

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

Machine Guns, Destructive Devices	)	
And Certain Other Firearms;	)	Docket No. ATF 41P
Background Checks for Responsible	)	
Persons of a Corporation, Trust or	)	RIN 1140-AA43
Other Legal Entity With Respect to	)	
Making or Transferring a Firearm	)	

**Texas Law Shield, LLP**  
**Comment in Opposition to Proposed Rule ATF 41P**

**I. Introduction.**

Texas Law Shield is a Legal Services Company operating in the State of Texas, associated with U.S. Law Shield which operates in Florida, Colorado, and Oklahoma. In the past two years alone, Texas Law Shield members have executed more than 1,600 trusts. Texas Law Shield is one of the foremost authorities in Texas regarding gun trusts and National Firearms Act Weapons. Texas Law Shield has conducted multiple seminars addressing the topic of lawful Class-III weapon ownership, and produced publications on the topic.

On September 9, 2013, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF” or the “Agency”) published a Notice of Proposed Rulemaking (“NPR”) in the Federal Register at Volume 78, pages 55014 through 55029, to institute this rulemaking proceeding with respect to firearms regulated under the National Firearms Act (“NFA”), 26 U.S.C. §§ 5801-5872. ATF’s current regulations under the NFA are codified at 27 C.F.R. Part 479.

**II. Summary of Opposition.**

The proposed rule violates three basic tenants of rulemaking authority. First, the proposed rule thwarts the intent of Congress as expressed in the underlying statutory scheme. Second, the requirement that all responsible persons receive a Chief Law Enforcement Officer (“CLEO”) certificate renders the proposed rule arbitrary, if not impossible from a functional standpoint. Finally, the rule

cannot be enacted as written due to multiple alternatives that the ATF did not consider in the creation of its proposed rule.

### III. The Proposed Rule Would Directly Violate Congressional Intent.

The Supreme Court, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 151 (2000), established that “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” Agency action cannot be in excess of statutory jurisdiction, authority, limitations, or short of statutory right.

Here, 26 USC § 5812 states that the application form must show:

“...that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications **shall be denied** if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.”

26 USC § 5822 similarly requires that the Secretary **either approve or deny** the registration or making of the item.

Congress, in drafting these statutes, specifically required that the Secretary make a decision as to whether or not the person is eligible for possession, transfer, making, or receipt of the firearm. Congress clearly intended a “thumbs up, or thumbs down” on the issue of the applicant’s eligibility to possess, transfer, etc. The current rule, however, in requiring CLEO signature for all responsible persons, allows for a third option; delegating the finding of eligibility to chief law enforcement officers who are 100% permitted to avoid ever having to make a decision. Even ignoring the anti-commandeering principle, this proposed rule completely thwarts the authorization granted by Congress.

Congress could have easily worded the underlying statute to permit applications to languish indefinitely, but did not. Congress could have easily worded the underlying statute such that applications could be denied even if the transfer, receipt, or possession of the firearm would **not** place the transferee in violation of law (as currently written), but did not. Instead, Congress clearly intended

an approval or denial based upon the merits of whether the applicant could lawfully engage in the relevant activity.

The current proposed rule thwarts this intent and cannot survive as written.

**IV. Universal CLEO Certification Renders NFA Item Creation or Acquisition Impossible Under Many Circumstances, Rendering the Proposed Rule Arbitrary.**

**A. CLEOs Will Continue to Refuse to Sign Certificates**

The proposed rule's first major change is the definition of what constitutes a "responsible person." It would include anyone who could possess an NFA item; trustees, members of a company, or people with similar authority. Combined with the other modifications it becomes a significant, if not insurmountable, burden in many circumstances. The second modification proposed is to require all responsible persons to submit fingerprint cards and photographs, along with a chief law enforcement officer certificate.

In this comment, Texas Law Shield does not specifically take issue with wanting to perform background checks on individuals that can possess the item, or providing a list of co-trustees. However, requiring CLEO sign-off creates an insurmountable barrier for would-be possessors or makers of NFA items. Additionally, requiring physical fingerprint cards and photographs could lead to another potential roadblock.

ATF acknowledges that the rise of trusts and corporations formed to acquire or make NFA items has been due to the refusal of CLEO's to sign forms. *78 Fed. Reg. at 55017*. Yet, despite this fact, the proposed rule would extend the certification requirement to all responsible persons within a legal entity. The ATF asserts that, because of the change in what the CLEO is signing off on, the refusal of CLEOs to sign will change. The certificate will change from the statement that the CLEO has no information indicating that the transferee will use the firearm other than for lawful purposes, to requiring a statement that the CLEO has no information that possession of the Class-III item would be in

violation of state or local law. The proposed rule states that CLEO signature has been largely withheld due to civil liability concerns, and that this rephrasing would produce different results. *Id.*

Considering how difficult it is to get a CLEO to even look at such forms, the change in what the CLEO has to certify is unhelpful at best. Numerous comments submitted so far document and detail the refusal of CLEOs to sign the certificate for entirely different reasons. Texas Law Shield has dealt with this issue on numerous occasions.

For example, MK Firearms in Austin, Texas, is attempting to start a suppressor manufacturing business. None of the CLEO's in MK's area are willing to provide certification, and not for fear of civil liability. Some have stated that they simply do not have the time to address these forms, and have suggested people resort to trusts. Others have stated that political pressure makes it impossible to sign such a document without a fear of backlash, leading to their abstaining from processing the certificate. Others simply object to civilians owning these firearms, in defiance of the will of Congress and state legislatures, and this is their own method of creating policy.

None of these factors are addressed by the wording change in the certification. If possession of such items by a civilian is disfavored by a CLEO, they will persist in refusing to execute these certifications. If the signature requirement becomes universal, CLEOs will continue to refuse to sign due to their own principles, not objective facts, such as political issues, views on firearms ownership, misplaced liability concerns, or other prejudicial belief systems. Such a system where CLEOs are the gatekeepers to NFA item ownership is rife for abuse; it is not a far stretch of the imagination to envision rampant cronyism, demands of campaign donations, or exchanging of other favors for their signing of the certificate.

The proposed regulation also expands the definition of CLEO, possibly in an attempt to divest the power from an elite few. Yet having an expanded definition of CLEO provides little aid; how can a district attorney or prosecutor, hypothetically an available CLEO that can sign the certificates, be

counted amongst the willing when they lack the facilities to take fingerprints? Is this same CLEO expected to certify that a photograph was taken within the past year when they have no ability to process that information? The answer must be no.

Additionally, the requirement of every responsible person creates the situation where a person is unable to proceed in the process because the local law enforcement facilities are unable to process their fingerprints or refuse to do so. Many law enforcement facilities have made the jump to purely digital fingerprinting media, while others could arbitrarily refuse for the same reasons for CLEO signatures.

To return to MK Firearms, it is owned by a gentleman named Bill Loëb. Mr. Loëb, a small business owner, would most certainly suffer the after effects of this proposed regulation. With the increased difficulty in the ability to procure CLEO signatures, NFA item purchase will become a fringe hobby for those with great luck or good connections. He will have to close his business. The ATF will similarly lose taxes that they otherwise could have collected; the \$200 tax stamp is an obvious loss, but also Special Occupancy Taxes that are lost when small businesses go bankrupt and no one wishes to pursue the career of being a Class-III dealer.

B. CLEOs Would Be Unable to Process the Increased Number of Certificates

Texas Law Shield members have executed more than 1,600 trusts in the past two years alone. On average, not counting the settlor who also becomes a trustee, a trust will have between three and five co-trustees. Under the proposed regulation, this means that per trust a CLEO would need to process between four and six fingerprint cards, photographs, and certificates on average per trust. Similarly, on these numbers alone, this would increase their number of individuals they would have to fingerprint, photograph, and certify from their current zero (as trusts do not have this requirement currently) to between 6,400 and 9,600. That any CLEO could process this amount of requests, even if they were not

predisposed to ignore them, may very well require them to neglect their primary duties of law enforcement and the pursuit of criminals.

Additionally, people in different counties will receive different results. If five out of six brothers in one county are able to receive CLEO certification, and one cannot because he lives in a different county, it is ludicrous that at family gatherings the sixth brother must remain away. That a grandparent, parent, and child, all of legal age in different counties, could receive different results as to whether they were certified to possess the item would be unduly burdensome. By definition, this renders the proposed rule arbitrary. That two individuals, situated identically from a legal perspective are treated differently under the law is the definition of arbitrary.

As discussed in Part II below, there are a plethora of alternatives that do not involve increasing the amount of applications a CLEO must review by a factor of 10,000.

#### C. CLEO Certificates Add No Substantial Protection or Information

Currently, individuals taking possession of an NFA firearm from an FFL must complete a Form 4473 and undergo a background check through the National Instant Check System (“NICS”) at that time. The ATF acknowledges that even in the absence of a CLEO certification, ATF already has “a fuller picture of any individual than was possible in 1934.” 78 Fed. Reg. at 55017. The simple fact is that NICS has rendered CLEO certification nearly obsolete. The age when the CLEO personally knew a large percentage of individuals within their jurisdiction has passed. NICS gives both a deeper and wider breadth of knowledge of an individual’s background than the cursory investigation a CLEO could conduct or even has access to.

Additionally, with no minimum level of investigation that a CLEO must conduct, it is unclear what precisely a CLEO could observe or know that a NICS check would not provide. Theoretically, if they decided to, every CLEO could sign a certificate without reviewing any information at all, providing no information whatsoever. Under *Printz v. United States*, 521 U.S. 898 (1997), the ATF mandating CLEO

action would clearly violate the anti-commandeering principle. This only serves to further frustrate the stated cause of the proposed regulations.

In compliance with the court in *Printz*, they have no choice but to give complete discretion to CLEOs, allocating the power to create their own policy with no regard to Congress and the State legislature. This would underscore an infringement of the Second Amendment rights of individuals. It interferes with the ability of States to make State-wide policy regarding NFA firearms, by empowering local officials to act in defiance of State law under the guise of Federal Regulation. It simply does not make sense to require CLEO certification, with no requirement as to the basis of such sign-off (if it is given at all), in light of functional alternatives that could keep NFA items out of the hands of prohibited individuals without increasing CLEO workloads.

D. The Proposed Rule Would Be Arbitrary and Capricious

While federal agencies are given latitude in what rules they make and the evidence they rely upon for those rules, there are limits set by the courts as to what will be allowed without solid reasons for their decisions. Justice Byron White, in *Motor Vehicle Manufacturers Association of the United States Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), wrote that courts can take a “hard look” at the agencies decisions. Specifically, Justice White states:

“... the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment... An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis...”

The agency simply has not supplied a reasoned analysis based on relevant factors. The agency has misstated the cause behind the frequent outright refusal of chief law enforcement officers to sign,

and has created a policy that does not address this issue. Based on faulty evidence, the reasoning behind the agency's policy changes cannot be considered adequate. This is true doubly so in light of the fact that it would create a substantial barrier to enter an already heavily restricted area of firearm ownership, without addressing any of the rational connections between its choices and the factual results of its decisions.

This situation is similar to that of *United States v. Nova Scotia Food Products Corp.* In that case, the rule was found to be arbitrary and capricious based on the agency's failure to acknowledge facts regarding their rule brought up during the public comment period. The rule proposed by the agency mandated that all fish should be treated by a certain uniform time, temperature, and salinity. This, however, would've made it impossible to store and treat certain types of fish. The agency failed to change their rule in face of these facts, and subsequently the rule was deemed arbitrary and capricious by the courts. Similarly the CLEO certification requirement, for the reasons outlined above, would make the sale and purchase of NFA items practically impossible for most individuals; this rule should be considered arbitrary and capricious for the same reasons.

**V. Alternative Solutions to CLEO Certification for Every Responsible Person.**

**A. Modify Existing NFA Trustee Obligations**

One potential modification would be to adjust the landscape of fiduciary duties of NFA trustees. The ATF could create fiduciary duties for trustees that explicitly require automatic resignation as trustee if that person becomes prohibited from possession and ownership of the item. It could further require surrendering any trust items to the co-trustees, actions by the other trustees to collect the trust assets from the prohibited person, and to ensure that the prohibited person does not receive actual possession of any firearms held by the trust.

Alternatively, a special type of trustee could be designated within the trust. This would involve designating one responsible person within the trust to undergo a background check, who then takes

precautions to prevent a prohibited person from gaining access to NFA firearms. This trustee would have special duties, requiring that they provide a record of fingerprints and photographs, or undergo periodic background checks every number of years. This person, who is intimate with the trust or legal entity and familiar with the individuals that would be added, can make informed determinations of who should be allowed into the trust. It allows the personal knowledge that the CLEO certification was originally intended to provide, and the consistent background checks would ensure that they were of good moral standing and criminal history.

Either of these modifications would not create any undue burdens on CLEO, nor would they be discouraging to those seeking to possess NFA items.

B. Use Digital Fingerprinting and Photography in Place of Physical Fingerprint Cards and Photographs

It is additionally unclear why the ATF would require physical fingerprint cards, when other federal agencies rely upon digital fingerprint technology and digital photography. The Securities & Exchange Commission utilizes "Fieldprint," a digital fingerprinting company, and the Transportation Security Agency utilizes a similar digital means to perform background checks on aviation workers. This could automate the process, removing the possibility of arbitrary decisions by CLEOs to refuse to fingerprint or photograph, while greatly improving the efficiency of the process.

C. Require Differing Levels of Certification Per Item

Suppressors and Any Other Weapons ("AOWs") are omitted from the requirement for authorization to transport such items across state lines. It is not by accident. *See* ATF, "When Permission is Required to Move NFA Firearms," FFL Newsletter (Mar. 2013) Vol 2. Suppressors are important safety devices that ATF should subject to minimal regulation within the NFA framework. There has been no justification by the ATF for imposing the substantial costs associated with increased hearing loss on the general public, and the ATF should not require CLEO certification on applications for the purchase of suppressors in the first instance. ATF casually disregards all health concerns in its rationale.

The need for suppressors is numerous. Hunters need to maintain situational awareness with respect to approaching prey, other hunters, or inadvertent intruders; this renders ear protection useless if not dangerous, and suppressors may be the only practical form of hearing protection available. Similarly, self-defense situations require the use of all senses to survive; resorting to ear protection while trying to hear an intruder and communicate with family members is dangerous. The reverberations from a firearm discharge in the enclosed quarters of a home can be disorienting, painful, and make it difficult to hear additional intruders, police instruction, or any other type of communication. Suppressors, again, are the most viable device.

Even outside of these specific situations, the noise of unsuppressed firearm discharge is one of the leading causes of noise-induced hearing loss. The Journal of the American Academy of Otolaryngology found, in a peer-reviewed test, that “the muzzle-level suppressors studied on these weapons and calibers reduced sound levels well below the likely noise reduction of either earplugs or earmuffs.” If suppressors are put to the same level of scrutiny as a machine gun or explosive device, a significant number of shooters would be continually exposed to unnecessarily high levels of noise impact, leading to substantial loss of hearing, medical costs, partial disability, and lost productivity. At the very least, CLEO signature should not be required for the purchase of suppressors. AOWs are given similar treatment under the NFA, and that too should be taken into account when it comes to CLEO certification.

Similarly, given the apparent ease with which one can simply buy a rifle or shotgun and cut it down, it is difficult to fathom how it is possible to justify an imposition greater than a NICS check on a legal purchaser of a firearm that will be registered with the ATF.

**V. Conclusion.**

Texas Law Shield does not, in this comment, object to every change made with regard to the regulation of NFA items. However as an organization that deals with individuals that have turned to the

formulation of trusts to deal with the frequent frustration of having the CLEO refuse to sign certificates, Texas Law Shield cannot support the proposed changes that would spread this impossible requirement to all methods of NFA item ownership. It would frustrate the intent of Congress and the State legislatures, and render ownership virtually impossible should the CLEO decide so (or simply make no decision). That Second Amendment rights could be held hostage by the fears of political liability or corrupt nature of a CLEO is simply impermissible. Expanding the definition of CLEO does little to alleviate this problem, as many in the expanded definition could not attest to fingerprinting or photographs.

There are a wealth of alternatives that would meet desire of both the ATF and individuals seeking to own NFA items. Requiring background checks on co-trustees would provide both a wider and deeper track of information than is currently available. Requiring a trustee to keep records and be aware of the status of the co-trustees is a simple yet powerful result. At very worst, not requiring CLEO signature on suppressors, devices which will save the hearing of millions of Americans, and AOWs would keep consistent with ATF rulings in the past that these are special items.

If the ATF proceeds to formulate a final rule in this matter, it must seriously consider the issues raised in this comment; specifically, differences among NFA items, the health and safety of American citizens, and their Second Amendment rights.

Respectfully submitted,

---

Texas Law Shield  
1020 Bay Area Blvd., Suite 220  
Houston, TX 77058  
281 461 6000 (phone)  
281 461 6776 (fax)