsible parties of a trust or legal entity to follow the same requirements as individuals will close this loophole. Currently, when an NFA transfer application is approved, a corporate officer or trustee arranges for the receipt of the firearm. If the seller is an FFL, the officer or trustee must complete ATF Form 4473 (5300.9), *Firearms Transaction Record*. On the Form 4473, the officer or trustee must answer questions that determine if the officer or trustee is a prohibited person. If one of the officers or trustees is prohibited, then one of the other officers or trustees may pick up the firearm and complete the Form 4473. Once the firearm is picked up by the officer or trustee, it then becomes corporate or trust property and can be possessed by any of the

officers or trustees. As discussed in the NPRM, ATF has encountered situations in which it lacked the necessary information to conduct any background checks to determine whether the responsible person at an LLC or trust was a prohibited person. See 78 FR at 55023 for more detailed discussion. As discussed in section IV.B.1.c, there are more recent examples. Between 2006 and 2014 there were over 260,000 NFA firearms acquired by trusts or legal entities where no individual associated with the trust or entity was subject to a NFA background check as part of the application process. As a result, under current regulations, prohibited persons can circumvent the statutory prohibitions and receive firearms.

### 3. Costs and Benefits of Final Rule to Notify CLEOs before Making or Transferring an NFA Firearm

#### a. Cost of Current Requirement to Obtain Law Enforcement Certification

Under current regulations, the maker or transferee of an NFA firearm typically will bring a Form 1, 4, or 5 to the maker or transferee's local CLEO to obtain the CLEO certification as required on the form and therefore may need to meet with the CLEO. The maker or transferee may need to return to pick up the certified form. ATF estimates that the time needed for the maker or transferee to procure the CLEO certification is 100 minutes (70 minutes travel time and 30 minutes review time with the CLEO).

For CY 2014, of the 159,646 Form 1, Form 4, and Form 5 applications processed by ATF, 115,829 were for trusts or legal entities to make or receive NFA firearms. Trusts and legal entities are not currently required to obtain CLEO certification. However, certification is required for the 29,191 applications for individuals to make or receive NFA firearms. The current cost to obtain CLEO certification is estimated as follows:

- The estimated cost for the individual to obtain the CLEO certification is \$1,614,749 (100 minutes at \$33.19 per hour x 29,191)
- The estimated cost for the CLEO to review and sign the certification is \$645,413 (30 minutes at \$44.22 per hour x 29,191)

The total estimated cost of the certification requirement is \$2,260,162 (individuals \$1,614,749; CLEOs: \$645,413).

Table D—Current CLEO Certification Process Costs

<b>Current CLEO Process</b>	<b>Estimated Time</b>	<b>Number of Respondents</b>	<b>Cost</b>
<b>Procure Certification from CLEO</b>	100 minutes	29,191	\$1,614,749
<b>Agency Review and Sign Certification</b>	30 minutes	29,191	\$645,413
		<b>Total</b>	<b>\$2,260,162</b>

b. Cost of Requirement to Notify CLEOs

The final rule replaces the existing requirement to obtain certification by the local CLEO before submitting an application to make or receive an NFA firearm with a requirement to notify the local CLEO before submitting an application to make or receive an NFA firearm. The notification requirement requires the maker or transferee to mail a copy of the application to the CLEO with jurisdiction over the area of the applicant’s residence or, in the case of a trust or legal entity, the CLEO with jurisdiction over the business or trust. In addition, the notification requirement requires all responsible persons for trusts and legal entities to mail a copy of Form 5320.23 to the CLEO for their area of residence, principal office, or business. The effect of this provision is that trusts and legal entities, as well as their responsible persons, are required to

provide notification of the proposed making or transfer to their local CLEOs, whereas currently trusts and legal entities and their responsible persons are not required to notify or obtain certification from their local CLEOs. Individuals must only notify their local CLEOs under the final rule, whereas currently they are required to obtain certification from their local CLEOs.

In CY 2014, ATF processed 115,829 applications from trusts and legal entities and 29,191 application from individuals. Under the final rule, each of these applications require CLEO notification. For individuals, the CLEO notification will include a copy of the Form 1, 4, or 5 application, which contains 3 pages for each application. For trusts and legal entities, the CLEO notification will include: (1) for the applicant, a copy of the Form 1, 4, or 5 application, which contains 3 pages for each application; (2) for responsible persons, a copy of Form 5320.23, which contains 2 pages. Form 5320.23 will contain a “copy 1” page for ATF and a “copy 2” page for the CLEO. This means that trusts and legal entities will not need to make copies of Form 5320.23 when mailing Form 5320.23 to the CLEO. All applicants will need to make copies of the application to mail the application to the CLEO.

ATF estimates the cost of CLEO notification for individuals as follows:

- The estimated cost to copy an application to send as a notification to the CLEO is \$.30 for each Form 1, Form 4, and Form 5 (\$.10 per page for 3 pages). Cost is \$8,757 ( $$.30 \times 29,191$ ).
- The estimated cost to mail an application to the CLEO is \$.49 (current postage cost). Cost is \$14,304 ( $$.49 \times 29,191$ ).
- The estimated cost of the time to copy and mail the application to the CLEO is \$5.53 (10 minutes at \$33.19 per hour). Cost is \$161,426 ( $\$5.53 \times 29,191$ ).



- The estimated cost of the time for the CLEO to review the notification is \$11.06 (15 minutes at \$44.22 per hour). Cost is \$322,852 ( $\$11.06 \times 29,191$ ).

ATF estimates the cost of CLEO notification for trusts and legal entities as follows:

#### Applicants

- The estimated cost to copy an application to send as a notification to the CLEO is \$.30 for each Form 1, Form 4, and Form 5 (\$.10 per page for 3 pages). Cost is \$34,749 ( $\$.30 \times 115,829$ ).
- The estimated cost to mail an application to the CLEO is \$.49 (current postage cost). Cost is \$56,756 ( $\$.49 \times 115,829$ ).
- The estimated cost of the time to copy and mail the application to the CLEO is \$5.53 (10 minutes at \$33.19 per hour). Cost is \$640,534 ( $\$5.53 \times 115,829$ ).
- The estimated cost of the time for the CLEO to review the notification is \$11.06 (15 minutes at \$44.22 per hour). Cost is \$1,281,069 ( $\$11.06 \times 115,829$ ).

#### Responsible Persons

- The estimated cost to mail Form 5320.23 to the CLEO is \$113,512 ( $\$.49 \times 115,829 \times 2$  (number of responsible persons)).
- The estimated cost of the time to mail Form 5320.23 to the CLEO is \$2.77 (5 minutes at \$33.19 per hour). Cost is \$641,693 ( $\$2.77 \times 115,829 \times 2$  (number of responsible persons)).
- The estimated cost of the time for the CLEO to review the notification is \$11.06 (15 minutes at \$44.22 per hour). Cost is \$2,562,137 ( $\$11.06 \times 115,829 \times 2$  (number of responsible persons) = \$2,562,137).

Table E(1) —CLEO Notification Process Costs for Individuals

<b>Process</b>	<b>Estimated Cost or Time</b>	<b>Number of Individuals</b>	<b>Cost</b>
<b>Provide Copy of Application for Notification to CLEO</b>	\$.10/page for 3 pages	29,191	\$8,757
<b>Mailing of CLEO Notification to Agency</b>	\$.49 for stamp	29,191	\$14,304
<b>Copy and Mail Notification</b>	10 minutes	29,191	\$161,426
<b>Agency Process CLEO Notification</b>	15 minutes	29,191	\$322,852
		<b>Total</b>	<b>\$507,339</b>

Table E(2) —CLEO Notification Process Costs for Trusts and Legal Entities (Applicants)

<b>Process</b>	<b>Estimated Cost or Time</b>	<b>Number of Trusts &amp; Legal Entities</b>	<b>Cost</b>
<b>Provide Copy of Application for Notification to CLEO</b>	\$.10/page for 3 pages	115,829	\$34,749
<b>Mailing of CLEO Notification to Agency</b>	\$.49 for stamp	115,829	\$56,756
<b>Copy and Mail Notification</b>	10 minutes	115,829	\$640,534
<b>Agency Process CLEO Notification</b>	15 minutes	115,829	\$1,281,069
		<b>Total</b>	<b>\$2,013,108</b>

Table E(3)—CLEO Notification Process Costs for Trusts and Legal Entities (Responsible Persons)

<b>Process</b>	<b>Estimated Cost or Time</b>	<b>Number of Trusts &amp; Legal Entities</b>	<b>2 Responsible Persons</b>
<b>Mailing of Form 5320.23 to Agency</b>	\$ .49 for stamp	115,829	\$113,512
<b>Mail Form 5320.23 to Agency</b>	5 minutes	115,829	\$641,693
<b>Agency Process CLEO Notification</b>	15 minutes	115,829	\$2,562,137
		<b>Total</b>	<b>\$3,317,342</b>

The estimated total cost of the final rule to require notification to the CLEO is \$5,837,789 annually (sum of Tables E1, E2, and E3). As shown in Table D, the estimated cost of the current requirement to obtain CLEO certification is \$2,260,162. Therefore, the final rule notification requirement results in an estimated cost increase of approximately \$3.6 million per year. However, for individuals, the final rule notification requirement results in an estimated reduction of approximately \$1.8 million per year ( $\$2,260,162 - \$507,339 = \$1,752,823$ ).

c. Benefits of Requirement to Notify CLEOs

The new law enforcement notification requirement provides at least two important benefits. First, by changing the certification requirement to a notification requirement, the final rule reduces the burdens on individuals and entities who seek to possess firearms in jurisdictions whose chief law enforcement officers either process certifications slowly or refuse to process them at all. Second, by making the same notification requirement applicable to individuals and responsible persons of trusts and legal entities the rule closes a loophole that incentivized individuals to form trusts and legal entities to circumvent the certification requirement.

Under current regulations, individuals must obtain a certification from a CLEO in their jurisdiction stating, *inter alia*, that the certifying official has no information indicating that possession of the firearm by the individual would be in violation of State or local law, or no information that the individual will use the firearm for other than lawful purposes. Some applicants have found the process of obtaining a CLEO certification burdensome. Additionally, local and State officials have the option of participating or not, and some CLEOs have refused to issue certifications, thereby making it more difficult for applicants and transferees to obtain the needed certification. Requiring only notice, rather than a certification, will benefit applicants and transferees by removing a potentially burdensome impediment to furnishing ATF with a completed application.

Under the current rule, the certification requirement does not apply to trusts and legal entities. Some individuals have therefore created trusts and legal entities to circumvent the certification requirement. This final rule makes the requirements for background checks the same for trusts and legal entities as they now are for individuals. The Department believes the incentive for makers and transferees to create corporations and trusts solely to avoid the CLEO certification requirement will decrease once the certification is no longer required. As noted in the comments above, some CLEOs are reluctant to issue certifications for a variety of reasons. As a result, an individual may decide to establish a trust or legal entity because trusts and legal entities are not required to provide CLEO certifications under current regulations. By eliminating the CLEO certification requirement, this rulemaking will reduce the burden imposed on such individuals. Certainly, there are legal reasons to create a corporation or a trust unrelated to the desire to avoid the certification. The Department therefore believes creation of these trusts and legal entities will continue.

#### 4. Consolidation of Forms

The incorporation of the information required on ATF Form 5330.20 into the existing Forms 1, 4, and 5 reduces the burden upon the applicant or transferee by eliminating an additional form to be completed and filed. The current estimated time to complete the form is 3 minutes. Because the information requested on the forms is the same, any savings result from the applicant not having to attach a separate form. ATF estimates the elimination of the form will reduce the industry costs by \$240,661 (145,020 transactions for individuals, trusts, and legal entities x 3 minutes per form saved x \$33.19 per hour) and ATF's printing costs by \$1,451 (145,020 forms x .01 cents per form) for a total reduction in costs of \$242,112.

#### *B. Executive Order 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The elimination of the CLEO certification reduces the burden on State and local agencies, and its replacement with the notification of the pending application still provides the agency with knowledge of a controlled firearm in its area of jurisdiction. As noted in the benefits section, ATF estimates that the cost of the notification to the agencies will be less than the cost to the agencies of completing the certification. ATF discussed this change with State and local agencies. While agencies will no longer be able to "deny" an application by not completing the law enforcement certification, the agencies will receive a notification and can contact ATF with any issues.

While there would be an increase in the paperwork filed with ATF and an increase in ATF's processing workload, that is balanced by ATF being able to conduct background checks on persons who do not receive background checks under the current regulations. The overall

impact on the States will be positive. Therefore, in accordance with section 6 of Executive Order 13132 (“Federalism”), the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*C. Executive Order 12988*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (“Civil Justice Reform”).

*D. Regulatory Flexibility Act*

The Regulatory Flexibility Act requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b). Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. *See* 5 U.S.C. 601. The Attorney General has reviewed and approved this rule, thereby certifying that it will not have a significant economic impact on a substantial number of small entities.

This rule primarily affects trusts and legal entities that seek to make or acquire NFA firearms and are not making or acquiring them as a qualified FFL. This rule requires responsible persons of trusts or legal entities to undergo background checks and comply with CLEO notification requirements. For CY 2014, ATF processed 115,829 applications from trusts and legal entities that were not qualified FFLs. ATF estimates the cost of implementing the rule will increase the cost for 115,829 trusts and legal entities with an average of 2 responsible persons by \$25,333,317 (identification costs for background checks: \$23,846,073; CLEO notification costs:

\$1,487,244) per year.<sup>15</sup> In addition, in a revision to the NPRM, this rule requires that individuals comply with CLEO notification requirements rather than CLEO certification procedures, resulting in a compliance cost reduction of \$1,430,262 from the costs estimated in the NPRM.<sup>16</sup> Accordingly, the estimated compliance cost per entity is estimated to be \$218.71 (cost of increase (\$25,333,317) ÷ number of entities (115,829)).

*E. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*F. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*G. Paperwork Reduction Act*

Under the Paperwork Reduction Act, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control

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<sup>15</sup> This increased cost does not include cost of agency processing time for notification. Based on 115,829 entities, the notification cost is \$1,487,244 (\$5,330,450 less \$3,843,206).

<sup>16</sup> Individual CLEO certification cost, excluding agency processing cost, is \$1,614,749. Individual CLEO notification cost, excluding agency processing cost, is \$184,487 (\$507,339 less \$322,852). Notification decreases costs by \$1,430,262 (\$1,614,749 less \$184,487).

number assigned by OMB. This final rule revises several existing information collections and creates a new information collection. The existing information collections that are revised are in 27 CFR 479.62, 479.63, 479.84, 479.85, 479.90, 479.90a, and 479.91, which are associated with ATF Forms 1, 4, and 5. Forms 1, 4, and 5 have been approved by the OMB under control numbers 1140-0011, 1140-0014, and 1140-0015, respectively. The new information collection that is being created is associated with ATF Form 5320.23, and is currently in review for approval by OMB prior to the effective date of this final rule. Form 5320.23 requires certain identifying information for each responsible person within a trust or legal entity requesting to make or receive an NFA firearm, including the responsible person's full name, position, home address, date of birth, and country of citizenship if other than the United States. Form 5320.23 also requires a proper photograph of each responsible person, and two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. In addition, Form 5320.23 requires each responsible person to list the full name and complete address of the chief law enforcement officer in the responsible person's locality to whom the responsible person has forwarded the responsible person's completed copy of Form 5320.23.

The estimated total annual burden hours and related information (number of respondents, frequency of responses, costs, etc.) for the revisions to Forms 1, 4, and 5, as well as the new Form 5320.23, appear below.

The current estimated total annual burden hours and related information for Forms 1, 4, and 5 are based upon the current CLEO certification requirements, and the number of applications processed in CY 2012. As this final rule eliminates CLEO certification and adds CLEO notification, the estimated submission times for Forms 1, 4, and 5 for individuals, trusts,



legal entities, and Gov/FFL have changed. For example, the revised estimated submission times associated with Form 1 are:

- 140 minutes for submission to or by an individual (50 minutes to procure photographs; 60 minutes to procure fingerprints, 10 minutes to copy and mail notification; and 20 minutes to complete and mail the form)
- 260 minutes for submission to or by a trust or legal entity (for 2 responsible persons) (100 minutes to procure photographs; 120 minutes to procure fingerprints; 10 minutes to procure the attachments; 10 minutes to copy and mail notification; and 20 minutes to complete and mail the form)
- 20 minutes (to complete and mail the form) for a submission to or by a government agency or to a qualified FFL

The above estimated times do not reflect that a trust or legal entity must also submit to ATF, as part of each Form 1, Form 4, or Form 5 application, a completed Form 5320.23 for each responsible person, and must provide a copy of completed Form 5320.23 to the CLEO of the jurisdiction for each responsible person. Those times are separately reflected in the estimated submission time of 40 minutes for submission to or by a trust or legal entity of Form 5320.23 (for 2 responsible persons) (30 minutes to complete and include “copy 1” of Form 5320.23 in the Form 1, Form 4, or Form 5 application, and 10 minutes to mail “copy 2” of Form 5320.23 for notification.

**With respect to ATF Form 1:**

*Estimated total annual reporting and/or recordkeeping burden:* 102,808 hours (current estimated total annual reporting and/or recordkeeping burden from OMB Information Collection Number 1140-0011: 16,374 hours). Note: 477 Gov/FFL responders will take 20 minutes (159

hours); 21,879 trust and legal entity responders will take 260 minutes (94,809 hours); and 3,360 individual responders will take 140 minutes (7,840 hours). (The numbers of responders by type are estimated based on the data in Table A.)

*Estimated average burden hours per respondent and/or recordkeeper: 3.86 hours* (current estimated average burden hours per respondent or recordkeeper from OMB Information Collection Number 1140-0011: 1.69 hours).

*Estimated number of respondents and/or recordkeepers: 25,716* (current estimated number of respondents and/or recordkeepers from OMB Information Collection Number 1140-0011: 9,662).

*Estimated annual frequency of responses: 1* (current estimated annual frequency of responses from OMB Information Collection Number 1140-0011: 1).

*Estimated total costs: \$1,472,570.95*

\$1,412,597 (fingerprints and photographs ( $\$29.98 \times 3,360$  (individuals) = \$100,732;  $\$29.98 \times 43,758$  (2 responsible persons) = \$1,311,865))

\$35,006 (copies of legal entity documents ( $\$1.60 \times 21,879$ ))

\$24,967.95 (mailing ( $\$.98$  each for 25,239 respondents = \$24,734.22;  $\$.49$  for 477 respondents = \$233.73) (current estimated total costs from OMB Information Collection Number 1140-0011: \$146,766).

**With respect to ATF Form 4:**

*Estimated total annual reporting and/or recordkeeping burden: 466,755 hours* (current estimated total annual reporting and/or recordkeeping burden from OMB Information Collection Number 1140-0014: 109,552 hours). Note: 4,257 Gov/FFL respondents will take 20 minutes (1,419 hours), 93,739 trust and legal entity respondents will take 260 minutes (406,202 hours),

and 25,343 individual respondents will take 140 minutes (59,134 hours). (The numbers of responders by type are estimated based on the data in Table A.)

*Estimated average burden hours per respondent and/or recordkeeper: 3.66 hours* (current estimated average burden hours per respondent and/or recordkeeper from OMB Information Collection Number 1140-0014: 1.68 hours).

*Estimated number of respondents and/or recordkeepers: 123,339* (current estimated number of respondents and/or recordkeepers from OMB Information Collection Number 1140-0014: 65,085).

*Estimated annual frequency of responses: 1* (current estimated annual frequency of responses from OMB Information Collection Number 1140-0014: 1).

*Estimated total costs: \$6,649,141.29*  
*\$6,380,373* (fingerprints and photographs ( $\$29.98 \times 25,343$  (individuals) =  $\$759,783$ ;  
 $\$29.98 \times 187,478$  (2 responsible persons) =  $\$5,620,590$ ))  
*\$149,982* (copies of trust or legal entity documents ( $\$1.60 \times 93,739$ ))  
*\$118,786.29* (mailing ( $\$.98$  each for 119,082 respondents =  $\$116,700.36$ ;  $\$.49$  for 4,257 respondents =  $\$2,085.93$ ) (current estimated total costs from OMB Information Collection Number 1140-0014:  $\$979,645$ ).

**With respect to ATF Form 5:**

*Estimated total annual reporting and/or recordkeeping burden: 5,350 hours* (current estimated total annual reporting and/or recordkeeping burden from OMB Information Collection Number 1140-0015: 5,287 hours). Note: 9,892 Gov/FFL respondents will take 20 minutes (3,297 hours); 211 trusts or legal entity respondents will take 260 minutes (914 hours); and 488

individual respondents will take 140 minutes (1,139 hours). (The numbers of responders by type are estimated based on the data in Table A.)

*Estimated average burden hours per respondent and/or recordkeeper:* .51 hours (current estimated average burden hours per respondent and/or recordkeeper from OMB Information Collection Number 1140-0015: 33 minutes).

*Estimated number of respondents and/or recordkeepers:* 10,591 (current estimated number of respondents and/or recordkeepers from OMB Information Collection Number 1140-0015: 9,688).

*Estimated annual frequency of responses:* 1 (current estimated annual frequency of responses from OMB Information Collection Number 1140-0015: 1).

*Estimated total costs:* \$33,152.10

\$27,282 (fingerprints and photographs ( $\$29.98 \times 488$  (individuals) = \$14,630;  $\$29.98 \times 422$  (2 responsible persons) = \$12,652))

\$338 (copies of trust or legal entity documents ( $\$1.60 \times 211$ ))

\$5,532.10 (mailing ( $\$.98$  each for 699 respondents = \$685.02;  $\$.49$  for 9,892 respondents = \$4,847.08)) (current estimated total costs from OMB Information Collection Number 1140-0015: \$25,844).

**With respect to ATF Form 5320.23:**

*Estimated total annual reporting and/or recordkeeping burden:* 57,914.50 hours (based on 2 responsible persons)

*Estimated average burden hours per respondent and/or recordkeeper:* .25 hours.

*Estimated number of respondents and/or recordkeepers:* 115,829.

*Estimated annual frequency of responses:* 1.

*Estimated total costs:* \$113,512 (mailing to CLEO (\$.49 x 231,658 (2 responsible persons))). All other estimated costs are associated with the submission package for Forms 1, 4, and 5.

Comments concerning the accuracy of these burden estimates for Form 5320.23 and suggestions for reducing the burden should be directed to the Chief, Materiel Management Branch, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Avenue, NE, Washington, DC 20226, and to the Office of Management and Budget, Attention: Desk Officer for the Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Office of Information and Regulatory Affairs, Washington, DC 20503.

The current estimated costs provided above for Forms 1, 4, and 5 are being revised. ATF has provided OMB with the revised cost estimates for these forms.

### **Disclosure**

Copies of the final rule, proposed rule, and all comments received in response to the proposed rule will be available for public inspection through the Federal eGovernment portal, <http://www.regulations.gov>, or by appointment during normal business hours at: ATF Reading Room, Room 1E-062, 99 New York Avenue, NE, Washington, DC 20226; telephone: (202) 648-8740.

### **Drafting Information**

The author of this document is Brenda Raffath Friend, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

**List of Subjects in 27 CFR Part 479**

Administrative practice and procedure, Arms and munitions, Excise taxes, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, and Transportation.

**Authority and Issuance**

Accordingly, for the reasons discussed in the preamble, 27 CFR part 479 is amended as follows:

**PART 479--MACHINEGUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS**

- 1. The authority citation for 27 CFR part 479 is revised to read as follows:

**Authority:** 26 U.S.C. 5812; 26 U.S.C. 5822; 26 U.S.C. 7801; 26 U.S.C. 7805.

- 2. In § 479.11, revise the definition for “Person” and add a new definition for the term “Responsible person” to read as follows:

**§ 479.11 Meaning of terms.**

\* \* \* \* \*

*Person.* A partnership, company, association, trust, corporation, including each responsible person associated with such an entity; an estate; or an individual.

\* \* \* \* \*

*Responsible person.* In the case of an unlicensed entity, including any trust, partnership, association, company (including any Limited Liability Company (LLC)), or corporation, any individual who possesses, directly or indirectly, the power or authority to direct the management and policies of the trust or entity to receive, possess, ship, transport, deliver, transfer, or

otherwise dispose of a firearm for, or on behalf of, the trust or legal entity. In the case of a trust, those persons with the power or authority to direct the management and policies of the trust include any person who has the capability to exercise such power and possesses, directly or indirectly, the power or authority under any trust instrument, or under State law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust. Examples of who may be considered a responsible person include settlors/grantors, trustees, partners, members, officers, directors, board members, or owners. An example of who may be excluded from this definition of responsible person is the beneficiary of a trust, if the beneficiary does not have the capability to exercise the powers or authorities enumerated in this section.

\* \* \* \* \*

3. Section 479.62 is revised to read as follows:

**§ 479.62 Application to make.**

(a) *General.* No person shall make a firearm unless the person has filed with the Director a completed application on ATF Form 1 (5320.1), Application to Make and Register a Firearm, in duplicate, executed under the penalties of perjury, to make and register the firearm and has received the approval of the Director to make the firearm, which approval shall effectuate registration of the firearm to the applicant. If the applicant is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company (including a Limited Liability Company (LLC)), association, trust, or corporation, all information on the Form 1 application shall be furnished for each responsible person of the applicant

(b) *Preparation of ATF Form 1.* All of the information called for on Form 1 shall be provided, including:

(1) The type of application, i.e., tax paid or tax exempt. If the making of the firearm is taxable, the applicant shall submit a remittance in the amount of \$200 with the application in accordance with the instructions on the form;

(2) The identity of the applicant. If an individual, the applicant shall provide the applicant's name, address, and date of birth, and also comply with the identification requirements prescribed in § 479.63(a). If other than an individual, the applicant shall provide its name, address, and employer identification number, if any, as well as the name and address of each responsible person. Each responsible person of the applicant also shall comply with the identification requirements prescribed in § 479.63(b);

(3) A description of the firearm to be made by type; caliber, gauge, or size; model; length of barrel; serial number; other marks of identification; and the name and address of the original manufacturer (if the applicant is not the original manufacturer);

(4) The applicant's Federal firearms license number (if any);

(5) The applicant's special (occupational) tax stamp (if applicable); and

(6) If the applicant (including, if other than an individual, any responsible person) is an alien admitted under a nonimmigrant visa, applicable documentation demonstrating that the nonimmigrant alien falls within an exception to 18 U.S.C. 922(g)(5)(B) under 18 U.S.C. 922(y)(2), or has obtained a waiver of that provision under 18 U.S.C. 922(y)(3).

(c) *Notification of chief law enforcement officer.* Prior to the submission of the application to the Director, all applicants and responsible persons shall forward a completed copy of Form 1 or a completed copy of Form 5320.23, respectively, to the chief law enforcement



officer of the locality in which the applicant or responsible person is located. The chief law enforcement officer is the local chief of police, county sheriff, head of the State police, or State or local district attorney or prosecutor. If the applicant is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company, association, or corporation, for purposes of this section, it is considered located at its principal office or principal place of business; if a trust, for purposes of this section, it is considered located at the primary location at which the firearm will be maintained.

(d) *Approval of Form 1.* If the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (*see* § 479.67). The approved application will then be returned to the applicant.

4. Section 479.63 is revised to read as follows:

**§ 479.63 Identification of applicant.**

(a) If the applicant is an individual, the applicant shall:

(1) Securely attach to each copy of the Form 1, in the space provided on the form, a 2 x 2-inch photograph of the applicant, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application; and

(2) Attach to the application two properly completed FBI Forms FD-258 (Fingerprint Card). The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them.

(b) If the applicant is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company (including a Limited Liability Company (LLC)), association, trust, or corporation, the applicant shall:

(1) Be identified on the Form 1 by the name and exact location of the place of business, including the name and number of the building and street, and the name of the county in which the business is located or, in the case of a trust, the primary location at which the firearm will be maintained. In the case of two or more locations, the address shown shall be the principal place of business (or principal office, in the case of a corporation) or, in the case of a trust, the primary location at which the firearm will be maintained;

(2) Except as provided in paragraph (c) of this section, attach to the application—

(i) Documentation evidencing the existence and validity of the entity, which includes complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, and declarations of trust, with any trust schedules, attachments, exhibits, and enclosures;

(ii) A completed ATF Form 5320.23 for each responsible person. Form 5320.23 requires certain identifying information, including each responsible person's full name, position, home address, date of birth, and country of citizenship if other than the United States;

(iii) In the space provided on Form 5320.23, a 2 x 2-inch photograph of each responsible person, clearly showing a full front view of the features of the responsible person with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application;

(iv) Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them.

(c) If the applicant entity has had an application approved as a maker or transferee within the preceding 24 months, and there has been no change to the documentation previously provided, the entity may provide a certification that the information has not been changed since the prior approval and shall identify the application for which the documentation had been submitted by form number, serial number, and date approved.

5. Section 479.84 is revised to read as follows:

**§ 479.84 Application to transfer.**

(a) *General.* Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless an application, Form 4 (5320.4), Application for Tax Paid Transfer and Registration of Firearm, in duplicate, executed under the penalties of perjury, to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The application shall be filed by the transferor. If the transferee is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company (including a Limited Liability Company (LLC)), association, trust, or corporation, all information on the Form 4 application shall be furnished for each responsible person of the transferee.

(b) *Preparation of ATF Form 4.* All of the information called for on Form 4 shall be provided, including:

(1) The type of firearm being transferred. If the firearm is other than one classified as “any other weapon,” the applicant shall submit a remittance in the amount of \$200 with the

application in accordance with the instructions on the form. If the firearm is classified as “any other weapon,” the applicant shall submit a remittance in the amount of \$5;

(2) The identity of the transferor by name and address and, if the transferor is other than a natural person, the title or legal status of the person executing the application in relation to the transferor;

(3) The transferor’s Federal firearms license number (if any);

(4) The transferor’s special (occupational) tax stamp (if any);

(5) The identity of the transferee by name and address and, if the transferee is a person not qualified as a manufacturer, importer, or dealer under this part, the transferee shall be further identified in the manner prescribed in § 479.85;

(6) The transferee’s Federal firearms license number (if any);

(7) The transferee’s special (occupational) tax stamp (if applicable); and

(8) A description of the firearm to be transferred by name and address of the manufacturer or importer (if known); caliber, gauge, or size; model; serial number; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length of the weapon and the length of the barrel; and any other identifying marks on the firearm. In the event the firearm does not bear a serial number, the applicant shall obtain a serial number from ATF and shall stamp (impress) or otherwise conspicuously place such serial number on the firearm in a manner not susceptible of being readily obliterated, altered, or removed.

(9) If the transferee (including, if other than an individual, any responsible person) is an alien admitted under a nonimmigrant visa, applicable documentation demonstrating that the

nonimmigrant alien falls within an exception to 18 U.S.C. 922(g)(5)(B) under 18 U.S.C. 922(y)(2), or has obtained a waiver of that provision under 18 U.S.C. 922(y)(3).

(c) *Notification of chief law enforcement officer.* Prior to the submission of the application to the Director, all transferees and responsible persons shall forward a completed copy of Form 4 or a completed copy of Form 5320.23, respectively, to the chief law enforcement officer of the locality in which the transferee or responsible person is located. The chief law enforcement officer is the local chief of police, county sheriff, head of the State police, State or local district attorney or prosecutor. If the transferee is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company, association, or corporation, for purposes of this section, it is considered located at its principal office or principal place of business; if the transferee is not a licensed manufacturer, importer, or dealer qualified under this part and is a trust, for purposes of this section, it is considered located at the primary location at which the firearm will be maintained.

(d) *Approval of Form 4.* If the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (*see* § 479.87). The approved application will then be returned to the transferor.

6. Section 479.85 is revised to read as follows:

**§ 479.85 Identification of transferee.**

(a) If the transferee is an individual, such person shall:

(1) Securely attach to each copy of the Form 4, in the space provided on the form, a 2 x 2-inch photograph of the applicant, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin

approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application; and

(2) Attach to the application two properly completed FBI Forms FD-258 (Fingerprint Card). The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them.

(b) If the transferee is not a licensed manufacturer, importer, or dealer qualified under this part and is a partnership, company, association, trust, or corporation, such person shall:

(1) Be identified on the Form 4 by the name and exact location of the place of business, including the name and number of the building and street, and the name of the county in which the business is located or, in the case of a trust, the primary location at which the firearm will be maintained. In the case of two or more locations, the address shown shall be the principal place of business (or principal office, in the case of a corporation) or, in the case of a trust, the primary location at which the firearm will be maintained;

(2) Except as provided in paragraph (c) of this section, attach to the application—

(i) Documentation evidencing the existence and validity of the entity, which includes complete and unredacted copies of partnership agreements, articles of incorporation, corporate registration, and declarations of trust, with any trust schedules, attachments, exhibits, and enclosures;

(ii) A completed ATF Form 5320.23 for each responsible person. Form 5320.23 requires certain identifying information, including the responsible person's full name, position, home address, date of birth, and country of citizenship if other than the United States;

(iii) In the space provided on Form 5320.23, a 2 x 2-inch photograph of each responsible person, clearly showing a full front view of the features of the responsible person with head bare,

with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application; and

(iv) Two properly completed FBI Forms FD-258 (Fingerprint Card) for each responsible person. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them.

(c) If the applicant entity has had an application approved as a maker or transferee within the preceding 24 months, and there has been no change to the documentation previously provided, the entity may provide a certification that the information has not been changed since the prior approval and shall identify the application for which the documentation had been submitted by form number, serial number, and date approved.

7. Section 479.90(b) is revised by removing the word “natural” in the third sentence.

8. Section 479.90a is added to subpart F to read as follows.

**§ 479.90a Estates.**

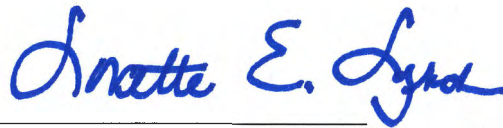
(a) The executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate (collectively “executor”) may possess a firearm registered to a decedent during the term of probate without such possession being treated as a “transfer” as defined in § 479.11. No later than the close of probate, the executor must submit an application to transfer the firearm to beneficiaries or other transferees in accordance with this section. If the transfer is to a beneficiary, the executor shall file an ATF Form 5 (5320.5), Application for Tax Exempt Transfer and Registration of Firearm, to register a firearm to any beneficiary of an estate in accordance with § 479.90. The executor will identify the estate as the transferor, and will sign the form on behalf of the decedent, showing the executor’s title (e.g.,

executor, administrator, personal representative, etc.) and the date of filing. The executor must also provide the documentation prescribed in paragraph (c) of this section.

(b) If there are no beneficiaries of the estate or the beneficiaries do not wish to possess the registered firearm, the executor will dispose of the property outside the estate (i.e., to a non-beneficiary). The executor shall file an ATF Form 4 (5320.4), Application for Tax Paid Transfer and Registration of Firearm, in accordance with § 479.84. The executor, administrator, personal representative, or other authorized person must also provide documentation prescribed in paragraph (c) of this section.

(c) The executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate shall submit with the transfer application documentation of the person's appointment as executor, administrator, personal representative, or as an authorized person, a copy of the decedent's death certificate, a copy of the will (if any), any other evidence of the person's authority to dispose of property, and any other document relating to, or affecting the disposition of firearms from the estate.

January 4, 2016  
Date

  
Loretta E. Lynch  
Attorney General