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December 9, 2013

Bureau of Alcohol, Tobacco, Firearms and Explosives
U.S. Department of Justice
99 New York Avenue, N.E.
Washington, DC 20226

Re: Docket No. ATF 41P; AG Order No. 3398-2013
Gun Owners of America, Inc. and Gun Owners Foundation Comments
on “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”

Dear Sirs:

Our firm represents Gun Owners of America, Inc. (“GOA”) and Gun Owners Foundation (“GOF”). Pursuant to the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (“ATF”) request for comments its Notice of Proposed Rulemaking (“PR”)¹ of changes to the requirements for applications to make or transfer certain National Firearms Act firearms and devices, we hereby submit these joint comments. GOA and GOF welcome the opportunity to comment on this topic.

1. Identity of Commenters.

GOA is a nonprofit, national membership, educational and lobbying social welfare organization, devoted to protecting and defending firearm rights across the country. GOA was incorporated in California in 1976, and is exempt from federal income tax under Section 501(c)(4) of the Internal Revenue Code (“IRC”). GOF is a nonprofit, educational and legal defense organization, defending the Second Amendment to the U.S. Constitution. GOF was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC Section 501(c)(3). GOA and GOF are headquartered in northern Virginia.

¹ 78 Fed. Reg. 55,014, Sept. 9, 2013, <http://www.gpo.gov/fdsys/pkg/FR-2013-09-09/pdf/2013-21661.pdf>.

2. Background.

The National Firearms Act of 1934 (“NFA”), 48 Stat. 1236, restricts the possession of certain classes of firearms and accessories (“NFA weapons”). The regulated categories are machineguns,² short-barreled rifles and shotguns, suppressors/silencers, “destructive devices” (“DD”), and “any other weapons” (“AOW”) as defined in 26 U.S.C. Section 5845(e). The NFA imposes an excise tax and strict registration requirements on anyone who wishes either to manufacture or transfer an NFA weapon, and places further restrictions on the transport and use of NFA weapons. Currently, the tax is \$5 for an AOW, and \$200 for all other regulated classes. 26 U.S.C. Section 5811.

Even after successful registration and payment of required taxes, there are still significant possession and use requirements for NFA weapons. For example, upon the death of the registrant, there must be a new application for any transfer to a beneficiary or next of kin. *See* ATF Forms 4 and 5. If the registrant changes addresses, he must promptly notify ATF of the change. ATF Form 4, p. 2. A registrant may not take most NFA weapons outside the state of registration without first obtaining permission from ATF. 18 U.S.C. Section 922(a)(4). A registrant must carry proof of registration with the NFA weapon at all times, and present it on demand. ATF Form 4, p. 2. It is generally understood that the registrant may not relinquish possession or control of the NFA weapon, even temporarily, to another person. The registrant must immediately report lost or stolen NFA weapons or paperwork. 27 C.F.R. Sections 479.141 and 479.142.

Pursuant to current ATF regulations, an individual who wishes to possess an NFA weapon must complete an ATF form, and submit the completed form³ to the ATF along with his fingerprints, photographs, and signature on the form by the Chief Law Enforcement Officer (“CLEO” or “CLEO signoff”) of the jurisdiction where he resides.⁴ However, “[u]nder

² As part of the Firearm Owners Protection Act of 1986, machineguns were further regulated to ban the civilian manufacture, sale, or possession of any machinegun manufactured after May of 1986. 18 U.S.C. Section 922(o).

³ The applicant must certify, *inter alia*, that he has a “reasonable necessity to possess” the NFA weapon.

⁴ The certification on the form may also be signed by other state officials, including a “sheriff of the county, head of the state police, state or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director....” PR at 55,027. The signatory is required to certify that possession of the NFA weapon by the applicant would not violate state or local law, and that there is no information that the applicant will use the NFA weapon unlawfully. *See* ATF Form 5320-4, “Application for Tax Paid Transfer and Registration of Firearm,” <http://www.atf.gov/files/forms/download/>

current regulations, the requirements for fingerprints, photographs, and law enforcement certificate ... are not applicable to an applicant who is not an individual....” PR at 55,015.

3. ATF Proposed Rulemaking.

The PR would change the requirements for “entities” (other than individuals) to manufacture and transfer NFA weapons:

- First, the PR would add a new term, “responsible person,” to the regulation of firearms in the possession of a “trust, partnership, association, company ... or corporation.”⁵
- Second, the PR would require each “responsible person” to submit his fingerprints, photographs, and obtain CLEO signoff on an application. PR at 55,018-19.
- Third, the PR would modify the statement from the CLEO to no longer require certification that there is no reason to believe the applicant will misuse the NFA weapon, but maintain CLEO certification that the photograph and fingerprints in the application belong to the applicant, and that possession would not violate state or local law. PR at 55,018-19.

4. Origin of ATF’s Proposed Rulemaking — NFATCA Petition.

ATF’s Proposed Rulemaking was initiated in response to a petition in 2009 from the National Firearms Act Trade and Collectors Association. PR at 55,016. That organization’s petition asked ATF to:

[atf-f-5320-4.pdf](#).

⁵ PR at 55,017. A “responsible person” would be “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 entity.” PR at 55,017-18. Moreover, “each responsible person of the transferee would be subject to the requirements....” PR at 55,020. Then, ATF suggests its regulations may become even more onerous, requiring “that [when] the composition of the responsible persons associated with a trust, partnership, association, company, or corporation may change ... new responsible persons [must] submit Form 5320.23 within 30 days of the change.” *Id.*

- “require photographs and fingerprints of persons responsible for directing the legal entity;” and
- “eliminate the requirement for CLEO approval ... for natural persons...”⁶

In response, ATF appears to have done largely what NFATCA’s petition requested — expanding requirements for all “responsible persons” involved with corporations and trusts, while lessening (but not entirely eliminating) CLEO signoff requirements. *See* PR at 55,017-19.

NFATCA claimed the heightened requirements on trusts and corporations was necessary for purposes of “public safety,” and that “there is concern regarding prohibited persons receiving firearms without background checks via trusts and corporations.”⁷ The proposed rulemaking states that “petitioner expressed concern that an NFA firearm could be acquired by a prohibited person and used in a violent crime.” *Id.* at 55,016.

It would seem that NFATCA has aroused significant legitimate public outcry against its petition, with gun owners noting that NFATCA has thrown them “under the bus.”⁸

NFATCA appears to believe it was simply trying to appear reasonable when asking for expanded background checks, as part of a give-and-take negotiation to eliminate the CLEO signoff.⁹ Now that ATF’s proposed rulemaking has done the “taking”¹⁰ without the “giving,”¹¹ NFATCA claims that ATF’s proposed rulemaking is an “over reach.”¹²

⁶ www.nfatca.org/pubs/NFATCA_petition1209.pdf at 1.

⁷ www.nfatca.org/pubs/NFATCA_petition1209.pdf at 3.

⁸ <http://www.nfatca.org/>.

⁹ http://www.nfatca.org/pubs/NFATCA_Statement_083113.pdf.

¹⁰ The PR states that “[t]he Department of Justice agrees with the concerns underlying this proposal, and believes that such persons 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.” PR at 55,016.

¹¹ The PR states that “ATF does not propose to eliminate the CLEO certificate requirement at this time. Rather, ATF proposes extending the CLEO certificate requirement to responsible persons of a legal entity.” PR at 55,017.

¹² <http://www.nfatca.org/>. *See* D. Codrea, “NFA Firearms Collectors Group Initiated ATF Gun Trust Rule Change,” Examiner.com, Aug. 30, 2013, <http://www.examiner.com/>

5. ATF Does Not Have the Regulatory Authority to Require Photographs and Fingerprinting of Legal Entities. Additionally, ATF Has No Authority to Require CLEO Signoff from Anyone.

It would appear that ATF has not considered its basic statutory authority to enact its proposed rules. 26 U.S.C. Section 5812 governs applications for the transfer of NFA firearms (as defined by Section 5845) stating that, among other requirements, no firearm shall be transferred to “the transferee ... unless ... if such person is an individual, the identification must include his fingerprints and his photograph...” ATF then, by regulation, **expanded those requirements**, citing 27 C.F.R. Section 479.85, requiring that “[i]f the transferee is an individual, such person shall [include] a photograph ... fingerprints ... **and [a] certificate of the local chief of police.**”¹³

The CLEO signoff requirement first appeared in the Treasury Department’s 1934 regulations, but in its first iteration the certificate requirement could also be satisfied by submitting the fingerprints and photograph to a “United States Attorney [or] United States marshal.” *See Lomont v. O’Neill*, 285 F.3d 9, 12 (D.C. Cir. 2002). From 1934 to 1985, the Treasury Department made only minor changes to this regulation. In 1985, the regulation was amended, “delet[ing] the certification authority of United States Attorneys and United States Marshals because this ‘required them to perform services outside their normal operations.’” *Id.* Instead, the CLEO certification requirement was left to “state and local officials [who] ‘are in a better position to know ... whether that transfer would be consistent with state and local law.’” *Id.*

Then, as Stephen Halbrook has observed, “[i]n 1968, Congress initially considered and passed a CLEO certificate” requirement, making what was a regulation into a statutory requirement. *See* Stephen Halbrook, *Firearms Law Deskbook*, §8:7, p. 587 (Thomson/West: 2008). *See* Omnibus Crime Control and Safe Streets Act of 1968 (Pub. L. 90–351, 82 Stat. 197). However, later the same year, in response to objections that local law enforcement could not be forced to participate, Congress changed to a limited provision **applying only to federal firearms licensee (“FFL”) transfers** of NFA firearms. *See* Gun Control Act, Pub. L. 90-618, 82 Stat. 1213, 1219 (1968). ATF is not now free to replace by regulation a requirement that Congress eliminated from a statute.

Additionally, Congress only permitted regulations “specifically authorized by the Secretary [now Attorney General] consistent with public safety and necessity.” By this

[article/nfa-firearms-collectors-group-initiated-atf-gun-trust-rule-change.](#)

¹³ The same is true for the statute regulating the making of an NFA firearm, 26 U.S.C. Section 5822, which requires only photograph and fingerprints, versus the ATF regulation at 27 C.F.R. Section 479.63 which requires photographs, fingerprints, **and CLEO signoff.**

provision, Congress did not purport to expand the Secretary's powers over NFA firearms, but to limit those powers to those granted by the NFA Act itself. 26 U.S.C. Section 7805 gives specific authority to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law **in relation to internal revenue**" (emphasis added).

There are at least five reasons that ATF may not legally require CLEO signoff for any NFA firearm, and may not in its PR require photographs and fingerprints from "responsible persons" of legal entities:

- As Section 7805 states, the purpose of Title 26 is taxation — not regulation. The purpose of the NFA was to obtain a tax and, in order to do so, it was necessary, as 26 U.S.C. Section 5812 requires, that the "transferee is identified," the "transferor ... is identified," and "the firearm is identified" through fingerprints, photographs, serial numbers, descriptions, etc. By now including a requirement for CLEO signoff, which has nothing to do with collecting a tax, ATF has unlawfully expanded the purpose of the statute to be not simply about **taxation** — and **identification** of the taxpayer and taxed firearm — but instead about firearms **regulation**, and a determination of the **eligibility** of the applicant.
- 26 U.S.C. Section 5812 describes "the transferee." It does not refer to "transferees." It is quite obvious that the singular "transferee" means the person or entity whose name is on the NFA application, and who will be physically present (or represented by an agent) at the FFL to receive the firearm. "Transferee" does not refer to some plural, unknown number of "responsible persons" of legal entities, which may constantly evolve, and may at some later point have access to the NFA weapon. This would make NFA registration an ongoing battle to keep up with the paperwork, any time the composition of "responsible persons" of a legal entity changed in any way. Moreover, since registrants have responsibility over NFA weapons, it is unclear how a person would get his name removed from the list as a registrant if he was no longer a "responsible person" of a "legal entity."
- 26 U.S.C. Section 5812 clearly states that only "if such person is an individual" must he submit a photograph and fingerprints. The clear import is that, "if such person is [not] an individual," such items are **not** required. ATF may not add such requirements because it deems them to be a good idea.
- The CLEO signoff is not "needful" to ensure that State and local law permits possession of the NFA arms in question. ATF itself certifies as much when it approves the Form 4. *See* 26 U.S.C. Section 5812(a)(6) ("Applications shall be denied if the transfer, receipt or possession of the firearm would place the

transferee in violation of law.”). Congress has placed ATF in charge of compiling and annually revising the list of “published ordinances,” defined to include “a published law of any political subdivision of a State which the Attorney General determines to be relevant to the enforcement of this chapter....” 18 U.S.C. Section 921(a)(19). The “chapter” referred to is the Gun Control Act rather than the NFA, but a review of the list of published ordinances shows that it includes State and local restrictions on NFA arms. Thus, ATF already knows which States and localities ban or regulate NFA arms.

- Nor is the CLEO certification necessary to authenticate the fingerprints and photograph submitted with the Form 4. CLEOs do not take fingerprints themselves; rather, FBI fingerprint cards are certified by the law enforcement technician who took the prints. The CLEO is unlikely to know what an applicant looks like. If there is any doubt, ATF need only ask for a copy of the applicant’s driver’s license or other such ID.
- 6. The PR Proposes to Exceed the Original Taxing Purpose of the NFA, and Impose an Unconstitutional Regulatory Scheme.**

The proposed regulation extending the CLEO signoff to the expanded class of “responsible persons” is an unconstitutional means designed to achieve an unconstitutional purpose.

The National Firearms Act of 1934 was recognized as a constitutional exercise of the power of Congress to tax. *See Sonzinsky v. United States*, 300 U.S. 506 (1937). In upholding the Act’s constitutionality, the Supreme Court found that the Act “contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose.” *Id.* at 513. Whatever deterrent effect the tax may have on sales of firearms, the Court ruled, was only incidental, having “interpose[d] an economic impediment to the activity taxed as compared with others not taxed.” *Id.* Thus, the Court concluded that the tax is “not any the less a tax because it has a regulatory effect.” *Id.* Consequently the Court declined to conduct any “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it.” *Id.*

By contrast, the motive behind the PR, extending CLEO signoff to persons other than the actual manufacturer or transferee, is not hidden, and the proposed regulation is not one that is necessitated as an aid to a revenue purpose. To the contrary, the PR has been touted by the White House as one “necessary to reduce gun violence.”¹⁴ Indeed, the ATF has asserted in

¹⁴ “FACT SHEET: New Executive Actions to Reduce Gun Violence,” The White House Office of the Press Secretary, Aug. 29, 2013 (“White House Fact Sheet”),

this regulatory proceeding that it is necessary to require fingerprinting, photographs, and CLEO signoff because, otherwise, a person could use a “legal entity” to avoid a criminal background check. PR at 55,016. As the White House has stated in support of new executive actions to reduce gun violence, the PR is represented as closing a so-called “loophole” which allegedly allows “felons, domestic abusers, and others prohibited from having guns can easily evade the required background check and gain access to machine guns or other particularly dangerous weapons by registering the weapon to a trust or corporation.” *See* White House Fact Sheet.

Clearly, the PR is not a taxing provision designed to ensure the payment of NFA tax, as contemplated by the statute. In fact, it has nothing to do with any revenue purpose. Rather, it is a regulation designed as a gun control measure, to be enforced not under the authority of the Secretary of the Treasury, as the NFA originally provided, but under the Attorney General — who is charged not with the collection of taxes, but with the enforcement of the federal criminal law. *See The Child Labor Tax Case*, 259 U.S. 20, 35-37. (1922). As Chief Justice Roberts recently observed, the federal “authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more.” *National Federation of Independent Business v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2600 (2012). The PR unconstitutionally goes beyond that limited revenue purpose, requiring CLEO signoff, even if the tax has been paid.

7. ATF’s Proposed Regulation Is a Solution in Search of a Problem.

ATF claims it to be necessary to require fingerprinting, photographs, and CLEO signoff from all “responsible persons,” or else an individual could use a “legal entity” to avoid undergoing a background check in obtaining an NFA weapon. *See* PR at 55,016 (“The Department of Justice agrees with the concerns underlying this proposal, and believes that such persons 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 White House, in announcing the proposed rulemaking, claimed that such action was necessary “to reduce gun violence.”¹⁵ Calling the use of “legal entities” a “loophole,” the White House claimed that “felons, domestic abusers, and others prohibited from having guns can easily evade the required background check and gain access to machine guns or other particularly dangerous weapons by registering the weapon to a trust or corporation.” *Id.*

Yet no one has been able to point to a single instance where a felon has even obtained an NFA weapon, much less used it to commit any sort of a crime. The PR cites only a single

<http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence>.

¹⁵ *See* White House Fact Sheet.

case where a felon’s individual application was denied, and then detected and again denied when he filed an application under a trust. PR at 55,016.

Not only is there no evidence that felons and other prohibited persons are illegally obtaining NFA weapons wholesale, but also there appear to have been almost no crimes committed using NFA weapons. With regard to suppressors, one study found that “[m]ost prosecutions in the federal system are for possession of an unregistered silencer, or possession without a permit.” P. Clark, “Criminal Use of Firearm Silencers,” *Western Criminology Review*, 8(2), 44-57 (2007) at 44-45. The same paper found only 167 total silencer criminal cases from the period 1995-2005. *Id.* at 50. And, of course, the vast majority of those involved homemade silencers, not ones obtained through NFA applications. Another source reports that it was able to find only two murders — over the NFA’s 79-year history — that were committed using fully automatic weapons registered in the NFA, and one of those was committed by a law enforcement officer.¹⁶

It is but mere speculation that a felon might somehow illegally obtain an NFA weapon if the PR is not adopted, much less actually use it in a crime. However, it is a factual certainty that law-abiding Americans in jurisdictions with anti-gun CLEOs will be completely unable to obtain NFA weapons if the PR is adopted. A record of zero-for-one by felons attempting to get NFA weapons clearly does not justify unduly burdening tens of thousands of law-abiding gun owners, particularly when ATF cannot even show a single example of anything bad having ever happened.

8. Requiring CLEO Signoff in Every Case Is *De Facto* Gun Control.

ATF claims its extension of CLEO signoff to legal entities is for public safety reasons, without which felons and other prohibited persons will obtain NFA weapons and do terrible things. In reality, if CLEO signoff is to be required for every NFA application, then in jurisdictions where anti-gun CLEOs refuse to signoff, there is *de facto* gun control, as there is no other way to obtain an NFA weapon without the CLEO’s **permission**. It is well known to ATF that state and local officials cannot be forced to participate in federal gun control schemes. *See Printz v. United States*, 521 U.S. 898 (1997). Thus, requiring CLEO participation in the NFA process before a person can acquire an NFA weapon is clearly designed to limit the number of Americans who have access to such weapons.

ATF discusses the increase in “legal entity” applications in the same section in which it discusses its fears that ineligible persons will use “legal entities” to thwart the system and illegally obtain NFA weapons. PR at 55,021. ATF seems to imply that the increase of “legal entity” applications from 840 in 2000 to 40,700 in 2012 means that tens of thousands of felons must now be running around the streets armed with machineguns. This is simply not the case.

¹⁶ http://www.guncite.com/gun_control_gcfullau.html.

Rather, there are a variety of legitimate reasons for which individuals use legal entities to obtain NFA weapons rather than obtaining them in an individual capacity. Examples include:

- to avoid anti-gun CLEOs who refuse to signoff on application forms;
- for families to avoid having to go through complicated transfer process upon a death; and
- to permit more than one person to have legal authority to possess an NFA weapon.

ATF's paring down of the CLEO signoff statement will not have an effect on the number of CLEOs who give their consent. A CLEO's refusal to sign normally is not because of some hesitancy to certify that the applicant will not use the firearm unlawfully. Rather, a CLEO's refusal is more often than not due to a virulent hostility to firearms in general, and his desire to keep guns out of the hands of the people he is supposed to protect. Indeed, even the PR acknowledges that "the lack of cooperation on the part of many CLEOs in recent years has forced larger numbers of individuals to acquire NFA firearms via a trust or corporate entity, so as to avoid the need for a law enforcement certificate." PR at 55,017. Allowing CLEOs the absolute authority over the ability to obtain NFA weapons puts the federal statutory scheme in the hands of state and local officials, who may use that authority in arbitrary and capricious ways, without any guidelines or requirements whatsoever.

9. The Attorney General Is Unauthorized to Use NICS to Clear a Private Transfer of an NFA Firearm.

18 U.S.C. Section 922(t) authorizes and requires an FFL to contact the National Instant Criminal Background Check System ("NICS") before transferring a firearm. There is no provision for the conduct of a NICS check with respect to a private transfer of a firearm. Indeed, 25 C.F.R. Section 25.6(a) provides that only FFLs are authorized to "initiate a NICS background check" and "only in connection with a proposed firearm transfer as required by the Brady Act." Accessing NICS for "any other purpose" is "strictly prohibited." *Id.*

Prior to transferring an NFA firearm, 26 U.S.C. Section 5812(a) requires that a transferee meet certain requirements, including showing that the Attorney General has approved the transfer and the registration. Additionally, 27 C.F.R. Section 479.85 requires CLEO signoff.

Further, 27 C.F.R. Section 479.86 provides that, in the process of determining whether to approve the NFA transfer and registration, the "Director shall contact the National Instant Criminal Background Check System." But there is no provision in the statute or the NICS regulations permitting the Director to contact NICS. Nor could there be, in light of the fact that the NICS check applies only to transfers of firearms by FFLs. Not only is such an extension of NICS unauthorized, it is prohibited by the NICS regulations. Moreover, it is further evidence that the CLEO signoff and NICS check are for an unconstitutional, gun

control and regulatory purpose, having nothing to do with the original taxation purpose of the NFA. While the ATF might be permitted to require an FFL to run a NICS check prior to making an NFA transfer that occurs through an FFL, the ATF may not on its own conduct NICS checks for all NFA transfers.

10. Conclusion.

ATF has no authority to require CLEO signoff from anyone. ATF has no authority to require photographs and fingerprints from “responsible persons” of “legal entities.” Moreover, ATF has no authority to contact NICS to run a check on NFA transferees. ATF should scrap this proposed rulemaking, and initiate one in line with these comments, in order to bring the agency back within the legal and constitutional scope of its authority.

Sincerely yours,

/s/

William J. Olson

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