

41F Final Rule

Key Points:

- In this final rule, ATF is amending its regulations governing the application to make or transfer a National Firearms Act (NFA) item to help ensure that prohibited persons do not gain access to them. In this way, the rule will help enhance public safety.
 - The NFA imposes special rules on items such as machineguns, short barreled rifles, short barreled shotguns, and silencers.
- The final rule **standardizes the requirements** for making or transferring an NFA item by ensuring that responsible persons for a trust or legal entity are subject to the same identification and background check requirements as individuals.
 - This approach addresses the prior disparity – where individuals were required to submit photographs, fingerprint cards, and undergo a background check, while persons associated with a trust or legal entity did not.
 - By standardizing the requirements, the final rule helps to **foreclose the possibility that prohibited persons could come into possession of NFA items** simply by creating a trust or corporation to serve as the transferee.
- The final rule **eliminates the Chief Law Enforcement Officer (CLEO) certification requirement for all applicants**—individuals and legal entities—and **replaces it with a CLEO notification** requirement. This change will significantly reduce the burden on the public associated with making or transferring an NFA item.
- The CLEO notification requirement also ensures that CLEOs will be made aware that an application to register an NFA item has been made in their jurisdiction
- The final rule clarifies the definition of “responsible person” for trusts and legal entities to address concerns about the definition’s scope while maintaining the important objective of ensuring background checks for relevant parties associated with a trust or legal entity.
- This rule adds a new section to 27 CFR part 479 to address the possession and transfer of NFA items registered to a decedent.
- The rule is **effective 180 days after the publication date.**

Background:

- On September 9, 2013, ATF published a notice of proposed rulemaking (NPRM), in response to a petition for rulemaking, dated December 3, 2009, filed on behalf of the National Firearms Act Trade and Collectors Association (NFATCA).
- The NPRM included the following proposals: defining the term “responsible person” for a trust or legal entity; requiring each responsible person to submit photographs and fingerprints, as well as CLEO certification; modifying the CLEO certification to remove a statement from the CLEO about the use of the firearm for other than lawful purposes; and adding a new section to 27 CFR part 479 to address the possession and transfer of firearms registered to a decedent.

- NOTE: Silencers are “firearms” under the NFA definition. That said, the “regular person” would not consider a silencer a firearm. As a result, the talking points speak in terms of “NFA items.” Where “firearm” is used in this background section, however, it is in the NFA definitional sense.
- ATF received approximately 9,500 comments to the proposed rule, most of which focused on concerns related to the CLEO certification requirement.
- This final rule has been revised from the NPRM to: 1) eliminate the requirement for CLEO certification and add a CLEO notification requirement instead; and 2) clarify that the term “responsible person” for a trust or legal entity includes those persons who have the power and authority to direct the management and policies of the trust or legal entity to receive, possess, ship, transport, deliver, transfer or otherwise dispose of a firearm for, or on behalf of, the trust or entity.
 - In the case of a trust, those with the power or authority to direct the management and policies of the trust includes any person who has the capability to exercise such power and possesses, directly or indirectly, the power or authority under any trust instrument, or under state law, to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of the trust.
 - Examples of who may be considered a responsible person include settlors/grantors, trustees, partners, members, officers, directors, board members, or owners. An example of who may be excluded from this definition of responsible person is the beneficiary of a trust, if the beneficiary does not have the current capability to exercise the powers or authorities listed above.
- As a result of the increased use of trusts or legal entities to acquire NFA firearms the number of qualifying firearms being acquired without a background check has greatly increased. Between 2004 and 2014, the number of NFA applications received from trusts and legal entities increased from 1,938 to 90,726. In 2013 and 2014, ATF received a combined total of 162,759 applications from trusts and legal entities – none of which were subject to a background check.
- A primary objective of the Final Rule is to ensure that prohibited individuals are not able to use trusts and other legal entities to illegally acquire NFA firearms. For example, ATF encountered a situation in which a trustee of a trust applicant was determined to be prohibited from possessing a firearm. Although ATF denied the transfer, if the trust name had been different from that of the prohibited transferee or a different firearm was being transferred, ATF would not have had the information to deduce that the trust included the prohibited transferee and the transfer would have been approved.

Q and A:

Q. Why did ATF prepare an NPRM (and final rule)?

A. The proposed regulations were in response to a petition for rulemaking, dated December 3, 2009, filed on behalf of NFATCA. The petitioner requested to amend 27 CFR 479.63 and 479.85, as well as corresponding ATF Forms 1 and 4. The proposed regulations were intended to make the requirements, relating to identification and background checks, the same for trusts and legal entities as they are now for individuals, thus providing important and public security benefits.

Q: Is this rule a solution in search of a problem? Can ATF identify any crimes that were committed by responsible persons of trusts or legal entities?

A: Although most individuals who apply to remake or acquire an NFA firearm are not prohibited from possessing or receiving firearms, there have been a significant number of instances in which prohibited persons have submitted NFA applications. From 2010 to 2014 there were approximately 270 NFA applications by individuals, out of 115,842 applications, that were disapproved due to background check denials. The NFA Branch also tracked the number of applications received from trusts and legal entities during the same period. The Department believes that the disapprovals would have been

higher if background checks would have been conducted on responsible persons associated with the 217,996 applications received from trusts or legal entities during this time, as the FBI's denial rate on NICS background checks between November 30, 1998 and December 31, 2014, is approximately 1.24%. ATF cannot comment on ongoing investigations.

Q: ATF offered guidance that a NICS check be run when a representative of the trust or entity took possession of their approved items. Why is the final rule necessary if these procedures apply?

A: 27 CFR 478.102(d) provides qualifying exceptions to the need for a NICS check. As described in the instructions found for Question 22 on Form 4473, this exception includes transfers of National Firearm Act items approved by ATF. This means that all individuals within the trust or legal entity were not subject to these requirements. Further, no individual is subject to these requirements when the trust or legal entity "makes" an NFA firearm. The final rule addresses this and the disparity between guidance and regulation.

NICS checks for NFA by FFLs is actually prohibited. The language in 922(t)(3)(B), 478.102(d)(2) says that if the transfer is approved, it is exempt - no mention whatsoever of the transferee being to a natural person or legal entity. For the "guidance" to have been correct, you would have to believe there is an unpublished exemption to the exemption. There is no language that prohibits the check, just exempts it. See the NICS regulations, specifically 28 CFR 25.6(a) - only to be accessed by FFLs for transfers when REQUIRED by Brady.

Q: How will CLEO notification be accomplished?

A: The Department has revised the regulations in 27 CFR 479.62 and 479.84 to require the applicant or responsible persons to mail a completed copy of the application (Form 1, 4, or 5) or a completed copy of Form 5320.23 (*National Firearms Act (NFA) Responsible Person Questionnaire*), respectively, to the chief law enforcement officer of the locality in which the applicant or responsible person is located. In the case of a trust, it is considered located at the primary location where the firearm will be maintained. to the

Q: Will new responsible persons, added after the making or transfer, be subject to the same requirements?

A: The Department notes that it did not propose to make any changes on this issue in the proposed rule. Rather the Department requested input and guidance relative to identification of new responsible persons who receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, an entity. The Department is not requiring new responsible persons to submit a Form 5320.23 within 30 days of any change of responsible persons in this final rule.

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

Q: ATF already has a significant backlog of NFA applications; won't this requirement just add delay to an already overburdened system?

A: Although there is a backlog of NFA applications, that backlog has decreased over the last year. ATF processes applications as quickly as its resources allow, and that will continue after the effective date of this final rule. Also, neither current backlogs nor the possibility of future backlogs should prevent ATF from ensuring that prohibited persons are denied firearms.

Q: Will trusts and corporate entities still be able to use the ATF eForms system to submit applications after this rule goes into effect?

A: No. The eForms system was not designed to allow the filing of forms where fingerprints and photographs were required. ATF will continue to work toward improving the eForms system and expanding its use.

Q. Were any new sections to 27 CFR part 479 added by the proposed rule (and final rule)?

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

Q. What are the estimated costs to applicants, legal entities, CLEOs, and ATF?

A. ATF estimates a total additional cost of \$29.4 million annually for trusts and legal entities to gather, procure, and submit such information to ATF and for ATF to process the information and conduct a background check on responsible persons.

ATF estimates the total cost of the notification requirement is approximately \$5.8 million annually (\$0.5 million for individuals; \$5.3 million for trusts and legal entities). The costs of the current CLEO certification requirement are approximately \$2.26 million annually.

The final rule estimated cost increase is approximately \$1.6 million annually. However, the final rule estimated cost savings for individuals are approximately \$1.8 million annually. This rule is not an "economically significant" rulemaking as defined by Executive Order 12866.

Q. Are any forms being revised?

A. Yes. A change from CLEO certification to CLEO notification will require a revision to Form 1 (*Application to Make and Register a Firearm*), Form 4 (*Application for Tax Paid Transfer and Registration of a Firearm*) and Form 5 (*Application for Tax Exempt Transfer and Registration of a Firearm*). There is also a new form, Form 5320.23 (*National Firearms Act (NFA) Responsible Person Questionnaire*), that will be required to be completed by responsible persons of a trust or legal entity.

Q. Are there specific requirements for the "responsible person?"

A. Yes. Each responsible person will be required to complete ATF Form 5320.23 (*National Firearms Act (NFA) Responsible Person Questionnaire*), and submit photographs and fingerprints when the trust or legal entity files an application to make an NFA firearm or is listed as the transferee on an application to transfer an NFA firearm. In addition, each responsible person for the trust or legal entity is required to notify the CLEO of the locality in which the responsible person is located that an application is being submitted to ATF.

Q. How will ATF process applications that were received prior to the publication date?

A. Applications postmarked prior to the effective date of the final rule will be processed under the current regulations. Only those applications postmarked on or after the effective date of the final rule will be subject to the new regulations.