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**What is a Gun Trust?**

**Frequently Asked Questions**

**NFA FIREARMS TRUSTS**

“Gun Trusts” are trusts created to purchase and hold firearms.  Specifically, Gun Trusts are designed to hold weapons regulated by the NFA (“NFA weapons”).  Gun Trusts contain provisions intended to prevent a violation of the NFA and other applicable laws with respect to the use, transfer and possession of the trust’s NFA weapons.  Gun Trusts can also hold non-NFA weapons.

**Common Gun Trust provisions:**

* Anticipate the trustee being sole possessor of trust’s NFA weapons;
* The trustee is almost always a beneficiary of the trust;
* Disqualify any trustee who is not able to possess firearms under applicable federal and state laws (including, but not limited to, convicted felons, fugitives from justice, persons subject to a domestic violence restraining order, and substance abusers);
* Require the trustee to follow any federal and state laws applicable to possession and transfers of weapons held in the trust;
* Direct the trustee to maintain actual or constructive possession of any NFA weapons;
* Allow the trust beneficiary use of NFA weapons provided the trustee is physically proximate; and
* Direct the trustee as to transfer rules following death of the grantor.

**Use of Gun Trusts to Expedite Purchase of NFA Weapons**

A primary use of Gun Trusts has been to expedite the purchase of NFA weapons.  As discussed herein, the purchase of an NFA weapon is a lengthy process.  Prior to July 13, 2016, Gun Trusts and legal entities could shortcut that process.  Previously, the regulations (which have been amended by ATF Rule 41F) did not require trusts or legal entities to provide fingerprints, photographs and law enforcement certification.  This regulatory loophole spurred the increased use of Gun Trusts: the ATF commented in Rule 41F that it processed 115,829 NFA weapon applications for trusts and legal entities in 2014.2

**The National Firearms Act (“NFA”)**

An understanding of the NFA is critical to a discussion of Gun Trusts.  The NFA was the government’s response to increasing criminal use of machine guns and other deadly weapons during the Prohibition era.  In 1934, the Attorney General, Homer S. Cummings, warned Congress "there are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined."3 The NFA was passed shortly after the attempted assassination of Franklin D. Roosevelt in 1933 and the deaths of “Bonnie and Clyde” who were killed in May 1934.  It is codified as Chapter 53 of the Internal Revenue Code, with corresponding regulations at 27 C.F.R. § 479.1 *et seq*., and is an exercise of the government’s taxing power.  The NFA levies an excise tax on, and mandates the registration of, certain classes of weapons as discussed herein.  Its purpose was to curtail the transfer of certain weapons and to track their ownership through registration.  The NFA was subsequently amended by the Gun Control Act of 1968.4

**The NFA Transfer Tax**

The enactment of the NFA in 1934 imposed a high tax of $200 on the transfer of most NFA weapons.5  In today’s dollars, $200 equals about $3,600.  For historical context, in 1934 a new vehicle could be purchased for under $500.  The NFA tax has remained at $200; however, 82 years after its enactment, $200 remains a substantial sum to many gun collectors.

**Registration to Transfer or Make an NFA Weapon**

All transfers and manufacture of NFA weapons must be approved by the ATF.6  The prior regulations required fingerprints, photographs, and a law enforcement certification for individual applicants to make or transfer NFA weapons.7

A law enforcement certification was essentially a statement from a chief law enforcement officer (CLEO) that the law enforcement officer has no knowledge that the applicant cannot possess an NFA weapon.  A CLEO includes a chief of police, county sheriff, head of the State police, or State or local district attorney or prosecutor of the locality in which the applicant is located.

Purchasing or transferring an NFA weapon is a lengthy process.  According to an ATF comment in Rule 41F, its applications are backlogged approximately five months.8

**What are NFA Weapons?**

NFA weapons are subject to the tax and registration requirements of the NFA.   The NFA regulates the following six classes of weapons:9

* Short-barreled rifles (barrel length under 16 inches);
* Short-barreled shotguns (barrel length under 18 inches);
* Fully automatic machine guns;
* Suppressors (silencers) and components to build them;
* Any other weapon (includes “James Bond type” weapons: pen guns, cane guns, and various other weapons); and
* Destructive devices (includes grenades, missiles, devices that propel a projectile by explosive with a barrel exceeding one-half inch in diameter).

The NFA defines a machine gun as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.”10  Fully automatic machine guns are relatively rare and expensive.  Their scarcity is due to the Firearm Owners Protection Act of 1986, which banned the sale of machine guns manufactured after May 19, 1986 to civilians.11  As a result, these pre-1986 “transferrable” automatic machine guns are now considerably more expensive than their semi-automatic counterparts and are often purchased as an investment.  At the writing of this article, an online ad listed a Thompson machine gun for $12,495 and a Heckler & Koch 9mm MP5 for $39,995; however, the budget-conscious might consider an Uzi, which can be purchased for as little as $5,000.12

**Weapons Not Regulated by NFA**

The NFA’s classes of regulated weapons are exclusive.  If a weapon does not fall under one of the defined classes, then the NFA’s restrictions do not apply to it.  Virtually all “household guns” are not NFA weapons, e.g., hunting rifles, sporting shotguns, revolvers, and semi-automatic pistols.  In addition, most antique and unserviceable weapons are not regulated by the NFA.13

The NFA does not regulate most semi-automatic weapons.  This includes full-size assault rifles sometimes used in headline crimes.  For example, at Sandy Hook Elementary, Adam Lanza used a .223 caliber Bushmaster version of the AR-15 assault rifle with a 30 round magazine; however, this weapon, while deadly, is not a “machine gun” as defined by the NFA, because it is semi-automatic, i.e., requiring one trigger pull for each shot.  These semi-automatic assault rifles can be purchased at gun shows, pawn shops and gun stores for $500 and up.  While these weapons look like “machine guns,” they are not regulated by the NFA.

**ATF Rule 41F Closes Regulatory Loophole**

By now the reader should be armed with a better understanding of Gun Trusts, NFA weapons, and the reduced regulatory oversight provided by Gun Trusts and legal entities in purchasing NFA weapons.  The purpose of the ATF’s final Rule 41F “is to ensure that the identification and background check requirements apply equally to individuals, trusts, and legal entities.”14

ATF Rule 41F accomplishes its purpose by simply adding to the regulations a definition for a “responsible person” of a trust or legal entity,15 and by subjecting that responsible person to the same identification and background check requirements as individuals.16

ATF Rule 41F defines “responsible person” as, “any individual who possesses, directly or indirectly, the power or authority to direct the management and policies of the trust or entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or legal entity.”17

ATF Rule 41F further provides that with respect to a trust, a responsible person could include, “those persons with the power or authority to direct the management and policies of the trust”, which 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, toreceive possess, ship, transport, deliver, transfer or otherwise dispose of a firearm for, or on behalf of, the trust.”18

ATF Rule 41F addresses parties to a trust, providing that responsible persons of a trust may include, “settlors/grantors, trustees . . . .  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 capability to exercise the powers or authorities enumerated in this section.”19

ATF Rule 41F does add one significant concession, which should ease the registration process; the certification of a CLEO is no longer required.  Instead, applicants for NFA weapons are only required to *notify* a CLEO, by providing a full copy of the ATF application.20

**Gun Trusts after ATF Rule 41F – Avoiding Accidental Felony Transfers**

Gun Trusts remain an excellent vehicle for owning NFA weapons.  While they no longer provide a shortcut for purchasers of NFA weapons, Gun Trusts remain essential for legacy planning and to control sharing and access to NFA weapons by identifying the “responsible persons” of the trust.  A properly drafted Gun Trust can help avoid an accidental felony transfer by setting forth how the NFA weapons can be used and possessed.  A violation of the NFA is a felony, and the resulting penalties are severe.21

The NFA transfer rules are a trap for the unwary.  The NFA generally prohibits a person from receiving, delivering, transporting, possessing, making, or transferring an NFA weapon in violation of the NFA.22  In addition, “transfer” is broadly defined to include “selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of” a regulated firearm.23
The following are a few examples that could result in an NFA felony transfer: (i) lending a silencer to a friend; (ii) an executor delivering an NFA weapon to a licensed gun dealer for storage; or (iii) transporting a machine gun across state lines for a hunting trip.

The consequences of violating the NFA include imprisonment and significant fines:  “Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.”24  In addition, because the NFA falls within the Internal Revenue Code, a willful attempt to evade the NFA tax could also trigger tax evasion penalties, which include up to five years in prison and fines up to $100,000 for individuals and $500,000 for corporations.25These penalties could be in addition to the penalties under the NFA.  Further, for an individual, the $100,000 penalty could be increased to $250,000.26

As shown, NFA weapons are strictly regulated, and violations can result in substantial penalties or imprisonment.  Gun Trusts will continue to be a useful tool to help manage and mitigate the risks associated with NFA weapons.  As such, attorneys drafting Gun Trusts must be well-informed of all federal and state laws regarding NFA firearms.

**Transferring NFA Weapons to Heirs of Estate**

Some fiduciaries will encounter NFA weapons in settling estates.  Proper handling of these weapons can help avoid a felony transfer.  The ATF has provided a letter of instruction regarding the transfer to heirs of NFA weapons:27

The following are excerpts from the ATF letter:

* The executor must apply to the ATF for approval for any transfer, via ATF Form 4 or ATF Form 5;
* Transfers to a lawful heir are exempt from the $200 tax;
* “Heir” includes a person named in a will or an heir by intestate succession;
* A transferee heir’s fingerprints on FBI Forms FD-258 must be included with ATF Form 4 or Form 5;
* The executor must transfer the weapons before probate is closed;
* The executor must maintain custody and control of the estate firearms.  The executor cannot transfer the firearms, even for consignment or safekeeping.  This would be a transfer subject to the requirements of the NFA.
* If there are unregistered NFA firearms in the estate, these firearms are contraband and cannot be registered by the estate.  The executor of the estate should contact the local ATF office to arrange for the abandonment of the unregistered firearms.

While the ATF instructions are informative, fiduciaries dealing with NFA weapons should nevertheless seek proper legal advice as well as assistance from a licensed gun dealer.

 ***Are these legal to own in Virginia?***Nearly all NFA items are legal to possess in Virginia, provided that they are properly transferred to and owned pursuant to federal law. The only enumerated exception in Virginia law is the Striker 12 shotgun (a drum-fed shotgun sometimes called a “streetsweeper”) which may not be possessed or transferred in Virginia.

Machineguns (only) must be registered with the Virginia State Police within 24 hours of their acquisition. The Virginia State Police provide a form for this registration, and the dealer from which you acquire a machinegun will likely have it available and submit it for you.

***What is a trust and why would I use one to acquire NFA items?*** A “trust” is a legal entity, like a corporation, that is recognized as having its own legal “personhood” under the Internal Revenue Code. Because the NFA is a tax law at its core, a trust is a legal “person” to which NFA items may be transferred.

 In most cases, you (or you and your spouse) will be the “Settlor” of the trust, the one(s) that actually create the trust and put property – in this case NFA items – into it. The NFA trust will be a “revocable” trust, one which you may add and remove items to and from during your lifetime, and which you will control during your lifetime.

 Individuals (i.e., human beings) may acquire NFA items in their own names. A trust offers a number of significant advantages, including the ability to have permanent or temporary "co-trustees" who may be authorized users of the NFA items in the trust.

 A trust also allows you to grant unsupervised use and access to the NFA items by others as you see fit, which is not possible with an individually owned NFA item. Finally, the NFA trust allows you to protect and direct the disposition and custody of these items when you pass away or in the event you become incapacitated.

***Can wife/child/cousin/friend be “on the trust” as well to allow them to access and use the NFA items?***

 Yes, any adult (over 18) who may otherwise possess firearms legally may be authorized under your trust to possess and use its NFA items. You should carefully consider, however, who should be given this authority. In addition, under new regulations effective July 13, 2016, any person who is a trustee at the time an application to transfer or make a NFA item is submitted must submit fingerprints and photographs. We can discuss how to handle this issue during your initial telephone consultation.

***Do I have to record or register my trust with any court or state agency, or pay an annual fee?***

 In Virginia, there is no requirement to register or record your trust, nor is any annual fee required to maintain it. This is one of the advantages of using a trust (as opposed to a corporate entity) to own NFA items.

***What happens to the NFA items in my trust when I die or become incapacitated?***
You get to control all of these scenarios via your trust, and Virginia Gun Trusts will discuss these issues with you prior to creating your trust. You may name one or more successor trustees, for example, to control the trust property if you die or become incapacitated, and hold it until your designated beneficiaries are ready to receive the NFA items. You may direct that the items be given to your children once they are of legal age, direct that they be liquidated for your benefit if you become incapacitated, be donated to the NRA … it’s entirely up to you.

**What is the point of a gun trust?**

A gun trust authorizes you to protect your guns both during and after your lifetime without the complications that typically surface after a gun owner's passing. A gun trust is a revocable trust erected to hold the title to your guns.

One of the major reasons to have a Gun Trust is to protect your NFA items in the event that the grantor of the Trust passes away. With a Gun Trust, the grantor states who would inherit the items in the Trust, and the person inheriting the items would be able to avoid the $200 transfer tax to take possession.

**Tax Stamp?**

A tax stamp is required for a non-FFL/SOT to possess any NFA Firearm.

The National Firearms Act of 1934 (NFA) regulated the “class 3 firearms” above, and required their registration along with the payment of a federal tax for each item.

To get a NFA tax stamp, an application is made with the ATF on either an ATF Form 1 or an ATF Form 4.

The approved NFA application is returned with a stamp showing that the tax has been paid – this is the literal “tax stamp.”

**ATF Form 4**

An ATF Form 4 is used when a non-FFL is buying a “class 3 firearm” either from a Class 3 FFL Dealer or another individual.

Once the Form 4 is returned with a tax stamp from the ATF, the purchaser can take possession of the NFA Firearm.

| **ATF Forms** | **Purpose** |
| --- | --- |
| ATF Form 1 | Permission to make an NFA Firearm by a non-FFL |
| ATF Form 2 | Notification after a Class 3 Firearm is made by an FFL |
| ATF Form 3 | Used for transferring an NFA Firearm between FFLs |
| ATF Form 4 | Used for purchasing a Class 3 Firearm by a non-FFL |
| ATF Form 5 | Used for transferring an NFA Firearm from an FFL to the government |

**Suppressor Tax Stamp**

The most common tax stamp is for suppressors.

Suppressors, or as I like to call them, silencers, are incredibly popular and legal in most states.

Before taking possession of a suppressor, you need to have an approved ATF Form with a tax stamp.

If you’re not an FFL and looking to buy a suppressor, use a Form 4. If you’re looking to build your own suppressor, use a Form 1.

**Why use a trust to buy a suppressor?**

Why would you want a trust? **A trust makes it easier to share the fun and benefits of shooting with suppressors**. Without a Trust, the person that got the Tax Stamp and purchased the suppressor MUST BE PRESENT and in possession of the suppressor when it is being used by another person.

**Do I need a tax stamp for every suppressor I buy?**

**Yes, you will need to have a tax stamp for each silencer that you want to purchase / own**. Each NFA firearm that you own as an individual or with your gun trust, corporation or other legal entity will require a tax stamp.

**Endonotes**

1Machineguns, Destructive Devises and Certain Other Firearms; Background Checks for Responsible Persons of a Trust or Legal Entity With Respect To Making or Transferring a Firearm, 81 Fed. Reg. 2658 (Jan. 15, 2016) (to be codified at 27 C.F.R. pt. 479).

281 Fed. Reg. 2658, 2714 (Jan. 15, 2016).

3*National Firearms Act: Hearings on HR. 9066 Before the H. Comm. on Ways & Means,*73d Cong. 4 (1934) (statement of Hon. Homer S. Cummings, Attorney General, United States).

4Pub. L. No. 90-618, 82 Stat. 1213*.*

5I.R.C. § 5811(a) (“There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred, except, the transfer tax on any firearm classified as any other weapon under section 5845(e) shall be at the rate of $5 for each such firearm transferred.”).

6I.R.C. §§ 5812, 5822; 27 C.F.R. §§ 479.62, 479.84 (2016).

7[27 C.F.R. §§ 479.63](https://www.federalregister.gov/select-citation/2016/01/15/27-CFR-479.63), 479.85 (2015).

881 Fed. Reg. 2658, 2711 (Jan. 15, 2016).

9I.R.C. § 5845(a).

10*Id*. § 5845(b).

11Pub. L. No. 99-308, 100 Stat. 449.

12A historical note: the tommy gun was originally developed for trench warfare and was to be called “the Annihilator.” However, at a board meeting held after the end of World War I, the gun maker chose a less aggressive moniker - the Thompson Submachine Gun.

13I.R.C. § 5845(a) (excluding such weapons from the definition of “firearm” under the NFA).

1481 Fed. Reg. 2658, 2658 (Jan. 15, 2016).

1527 C.F.R. § 479.11 (2016).

16*Id*. §§ 479.63(b), 479.85(b).

17*Id*. § 479.11.

18*Id*.

19*Id*.

20*Id*. §§ 479.62(c), 479.84(c).

21*See* I.R.C. § 5871.

22*Id*. § 5861.

23*Id*. § 5845(j).

24*Id*. § 5871.

25*Id*. § 7201.

2618 U.S.C. § 3571(b)(3).

27Bureau of Alcohol, Tobacco & Firearms, *Transfers of National Firearms Act Firearms in Decedents’ Estates*, <https://www.atf.gov/firearms/docs/transfers-national-firearms-act-firearms-decedents-estates/download> (Sept. 5, 1999, last revised Feb. 23, 2006).