



Dear Ms. Friend,

The American Silencer Association (ASA), a trade association representing the major manufacturers and distributors of sound suppressors, as well as many retailers and owners of suppressors, strongly opposes the main elements of the Bureau of Alcohol, Tobacco, Firearms and Explosives' proposed rule on "Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity With Respect to Making or Transferring a Firearm" (Docket No. ATF 41P).<sup>1</sup>

Our concerns about the proposed rule fall into three categories:

1. ATF has no statutory authority to require either photographing or fingerprinting of responsible persons, or a certification of approval by state or local chief law enforcement officers (CLEOs).
2. Even if statutory authority existed, the proposed rule would cause enormous confusion and delay among licensees and nonlicensees seeking to comply with it, further adding to already outrageous delays in processing applications to make and transfer suppressors and other items regulated under the National Firearms Act.
3. ATF has severely underestimated the burdens the proposed rule would impose on individuals, businesses small and large, CLEOs, and ATF itself.

#### UNLAWFUL RULES

First and foremost, we believe the proposed rule is not authorized under the National Firearms Act, and is therefore highly likely to lead to litigation by affected parties. We agree with and endorse the comments of others who have addressed these issues at length, such as the National Rifle Association and the National Firearms Act Trade and Collectors Association, and will only briefly state our concern on these points.

First, both the legality and the wisdom of the CLEO certification requirement (commonly known as the CLEO signoff) has been in question for many years. In a nutshell, we believe that as a federal revenue statute, the NFA should be implemented solely by federal officials. Giving local authorities what amounts to veto power over federally regulated firearm transactions allows the federal government to avoid responsibility for executing federal law, and to avoid challenges to unjust denial of applications under the Administrative Procedure Act. We believe the CLEO signoff requirement also attempts to circumvent federal tax privacy laws, see 26 U.S.C. § 6103, by forcing applicants to submit tax return information to local officials before filing.

<sup>1</sup> However, we support two aspects of the proposal, either or both of which could be promulgated independently: (1) the proposal to include the citizenship and immigration certification directly on Forms 1, 4 and 5, and (2) the provisions excluding decedents' estates from NFA application and tax requirements, and from any new "responsible person" requirements.



As a policy matter, at least as early as 1981, ATF itself expressed an intention to delete the CLEO certification from its forms. See *Steele v. National Firearms Act Branch*, 755 F.2d 1410, 1412-13 (11th Cir. 1985). Between the petition for rulemaking that started the current rulemaking process and the publication of the notice of Docket No. 41P, ATF twice proposed eliminating the requirement. See Department of Justice Unified Agenda, RIN 1140-AA43, Fall 2011 and 2012. Especially in light of technological developments such as the availability of the National Instant Criminal Background Check System, and the ongoing improvements to NICS as a result of the NICS Improvement Amendments Act, P.L. 110-180, 121 Stat. 2559 (2008), it makes little sense to retain and expand what ATF has long been willing to abolish.

The burden imposed by the CLEO signoff, and by the widespread refusal of eligible CLEOs to sign, is illustrated in nearly every court decision on challenges to the requirement.

- One suit (challenging a previous version of what is now 27 C.F.R. § 479.85) was dismissed for lack of standing because the plaintiff hadn't exhausted all possible CLEOs. Although he had unsuccessfully sought signatures from his local police chief, United States Marshal, and United States Attorney, he was unable to sue because he had not asked his county sheriff, or possibly others. See *Steele*, 755 F.2d at 1412-13. (Today, federal officials are no longer authorized to sign as CLEOs, but at least four types of local officials may do so.)
- Another challenge was dismissed because the plaintiff had been rejected by his local police chief, sheriff, and district attorney, but had not asked the head of the state police or various judges. *Westfall v. Miller*, 77 F.3d 868, 869-72 (5th Cir. 1996).
- And when the U.S. Court of Appeals for the District of Columbia Circuit upheld the CLEO signoff in the *Lomont* case, it did so even though one plaintiff had unsuccessfully sought approval from all eight of the apparently eligible CLEOs, pointed out that fact to ATF, and received no response. *Lomont v. O'Neill*, 285 F.3d. 9, 17 n.11 (D.C. Cir. 2002).

We also believe ATF is incorrect in thinking that liability concerns are the main reason some CLEOs refuse to approve NFA applications. ASA members have submitted comments on this proposed rule noting personal experience with refusals based on CLEOs' "personal feelings," "perception" of individuals, discrimination in favor of their personal friends, and "political reasons." Other CLEOs reportedly "[don't] believe anyone should own NFA firearms" or think "the only people who want [suppressors] are criminals." Merely changing the wording of the CLEO certification on the forms will not change these attitudes. Only the abolition of the CLEO signoff will prevent these deep seated problems from interfering with the rights of lawful gun owners.

With regard to photographs and fingerprints, the NFA says that those applying to make or receive firearms must be 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 photographs.” 26 U.S.C. §§ 5812(a)(3) and 5822(d) (emphasis added). This language makes clear that Congress intended to require fingerprints and photographs only for individuals—not for trusts, corporations, and partnerships. If Congress had wanted to require fingerprints and photographs of all applicants, it would not have needed to add specific language requiring them from individuals. After all, the language expressly requires identification of the applicant, not of individuals associated with the applicant. An applicant that is a corporation, trust, or other legal entity is properly “identified” only by the documents that created it.

#### **CONFUSION FOR INDUSTRY AND CONSUMERS**

Fundamentally, we believe ATF’s proposed rule is misguided. Individuals who apply to make or receive NFA firearms are so inherently law-abiding that anti-gun activists and officials often mistakenly credit the NFA itself for the lack of crimes committed with registered NFA firearms. That should go double for those who go to the trouble and expense of forming legal entities for the purpose of obtaining NFA firearms. Therefore, chief among the burdens that will be imposed are the questions it leaves unanswered.

For example:

- Who “possesses, directly or indirectly,” power or authority under a trust or other legal instrument, and would therefore be required to be listed as a “responsible person”? Is it limited to those with policymaking power, or does it include anyone who could possibly possess a firearm owned by the trust or legal entity?
- Is the definition of “responsible person” limited to those who currently have the specified powers or authorities, or might it include persons named in the entity’s legal documents who will, or might, have authority in the future—such as beneficiaries who are now minors?
- How will ATF treat entities that include some “responsible persons” who live in areas where CLEOs will sign applications, but others who live in areas with hostile CLEOs, or where possession of NFA firearms is prohibited outright? We are personally familiar with several situations like this. Given the political and legal realities of certain jurisdictions, it is unlikely that CLEOs in New York City or Washington, D.C. will sign off on transfers of NFA firearms, even if those firearms are to be stored in Arizona or Florida.
- How will ATF implement the transition if and when this proposed rule takes effect? Presumably, given ATF’s large backlog of NFA applications, ATF will at some point have to reject applications that would be fully acceptable today, but that do not include the proposed Form 5320.23 for each “responsible person.” Even aside from the time it will take for rejected applicants to obtain photographs, fingerprints, and (if possible) CLEO signoffs, will those applications have to be submitted all over, and go to the back of the line for processing?



## **UNREALISTIC BURDEN ESTIMATES**

Finally, based on the collective experience and observation of ASA members, we believe ATF's burden estimates are profoundly unrealistic. In particular, ATF has not accounted for the common practice, among dealers of NFA firearms, of assisting customers with completion of Form 4. Just as car dealers help customers with the initial titling and registration of their vehicles, dealers routinely help firearm purchasers with this potentially confusing and time-consuming process. ATF's proposed rule would therefore impose burdens on dealers who choose to help customers with approval as a matter of customer service. (If dealers simply stopped providing the service, that would throw customers on their own resources, likely resulting in submission of a higher rate of inadequate applications — which would impose costs on ATF to reject those applications, on applicants to resubmit them, and on ATF to review them once again.)

To address these burdens, the ASA has surveyed its members, seeking their best estimates of the number of “responsible persons” listed in the “legal entity” papers they have seen in customers' hands in recent years, and on the added processing time ATF's proposal would impose on dealers who assist customers with their paperwork. We have also urged our members and supporters to comment publicly on the typical numbers of “responsible persons” in the documents they have created or seen, as well as on the typical added time and cost that would be required to gather the newly required photographs and fingerprints for “responsible persons.”

Based on their responses and comments, we offer the following observations:

- ATF estimates that “each legal entity has an average of two responsible persons.” ASA retailer members report an average of two to six responsible persons in the documents they review. This is up to 200% higher than ATF's estimate. If applied to ATF's estimate of 40,700 legal entities submitting Forms 1, 4 or 5 each year it would mean that as many as 203,500 more responsible persons would have to be photographed, fingerprinted, and approved by CLEOs each year than ATF estimates.
- As for the increase in customer service time, ASA members predict that they will spend about two to three times longer helping customers with each Form 4 submitted. Specifically, retailers predicted an average of 30-60 minutes of additional time per form—an estimate that is probably low due to the difficulties retailers would face in dealing with “responsible persons” who don't live nearby, and who may live in areas with unfriendly CLEOs. Applying this time estimate to ATF's estimate of 40,700 forms submitted by legal entities, we would have a low-end estimate of between 20,350 and 40,700 more hours per year. At ATF's estimated hourly wage of \$30.80, this would be a cost of between \$626,780 and \$1,253,560.<sup>2</sup>

<sup>2</sup> As noted by the National Firearms Act Trade and Collectors' Association, this wage estimate is too low. Low-income individuals are less likely to be able to afford the purchase price of NFA firearms, the transfer tax, and the costs of creating legal entities.



## CONCLUSION

The ASA believes that ATF has not fully considered many problematic aspects of its proposal to require photographs, fingerprints and CLEO signoffs for the making or transfer of NFA firearms by legal entities. We especially believe that the burden estimates are so far in error that they require extensive revision. However, it is our position that no revision of those estimates will override the fact that the proposal is contrary to the NFA itself, and is unnecessary as a crime control measure. We urge the ATF to withdraw the proposal and to work with makers, sellers and users of NFA firearms to develop a more realistic rule that addresses the real needs of all concerned. Failing that, ATF should hold a public hearing on the proposal to ensure that all views are fully heard.

With Sincere Appreciation,

Knox Williams  
PRESIDENT, ASA