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December 9, 2013

Brenda Raffath Friend
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Office of Regulatory Affairs
Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms, and Explosives,
U.S. Department of Justice
99 New York Avenue N.E.
Washington, DC 20226

Attn: ATF 41P

Dear Ms. Friend:

On behalf of the National Firearms Act Trade and Collectors Association (NFATCA), I respectfully submit the following comments concerning 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), published on September 9, 2013, at 78 Fed. Reg. 55014. Attached and incorporated in these comments is a legal memorandum more fully explaining the NFATCA's concerns about ATF's lack of statutory authority to promulgate certain parts of the proposed rule.

As you know, the NFATCA has long advocated for changes in certain aspects of the approval process for making and transferring firearms regulated under the National Firearms Act (NFA). That is why the NFATCA submitted the 2009 petition for rulemaking that ATF cites as its reason for publishing the proposed rule. However, the proposed rule bears little resemblance either to the NFATCA's original proposal, or to the changes that the NFATCA discussed with ATF and that were published in ATF's Unified Agenda repeatedly over the past several years.[1]

Furthermore, additional review of ATF's statutory authority in this area has led the NFATCA to the conclusion that one element of ATF's proposal—the requirement for photographs and fingerprinting of "responsible persons" of "legal entities"—is unauthorized by law. Accordingly, the NFATCA withdraws that portion of the 2009 petition. With respect to

[1] *See* Unified Agenda, RIN 1140-AA43 (Fall 2011); RIN 1140-AA43 (2012).

[2] While the NFATCA did not use the term "responsible person," the language proposed was adapted from ATF's Form 7, the application for a federal firearms license. A "responsible person" is defined on that form as "any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the corporation, partnership, or association, insofar as they pertain to firearms." The regulatory amendment proposed in the petition was nearly identical, except that it explicitly mentioned trusts.

the current rulemaking proposal, the NFATCA believes that even if the requirement was authorized, ATF has grossly underestimated the burden it would impose on applicants and others.

As a result of these factors, the NFATCA strongly oppose the proposed rule as published, and urge ATF to withdraw or substantially rewrite it. The NFATCA's concerns on all these issues are more fully explained below.

NFATCA's Petition and ATF's Response

NFATCA's 2009 petition (attached) asked ATF to make four changes:

1. To "require photographs and fingerprints of persons responsible for directing [a] legal entity";
2. To require a statement on Forms 1 and 4 concerning the applicant's legal status as a nonimmigrant alien;
3. To add instructions as to "responsible persons" on Forms 1 and 4, "similar to those on Form 7"; and
4. To "[e]liminate the requirement for CLEO [chief law enforcement officer] approval of Forms 1 and 4 for natural persons, and require notification to CLEOs for *all* Form 1 and Form 4 applicants." (Emphasis in original.)

Unfortunately, the only one of these changes that ATF now proposes to make, and that is authorized by law, is the citizenship and immigration certification.

Chief Law Enforcement Officer (CLEO) Approval

As ATF's notice points out, the NFATCA proposed in 2009 to eliminate the CLEO certificate requirement entirely. The petition followed about five years of informal contact with ATF toward the same end.

As the NFATCA pointed out in the petition, "[n]o statutory language exists in the NFA to require the approval of a transferee's acquisition of a NFA firearm by the local Chief Law Enforcement Officer." (See the attached legal memorandum for a full discussion of this issue.)

The NFATCA also noted that the system dates to the 1930s, and is now "outdated" and "antiquated" due to the availability of modern technology and ATF's practice of independently verifying the lawfulness of each application under state law.

ATF seemed to agree, if not with that legal analysis, then at least as a matter of policy. In its Unified Agendas for Fall 2011 and 2012, ATF stated its intention to eliminate the CLEO sign-off in favor of simply notifying CLEOs of applications submitted. In the 2013 Unified Agenda, ATF changed course, proposing instead to "modify" the requirement.

Now it is clear that ATF's plan is to "modify" the requirement by greatly expanding it. Eliminating the CLEO certification requirement would have reduced the burden CLEO certification imposes both on CLEOs and on private citizens—and on ATF, since the CLEO certification is a prime reason that many people have formed legal entities for the making and acquisition of NFA firearms, and ATF must now review the legal instruments for all those entities. Instead, ATF proposes to increase all those burdens by expanding the certification requirement to include all "responsible persons" of any legal entity.

While ATF correctly notes the NFATCA's 2009 comment 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," that point was secondary to the larger concern that the requirement is unlawful in the first place. ATF also ignores the reality that while liability may be a concern for some CLEOs, it may not be the only concern—or a concern at all—for other CLEOs, who may refuse to sign CLEO certificates for budgetary reasons, or because they oppose private ownership of NFA firearms—or firearms in general—among many other possible reasons. For example, the NFATCA is headquartered in the Houston, Texas, area. In the experience of the organization's staff, nearly all requests for CLEO certifications are routinely rejected by the Houston Police Department and Harris County Sheriff's Office. Applications that are filed go unanswered for months, and the departments do not respond to phone calls attempting to check on the progress of applications. When applications are ultimately rejected, little or no explanation is given. Based on reports from NFATCA members and others, this experience is far from unique.

Therefore, while ATF's proposal to modify the language of the CLEO certification is welcome as far as it goes, it does not go far enough. The CLEO certification should be eliminated completely.

Photograph and Fingerprint Requirement

In the 2009 petition, the NFATCA suggested that ATF should require the photographing and fingerprinting of certain persons associated with legal entities applying to make or receive NFA firearms.[2]

Upon further review, and for the reasons fully explained in the attached legal memorandum, the NFATCA now believes that any photographing and fingerprinting requirement, other than for individuals, is not authorized by law.

ATF also "seeks public comments regarding whether it is feasible to ask CLEOs to certify that they are satisfied that the photographs and fingerprints match those of the responsible person." First, some CLEOs may be unwilling to provide even that seemingly simple certification. Second, given the possibility (as discussed below) that legal entities would have to gather documentation from many far-flung individuals, the NFATCA believes that requiring applicants to seek such a certification would add yet another unnecessary inconvenience. Applicants have, after all, willingly brought themselves to the attention of the ATF and local CLEOs, and would therefore be unlikely to risk denial of their applications—let alone criminal prosecution—by submitting fraudulent photos or fingerprints.

As a lawful alternative to the photograph and fingerprint requirement, the NFATCA would suggest the use of checks by the National Instant Criminal Background Check System. Unfortunately, ATF's guidance on this issue has been confusing. The Gun Control Act exempts approved NFA transfers from the NICS check requirement. *See* 18 U.S.C. § 922(t)((3)(B). That exemption is also reflected on Form 4473. However, the use of NICS for NFA transfers would appear to fall safely within the FBI's regulations for use of NICS. See 25 C.F.R. § 25.6(j). ATF has informally suggested NICS checks on NFA transfers as a "best practice," and

[2] While the NFATCA did not use the term "responsible person," the language proposed was adapted from ATF's Form 7, the application for a federal firearms license. A "responsible person" is defined on that form as "any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the corporation, partnership, or association, insofar as they pertain to firearms." The regulatory amendment proposed in the petition was nearly identical, except that it explicitly mentioned trusts.

says in the *National Firearms Act Handbook* that such checks are required. *See National Firearms Act Handbook* § 12.6.1. Conducting a NICS check on the primary responsible person for each legal entity submitting a Form 1, 4 or 5 would ensure that every NFA transfer is subject to an effective background check.

"Responsible Person" Definition and Instructions

Even if ATF had the authority to demand photographs and fingerprints from applicants other than natural persons, ATF's proposal would sweep too broadly.

The NFATCA's 2009 petition only suggested requiring photographs and fingerprints of "the *Primary* individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, trust, or association." (Emphasis added.) That language is far more limited than what ATF now proposes.

Instead of photographs and fingerprints only of one principal of the legal entity, the proposed rule would add no fewer than five definitions of "responsible person":

- For a trust, the definition would include anyone who "possesses, directly or indirectly, the power or authority under any trust instrument or other document, or under state law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust." 78 Fed. Reg. 55026.
- For the other four types of entities (partnerships, associations, companies and corporations), the definition would include anyone who "possesses, directly or indirectly, the power or authority under [the legal documents creating or governing the entity], or under state law, to direct the management and policies of [the entity] to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the [entity]." *Id*.

The latter language is especially confusing, and should be clarified in any final rule. As written, it could be read either of two ways:

- It could refer (as on the Form 7 instructions) only to persons who possess the power to direct the policies of the entity regarding the acquisition, possession, and disposition of firearms. This would exclude individuals who may possess, ship or receive the entity's firearms, but who have no policymaking power.
- It could be read more broadly to mean (as in the proposed definition for "responsible persons" of trusts) anyone who may acquire, possess, or dispose of a firearm on behalf of the trust. That would be far broader than the definition of "responsible persons" on an FFL application, and would set a worrisome precedent for all types of federal firearms licensees. If a similar definition were applied to retailers, any part-time employee working at a sporting goods store's gun counter would be a "responsible person" because he would "possess[], directly or indirectly, the power or authority under [a] contract [or] agreement … to … otherwise dispose of a firearm for, or on behalf of, the corporation."

Either reading of this language would require CLEO certifications, photographs and fingerprints for large numbers of people who are not required to submit such information today. As several commenters with long experience in trust and estate law have pointed out, modern trusts and other legal entities are established for a host of purposes, some of which have little

relationship to ATF's concerns. Such entities also confer infinitely varied powers on large numbers of individuals—such as successor trustees and contingent beneficiaries—who may never have occasion to see or handle, let alone dispose of, firearms held by the trust. *See*, *e.g.*, Comments of David M. Goldman.

Just identifying all the "responsible persons" for every kind of legal entity that may apply to make or receive an NFA firearm would be an extraordinary burden on applicants and on ATF. Obtaining photographs and fingerprints from "responsible persons" scattered across the country would be an additional burden. So would obtaining CLEO certifications for widely dispersed "responsible persons," some of whom may live in areas where no CLEO will provide the required certification. Finally, as others have pointed out, the proposed rule makes no allowance for how an application would be handled if some, but not all, "responsible persons" are disapproved. *See* Comments of Glenn Bellamy. Would the application have to be resubmitted anew, causing months or years of additional delay due to the backlogs caused by the current NFA branch staffing levels?

Finally, ATF seeks comment on whether additional "responsible persons" added to an entity should have to submit Forms 5320.23. The NFATCA currently opposes this idea because of its view, as stated in the 2009 petition, that only a primary responsible person should be identified. In any event, a continued reporting requirement of this nature would impose an additional burden that is currently unforeseeable due to the problems in the definitions of "responsible persons" noted above. Such a requirement should therefore only be imposed after additional study of the burdens involved. And as others have noted, ATF's proposal makes no provision for the flip side of this issue—i.e., there is no mechanism for revoking an individual's status as a "responsible person." *See* Comments of Glenn Bellamy.

Burden Estimate

As the comments above indicate, the NFATCA believes that ATF has greatly underestimated the burdens its proposal will place on applicants, CLEOs, and ATF itself. In particular:

- ATF estimates that 40,700 legal entities will apply to make or receive firearms each year. This estimate is based on applications received in calendar year 2012. 78 Fed. Reg. at 55020. While ATF recognizes that the proposed rule will, if implemented, have some effect on the number of applications submitted by legal entities, ATF says it "cannot estimate with reasonable precision" what that effect would be. 78 Fed. Reg. at 55023. There might be multiple competing effects:
    - Either because more CLEOs may approve applications or because the new regulations are so burdensome, fewer people might use legal entities as means of making or receiving NFA firearms.
    - However, the legal entities that are created would likely be more complex, with a higher average number of "responsible persons," especially if ATF adopts a broad interpretation of that term. On the other hand, people drafting documents to create legal entities might try to craft those documents in a way that minimizes the number of "responsible persons" who would be burdened by the new requirements.

The NFATCA agree that these possibilities make the net burden of the rule extremely hard to calculate, and therefore suggests that ATF undertake a much more detailed study of the rule's likely total impact.

- ATF estimates that "each legal entity has an average of two responsible persons." The NFATCA's experience and observation is that only the simplest of legal entities have so few "responsible persons." More commonly, the entities observed in the trade have at least three to six individuals who would qualify as "responsible persons" under ATF's definition, depending again on how broadly that term is defined and interpreted under a final rule.
- ATF bases all of its time valuations on the average hourly compensation for all civilian workers in the United States, currently $30.80. This calculation fails to consider that NFA firearms are often very costly, and that even the least expensive of them are discretionary purchases that are unlikely to be made by low-income individuals. This is even more true when one considers the $200.00 making or transfer tax that applies in most cases, as well as the fact that people using legal entities to make or acquire NFA firearms will already have paid legal fees, corporate filing fees, and other expenses for the creation of those entities. ATF should base its burden estimates on the actual characteristics of those who would be defined as "responsible persons."
- ATF estimates that fingerprints will cost $24.00 per person and take 60 minutes to obtain. The NFATCA believes that time estimate is particularly low, given the difficulty in scheduling or otherwise arranging for fingerprinting in major metropolitan areas. In addition, because ATF requires ink-rolled fingerprints rather than electronically submitted prints, fingerprints may be rejected months after submission, forcing applicants to return to a local law enforcement agency for fingerprinting. If multiple "responsible persons" experience similar difficulties, the cumulative delay may be significant.

Nonimmigrant Alien Status Certification

ATF proposes to incorporate the certification of the applicant's status as a U.S. citizenship, immigrant alien, or exempt nonimmigrant alien into Forms 1, 4 and 5, rather than attaching a separate certificate of compliance. The NFATCA suggested this change in its 2009 petition as a paperwork reduction measure. Therefore, the NFATCA supports this part of the proposed rule.

Decedents' Estates

The NFATCA agrees with ATF's exclusion of estates from any new requirements relating to "responsible persons." The NFATCA also supports the proposal to add a new § 479.90a specifying that executors or other persons disposing of estates would not be treated as transferees subject to NFA application requirements, and clarifying the tax status of transfers by estates.

Additional Issues

Finally, regardless of the details of the final rule, ATF should delay its effective date to whatever degree will allow ATF to process applications that have already been submitted. Given the NFA Branch's substantial backlog of applications under the current rules, a delayed effective date will minimize the need for rejection and resubmission of applications that are adequate under the current rules, but that would not meet new requirements. If ATF does not provide for this, the cost to applicants of resubmitting applications, as well as the cost to ATF of rejecting current applications and processing new ones, should be included in ATF's burden estimates for the initial implementation period.

Public Hearing

Due to the high level of public interest in this proposal, the NFATCA requests that ATF hold a public hearing to accept further comments.

Conclusion

ATF's proposed rule is unlawful, unworkable, and burdensome. The NFATCA hopes ATF will reconsider its approach, and would welcome the opportunity to work with ATF to do so in a productive way. Thank you for taking the time to consider these comments.

Sincerely,

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LEGAL MEMORANDUM OF NATIONAL FIREARMS ACT TRADE AND COLLECTORS ASSOCIATION IN OPPOSITION TO PROPOSED ATF RULE ON TRUSTS AND OTHER LEGAL ENTITIES

The National Firearms Act Trade and Collectors Association hereby submits the following in opposition to the proposed rule of the Bureau of Alcohol, Tobacco, Firearms and Explosives 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), 78 Fed. Reg. 55014 (Sept. 9, 2013).

The basis of this memorandum is that ATF lacks statutory authority to adopt the proposed rule. First, for the transfer or making of a firearm, the National Firearms Act (NFA) provides that fingerprints and a photograph may be required only from an individual, but not from what ATF has designated as a "responsible person" of a trust, corporation, or other artificial person. Second, nothing in the NFA authorizes ATF to require the certificate of a Chief Law Enforcement Officer (CLEO) of a State or locality in order to approve the transfer or making of a firearm.

I. NO AUTHORITY EXISTS TO REQUIRE FINGERPRINTS AND PHOTOGRAPHS OF "RESPONSIBLE PERSONS" OF TRUSTS AND OTHER ARTIFICIAL PERSONS

ATF lacks statutory authority to require submission of fingerprints and photographs of individuals it calls "responsible persons" of a legal entity such as a trust or corporation. The National Firearms Act is part of Title 26 U.S.C., which includes the following pertinent definition: "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). The NFA clearly distinguishes the obligations of individuals from those of artificial persons.

The NFA provides that a firearm shall not be transferred, *inter alia*, unless "the transferee is identified in the application form in such manner as the Secretary[1] may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph . . . ." 26 U.S.C. § 5812(a)(3). Similarly, in a application to make a firearm, the applicant must have "identified himself 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 . . . ." § 5822(d).

Thus, Congress expressed its intent that fingerprints and a photograph shall be required only of a transferee or a maker who is an individual. "Congress knows how to authorize" something "when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987). "Congress . . . does not alter the fundamental details of a regulatory scheme

[1] "The Secretary" means "the Attorney General" in the NFA. § 1111(k), P.L. 107-296, 116 Stat. 2135 (2002).

in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23 (1983) (citation omitted). *See also Hamdan v. Rumsfeld,* 548 U.S. 557, 578 (2006) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("'it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.' (citation omitted).").

Nor is the regulation authorized by 26 U.S.C. § 7805(a), which provides that "the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title . . .." The NFA specifies the qualifications to register a firearm. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), explains:

> The framework for analysis is refined by consideration of the source of the authority to promulgate the regulation at issue. The Commissioner has promulgated [a regulation] interpreting this statute only under his general authority to "prescribe all needful rules and regulations." 26 U.S.C. Section 7805(a). Accordingly, "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." (Citation omitted.)

The regulation "purports to do no more than add a clarifying gloss on a term . . . that has already been defined with considerable specificity by Congress. The commissioner's authority is consequently more circumscribed . . . ." *Id. See C.I.R. v. Engle*, 464 U.S. 206, 227 (1984) (rejecting agency reliance on § 7805(a) in a manner that "might make the statute 'simpler to

administer,' . . . it does so by ignoring the language of the statute, the views of those who sought its enactment, and the purpose they articulated.").

In short, Congress has explicitly decided that, for purposes of transfer or making of a firearm, identification of a person by fingerprints and a photograph is limited to individuals, and does not extend to trusts, corporations, or other artificial persons. ATF is not authorized to alter the statutory scheme.

II. NO AUTHORITY EXISTS TO REQUIRE A CLEO CERTIFICATE FOR THE TRANSFER OR MAKING OF A FIREARM

A. ATF, Not State and Local CLEOs, Is Responsible for Administration of the National Firearms Act

ATF has no authority to impose the CLEO certificate requirement on those it defines as "responsible persons" of a trust, corporation, or other artificial person. Further, ATF lacks authority for its existing regulation requiring a CLEO certificate for individuals. The CLEO-certificate requirement has no statutory basis, defeats the aim of the NFA to register and tax firearms, unlawfully insulates administration of the NFA from judicial review, and delegates administration of the NFA to State and local CLEOs who have no such duty.

The National Firearms Act, 26 U.S.C. § 5801 *et seq.*, Chapter 53 of the Internal Revenue Code, is administered by the Attorney General ("the Secretary" in NFA parlance), who delegated his authority to ATF. The NFA is a comprehensive regulatory scheme to tax the making and transfer of "firearms" as defined in § 5845(a). In order to facilitate collection of the taxes, firearms must be registered. § 5841. "The Secretary shall collect the taxes imposed by the internal revenue laws." 26 U.S.C. § 6301.

The NFA's registration and taxation requirements are an exercise of Congress' power "to lay and collect taxes, duties, imposts, and excises." U.S. Const., Art. I, § 8. The NFA was

upheld on the basis that it "contains no regulations other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure . . . ." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937). "As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power."[2] *Id.* at 513-14. The CLEO-certificate requirement is just such "an offensive regulation" which prevents the NFA from "operat[ing] as a tax."[3]

The NFA is "an interrelated statutory system for the taxation of certain classes of firearms." *Haynes v. United States*, 390 U.S. 85, 87 (1968). "All these taxes are supplemented by comprehensive requirements calculated to assure their collection." *Id.* at 88.

The Secretary has authority to deny an application where the transfer or making would place the applicant "in violation of law." 26 U.S.C. §§ 5812(a), 5822. The Secretary may not deny an application for a non-statutory reason, such as failure to submit a CLEO certificate.

ATF has no authority to sever the NFA from its roots in the Internal Revenue Code to allow the action or inaction of CLEOs to prohibit the transfer or making of lawful firearms. "Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon." *United States v. Calamaro*, 354 U.S. 351, 357 (1957). "The statute was passed, and its constitutionality was upheld, as a revenue measure, . . . [and] in construing it we would not be justified in resorting to collateral motives or effects

[2]*Sonzinsky* has been reaffirmed most recently in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2596 (2012).

[3]ATF conceded in the final rule promulgating 27 C.F.R. §§ 479.63 and 479.85 that the CLEO certificate has no revenue purpose and delegates an absolute power to CLEOs to veto collection of the tax: "these officials [CLEOs] have the discretion to execute or not execute the required certifications." T.D. ATF-270, 53 F.R. 10480, 10488 (Mar. 31, 1988).

which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt." *Id*. at 358.

B. The CLEO Requirement Unlawfully Forecloses Judicial Review Under the Administrative Procedure Act

Congress did not intend to make refusal to approve the transfer or making of firearms non-reviewable under the Administrative Procedure Act (APA). The actions of a local CLEO, however, are not subject to the APA. ATF seeks to alienate its authority to administer the NFA to a non-federal official and thereby to make administration of the NFA not subject to judicial review.

Under the APA, a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. The reviewing court is required to "compel agency action unlawfully withheld or unreasonably delayed," and to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706. The term "'agency' means each authority of the Government of the United States . . . ." § 701(b)(1). "'[A]gency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." § 701(b)(2), incorporating § 551(13). The APA applies except to the extent "statutes preclude judicial review" or "agency action is committed to agency discretion by law." § 701(a).

The APA applies to ATF's refusal to approve the transfer or making of a firearm. In a case in which it denied an NFA transfer application, "the Bureau made no findings of fact and offered no reasoned explanation on the subject. This alone would warrant setting aside the agency's action and remanding the case." *F.J. Vollmer Co., Inc.* v. *Higgins*, 23 F.3d 448, 451

(D.C. Cir. 1994). *See Sendra Corp. v. Magaw*, 111 F.3d 162, 165 (D.C. Cir. 1997) ("We are dealing here with informal agency adjudication. . . . [T]he Administrative Procedure Act subjects 'final agency action' of this sort to judicial review. 5 U.S.C. § 704."); *Police Automatic Weapons Service v. Benson,* 837 F. Supp. 1070, 1073-75 (D. Ore. 1993) (holding that APA review applies to ATF's refusal to register firearms).

A local or State CLEO is not an "agency" as defined.[4] There can be no APA review of a CLEO's action because no "agency action" is involved.

By purporting to assign its legal duty to a State or local CLEO over which he has no control, ATF has insulated from APA review its own actions which are subject to APA review. If this gimmick was lawful, federal officials could avoid APA review over any of their actions or failures to act simply by irrevocably delegating their authority to an officer of a non-federal sovereign.[5]

Under the APA, "the legality of an agency action is presumptively subject to judicial review . . . . In order to ensure that an agency's decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its decision." *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996), citing *F.J. Vollmer Co.*, 23 F.3d at 451.

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[4] *See Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Com.*, 550 F. Supp 1206, 1208 (S.D. Fla. 1982) ("the APA is restricted to federal action and thus cannot be extended to cover the proposed deer hunt by the [State] Commission, because, no agency of the Federal Government participated in this proposed hunt"); *BAM Historic Dist. Ass'n. v. Koch*, 723 F.2d 233, 237 (2nd Cir. 1983) ("The Fourteenth Amendment does not impose upon states and localities . . . an Administrative Procedure Act . . . . Whether notice and hearing procedures should be instituted . . . remains a matter for consideration by state and local legislative bodies.").

[5] *See Dillard v. Baldwin County Commissioners,* 225 F.3d 1271, 1282 (11th Cir. 2000) ("We cannot shield federal court orders from constitutional challenge simply because the federal court's orders are being implemented by local officials").

Moreover, "under the Administrative Procedure Act, it is only statutes, not agency regulations, that can preclude otherwise available judicial review." *Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998). The CLEO-certificate regulation purports to allow a non-reviewable decision, but nothing in the NFA authorizes that.[6]

C. ATF May Not Compel Disclosure of Tax Returns to CLEOs

ATF Form 1 (application to make firearm) and Form 4 (application to transfer firearm) are tax returns and contain return information and taxpayer return information. See 26 U.S.C. §§ 5811 & 5821 (taxes on the transfer and making of firearms). The compelled disclosure of federal tax returns and return information to CLEOs, which is required by 27 C.F.R. §§ 179.63 and 179.85, circumvents and violates provisions protecting confidentiality of tax returns and return information, including the prohibition on federal officers or employees disclosing such. 26 U.S.C. § 6103(a).[7]

ATF acknowledges that NFA forms are tax returns prohibited from disclosure: "The disclosure of information from the NFRTR [National Firearms Registration and Transfer Record] is severely restricted by the provisions of 26 U.S.C. section 6103. Disclosure may be made only to Federal agencies and then only for official duties." *Firearms Enforcement*

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[6] *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("the reason for this rule is that we ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive violates such a command"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (the APA "embodies the basic presumption of judicial review"); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority. Rarely, if ever, has Congress withdrawn courts' jurisdiction to correct such lawless behavior").

[7] The disclosure of tax returns, return information and taxpayer return information is both a felony, 26 U.S.C. § 7213, 18 U.S.C. § 1905, and a statutory tort, 26 U.S.C. § 7431.

Program, ATF Order 3310.4B, at 47 (2/8/89).[8] Under § 6103, "disclosures to State or local agencies are prohibited." *Id*. at 48.[9] Such agencies include CLEOs.

In the past, ATF has argued that an NFA transfer form is not a tax return until it is filed with ATF, and thus requiring the form to be disclosed to the CLEO does not violate § 6103. But "return information" includes a taxpayer's identity, "whether the taxpayer's return was, is being, or *will be examined or subject to other investigation or processing* . . . ." § 6103(b)(2)(A). And "disclosure" means "the making known to any person *in any manner whatever* a return or return information." § 6103(b)(8). Requiring disclosure by regulation does not avoid the prohibition.

Even if this circumvention of § 6103 were to hold water, it ignores the scenario when the form is filed with ATF without the CLEO certificate, and ATF returns it to the transferor with the requirement that it be disclosed to the CLEO. To suggest that the taxpayer, not ATF, would be disclosing the form to the CLEO ignores that the ATF regulation requires the disclosure and that the taxpayer is merely acting as ATF's courier. Imagine the IRS requiring disclosure of income tax forms to local police before it is willing to process them.

"We must be ever mindful that when Congress enacts a statute designed to limit government intrusion in the private affairs of its citizens, the statutory provisions must be followed scrupulously." *United States v. Bacheler*, 611 F.2d 443, 447 (3d Cir. 1979) (construing § 6103(a)). "This general ban on disclosure provides essential protection for the taxpayer; it guarantees that the sometimes sensitive or otherwise personal information in a return will be

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[8]Cited as authority in *Vollmer*, 23 F.3d at 451.

[9]*See United States v. Hunter*, 863 F. Supp. 462, 476 n.22 (E.D. Mich. 1994) (noting ATF Counsel opinions "refusing to give the registration status of a firearm registered with ATF because the registration was a 'return' protected by § 6103" and holding "that transferee's identity on transfer forms was tax return information under § 6103)."

guarded from persons not directly engaged in processing or inspecting the return for tax administration purposes." *Gardner v. United States*, 213 F.3d 735, 738 (D.C. Cir. 2000).

D. The CLEO-Certificate Requirement Violates Principles of Federalism and the President's Responsibility to Execute the Laws

The CLEO-certificate requirement seeks to foist ATF's duties on State and local CLEOs without their consent. Even if interpreted as purely discretionary, the regulation forces unwanted political accountability onto CLEOs in violation of basic principles of federalism and of the separation-of-powers doctrine. No constitutional or statutory provision authorizes ATF to delegate administration of any part of the NFA to State and local CLEOs.

Printz v. United States, 521 U.S. 898, 903 (1997), invalidated the Brady Act command that CLEOs must ascertain "whether receipt or possession [of a handgun] would be in violation of the law" by researching State, local, and federal records. While here the CLEO is not required to act, "it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakenly rejected." *Id*. at 930.

Moreover, the Constitution requires that federal laws are to be implemented by federal officials and employees. As stated in *Printz*, 521 U.S. at 922:

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints . . . . The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control . . . .

The CLEO regulations at issue here do just that as well.

In sum, the CLEO regulations purport to transfer administration of a federal statute to State and local officials. In doing so, they violate constitutional principles of federalism and of the duty of the federal executive branch to administer federal laws.

CONCLUSION

ATF lacks statutory authority to adopt the proposed rule requiring "responsible persons" of trusts, corporations, and other artificial persons to submit fingerprints and photographs for the transfer or making of firearms. ATF further lacks statutory authority to require the certificate of a State or local CLEO for the transfer or making of a firearm. According, the proposed rule should be rejected.