

# **NATIONAL FIREARMS ACT (NFA) TRUSTS**

## **SEAN P. HEALY**

Healy Law Offices, P.C.  
113 E. Houston St.  
Tyler, Texas 75702-8130  
(903) 592-7566  
[www.healylaw.com](http://www.healylaw.com)  
[genghis@healylaw.com](mailto:genghis@healylaw.com)

State Bar of Texas  
**WHAT EVERY TEXAS LAWYER NEEDS TO KNOW  
ABOUT FIREARMS LAW**

September 12, 2014  
Houston

**CHAPTER \_\_\_\_\_**

## **About the Author**

Mr. Healy is an attorney in private practice. He has served as general counsel for two congressional campaigns, and as National Corporate Counsel for American Mensa. He spoke at the 2003 and 2004 State Bar Firearms Law Seminars, and served as Course Director of the 2012 and 2013 Seminars. He is the General Counsel for the Texas State Rifle Association. He is a mediator for civil, family law, and child protective cases, a member of the American Arbitration Association's Panel of Mediators, and an arbitrator for the Better Business Bureau and AAA. During law school he served as an appellate advocacy instructor, and he previously served as a college instructor in business law.

**Firearms instruction:** Mr. Healy is also a concealed handgun instructor, an NRA-Certified Instructor and Training Counselor, with certifications in Pistol, Rifle, and Shotgun; Muzzleloading Pistol, Rifle, and Shotgun; Metallic Cartridge Reloading and Shotgun Reloading; Home Firearms Safety; and Personal Protection in the Home. He is a Chief Range Safety Officer. He is a nationally-trained instructor trainer for Texas 4-H Shooting Sports, and is qualified as a force-on-force instructor.

**Speeches and Publications:** Mr. Healy testified before a Senate committee as the expert witness for NRA and TSRA regarding House Bill 823, the predecessor to the Motorist Protection Act. He now serves as Election Volunteer Coordinator for the National Rifle Association Institute for Legislative Action, covering Texas Congressional District 1. He has given numerous speeches, continuing legal education presentations to judges and lawyers, and televised interviews on firearms matters and other subjects, including an extensive interview that aired on CNN.

**Political Activities:** Mr. Healy is a life member of the National Rifle Association and Second Amendment Foundation. He served for eighteen years on the East Texas Friends of NRA Committee. He also served on the Friends of NRA State Fund Committee for North Texas for thirteen years. Mr. Healy represented eight states on the Young Republican National Federation National Committee, and held numerous other state and local offices, including President of the Tyler Young Republicans. He has volunteered on a number of campaigns, served as a delegate to the Republican Party of Texas state conventions, and served on the RPT Ballot Security Task Force during two elections. He has completed a number of campaign schools including the RNC Western Regional Campaign School and ballot security training. He has also served and as Local Secretary (local President) and certified Proctor for East Texas Mensa. He served as a state officer for years for the Texas Junior Chamber of Commerce, and as President of the Tyler Jaycees. He served for seven years on the Board of Directors of Azleway, Inc. and its charter school Board of Trustees, including one year as Chairman of the Board.

**Firearms Competitions and Outside Activities:** Mr. Healy has participated in over 150 firearms competitions, including matches organized by the United States Practical Shooting Association (USPSA), International Defensive Pistol Association (IDPA), and Steel Challenge Association. He is also a private pilot and a Panel Attorney for the Aircraft Owners and Pilots Association.

Mr. Healy's law practice focuses on business law, civil litigation, family law, representation of property owners' associations, and firearms and aviation matters.

**Table of Contents**

1. <u>Introduction</u> .....	<u>5</u>
2. <u>Changes to the Paper and Presentation From Prior Versions</u> .....	<u>5</u>
3. <u>Professional Considerations: Business, Ethics, and Avoiding Malpractice</u> .....	<u>5</u>
4. <u>The Law</u> .....	<u>7</u>
a. Federal Law.....	<u>7</u>
i. National Firearms Act.....	<u>7</u>
(1) General provisions.....	<u>7</u>
(2) Definition of “Firearm”.....	<u>7</u>
(3) “Assault Weapons”.....	<u>8</u>
(4) Machine gun freeze.....	<u>9</u>
(5) Definition of “Person”.....	<u>9</u>
(6) Requirements for acquiring NFA firearms.....	<u>10</u>
(7) Criminal penalties.....	<u>10</u>
(8) Death of owner.....	<u>10</u>
ii. Gun Control Act.....	<u>10</u>
(1) Definition of “Firearm”.....	<u>10</u>
(2) GCA Provisions applicable to NFA firearms.....	<u>11</u>
(a) Prohibited persons.....	<u>11</u>
(b) Minors.....	<u>12</u>
(c) Transfers to prohibited persons.....	<u>12</u>
(3) Criminal penalties.....	<u>12</u>
b. Texas law.....	<u>12</u>
i. “Prohibited weapons” and criminal penalties.....	<u>12</u>
ii. Hunting with suppressors.....	<u>13</u>
iii. Trusts.....	<u>13</u>
(1) Same person as settlor, trustee, and beneficiary.....	<u>13</u>
(2) Spendthrift Trusts.....	<u>14</u>
(3) Same person as settlor and beneficiary.....	<u>14</u>
(4) Powers of trustees.....	<u>14</u>
5. <u>Advantages of NFA Trusts</u> .....	<u>15</u>
a. Access to NFA firearms.....	<u>15</u>
b. Protection from criminal prosecution.....	<u>16</u>
c. Continuity.....	<u>16</u>
d. Quicker processing.....	<u>16</u>
e. CLEO Approval not required.....	<u>16</u>
f. Fingerprints and photos not required.....	<u>17</u>
g. 4473 and NICS check ARE required.....	<u>17</u>
6. <u>Steps involved in acquiring NFA firearms (including forming a trust if desired)</u> .....	<u>17</u>
a. Order NFA firearm.....	<u>17</u>
b. Obtain CLEO approval.....	<u>17</u>
c. If using a trust, draft and execute it.....	<u>17</u>
d. Complete Form 4.....	<u>17</u>
e. Obtain CLEO approval.....	<u>17</u>
f. Submit two complete copies of Form 4 with the proper tax.....	<u>17</u>
g. Take possession of the NFA item.....	<u>17</u>
7. <u>Risks</u> .....	<u>18</u>
a. Normal estate planning risks.....	<u>18</u>
b. Interstate transportation of NFA firearms.....	<u>18</u>
c. Inadvertent transfers to prohibited persons.....	<u>18</u>
d. Transfers without Form 4.....	<u>18</u>
e. Inadvertent violation of firearms laws.....	<u>19</u>

f.	Changes to the law.....	<a href="#">19</a>
8.	<u>Losing Form 4; Problems with the NFRTR.</u> .....	<a href="#">19</a>
9.	<u>Drafting NFA Trusts.</u> .....	<a href="#">19</a>
a.	Conduct an adequate consultation with the client.....	<a href="#">19</a>
b.	Consider the client’s overall situation, and general estate planning needs.....	<a href="#">20</a>
c.	Start with the standard form. ....	<a href="#">20</a>
d.	Draft a valid trust.....	<a href="#">20</a>
e.	Customize the trust for its intended purpose.....	<a href="#">21</a>
f.	Limit civil liability as much as possible.....	<a href="#">22</a>
g.	Limit criminal exposure as much as possible.....	<a href="#">22</a>
h.	Maximize client’s control of the trust and assets.....	<a href="#">22</a>
i.	Determine what assets the trust will hold.....	<a href="#">22</a>
j.	Maximize flexibility of the trust.....	<a href="#">22</a>
k.	Provide continuity.....	<a href="#">23</a>
l.	Maximize privacy.....	<a href="#">23</a>
m.	Include related documents.....	<a href="#">23</a>
i.	Letter of explanation.....	<a href="#">23</a>
ii.	Appointment of Additional Trustee.....	<a href="#">23</a>
iii.	Assignment (to add property to trust).....	<a href="#">24</a>
iv.	Declaration of Trust.....	<a href="#">24</a>
10.	<u>Alternatives to NFA Trusts.</u> .....	<a href="#">24</a>
a.	Individual ownership.....	<a href="#">24</a>
b.	Corporation/Business entity. ....	<a href="#">24</a>
11.	<u>Privacy.</u> .....	<a href="#">25</a>
a.	Information that must be disclosed to ATF.....	<a href="#">25</a>
b.	Trusts and privacy.....	<a href="#">25</a>
c.	Corporations and privacy. ....	<a href="#">25</a>
d.	Practice notes. ....	<a href="#">26</a>
12.	<u>Recent developments.</u> .....	<a href="#">26</a>
a.	8/29/13 Proposed Federal Regulation 41P.....	<a href="#">26</a>
i.	The rule has not yet been adopted.....	<a href="#">27</a>
ii.	Problems with the Rule. ....	<a href="#">27</a>
iii.	Possible future requirements. ....	<a href="#">28</a>
iv.	If this rule is adopted, are NFA trusts still useful?.....	<a href="#">28</a>
b.	Electronic Filing.....	<a href="#">28</a>
i.	7/10/13 Rule. ....	<a href="#">29</a>
ii.	Technical Difficulties. ....	<a href="#">29</a>
iii.	Decreased Wait Times.....	<a href="#">29</a>
iv.	Future Improvements.....	<a href="#">30</a>
13.	<u>Conclusion.</u> .....	<a href="#">30</a>

## **1. Introduction**

It comes as a surprise to many people that federal law permits civilians to own machine guns, suppressors, and similar items. That law is called the National Firearms Act (NFA). In this paper I will refer to items regulated by the NFA as “NFA firearms.” Texas law also allows individuals to own and possess NFA firearms.

The NFA was enacted in 1934. It generally banned civilian ownership of machine guns, except those lawfully registered. Since then, there appear to be only two instances where a *legally*-owned machine gun was used in a crime. Both happened in Ohio. One was committed by a law enforcement officer. Crimes committed using *illegally* possessed machine guns are also rare. [http://www.guncite.com/gun\\_control\\_gcfullau.html](http://www.guncite.com/gun_control_gcfullau.html).

As of 2007 there were approximately 2 million firearms registered in the National Firearms Registration and Transfer Record (“NFRTR”), the database of NFA firearms maintained by ATF. ATF National Firearms Registration and Transfer Record (2007), posted at <http://www.justice.gov/oig/reports/ATF/e0706/final.pdf>. As of 1995, there were approximately 240,000 registered machine guns. Bureau of Justice Statistics, “Guns Used in Crime, July, 1995, posted at:

<http://www.bjs.gov/content/pub/pdf/GUIC.PDF>.

Because federal law defines “person” to include trusts, corporations, and other entities, it is lawful to form a trust for the purpose of owning NFA firearms. This paper will discuss the various factors that must be considered in drafting National Firearms Act trusts.

This paper is intended to be used by attorneys drafting NFA trusts for their clients. It is *absolutely* not intended to be used by nonlawyers for anything other than general information. I *strongly* recommend against nonlawyers drafting their own NFA trusts, because of the immense legal risks.

This paper will discuss the state and federal laws regarding machine guns, suppressors and similar items, but only in sufficient detail to allow discussion of NFA trusts. It will also discuss Texas law regarding trusts, but only in sufficient detail to allow a practitioner to draft an NFA trust. It is not intended to list each and every statute and case bearing on these subjects.

Please keep in mind that this paper is based on current state and federal law, and on current policy and practices

of ATF. The portions dealing with state law (requirements for trusts and corporations, for instance) are based on current Texas law. If there are changes in the law, regulations, or ATF practices, then this advice will change. You must remain informed of the law, if you choose to draft NFA trusts as a part of your practice.

## **2. Changes to the Paper and Presentation From Prior Versions**

I presented this paper at the SBOT Firearms Law Seminar in Fort Worth on September 27, 2013, and in a SBOT Webcast that was presented live on December 18, 2013 and rebroadcast several times. I presented the same paper at both of those programs. This paper is the same as the prior version, except for a few changes, almost all of them in the section entitled “Recent Developments.” That section was previously located in Section 3(a)(iii), but has now been moved to the end of the paper, to make it easier to find. The information in that section has been significantly expanded and updated. The first part of that section, the proposed regulation, includes more detail and also reflects the delays in the anticipated effective date. The second section, discussing ATF’s new electronic filing system, describes the problems ATF has had keeping the system online and some of the measures taken to repair the system and streamline the NFA Section. Other than these changes, this paper is substantively identical to the prior drafts.

In addition, I added one update to the number of applications processed by NFA in 2013, in the section entitled “Advantages of NFA Trusts,” in the subsection entitled “Quicker processing.”

## **3. Professional Considerations: Business, Ethics, and Avoiding Malpractice**

Before expanding your law practice to include NFA trusts, you must understand a few facts about the market.

First, you must consider your competition. Experienced attorneys may charge thousands of dollars for comprehensive estate planning packages. But most gun owners would rather spend their money on guns, rather than legal documents. They will not see the value of your NFA trust, compared to the other ones advertised on the Internet.

Some people draft their own NFA trusts using standard forms or consumer software such as Quicken or LegalZoom, which is designed to allow nonlawyers to draft their own simple legal documents. Others get their

forms from office supply stores. Still others start with copies of their friends' NFA trusts. Others cobble together their own form from documents found on the Internet. There are numerous pitfalls to this approach. These forms are usually intended to be basic forms, and are not intended to form NFA trusts. They generally do not include specific instructions to the trustees to help them comply with the laws regarding guns. They do not include advice from an attorney. The drafters often make arbitrary choices about the wording, and the result could invalidate or terminate the trust and result in illegal possession of NFA firearms. You must be prepared to explain the grave risks of this approach, and to justify your fee in other ways. It does not make sense to take a chance of a felony conviction to save a little money.

Most attorneys who advertise their NFA trusts charge a flat fee. Many of them focus on spending as little time as possible on these matters, to keep their fees competitive. They barely confer with the client, provide little or no legal advice, and generally use the same form with few modifications, other than for substituting in the name of the settlors, trustees, and beneficiaries.

I have seen NFA trusts advertised by attorneys for less than \$200.00. According to the State Bar of Texas, the average rate for an attorney working full-time in private practice in Texas in 2011 was \$238.00 per hour. [http://www.texasbar.com/AM/Template.cfm?Section=Demographic and Economic Trends&Template=/CM/ContentDisplay.cfm&ContentID=20499](http://www.texasbar.com/AM/Template.cfm?Section=Demographic%20and%20Economic%20Trends&Template=/CM/ContentDisplay.cfm&ContentID=20499). Just how much help should a client expect from an attorney who has allocated a total of 45 minutes to confer and draft an NFA trust?

Texas Disciplinary Rule of Professional Conduct 1.04(b) is used to determine whether a given fee is reasonable, based on certain factors. One of those factors is "the amount involved and the results obtained." In other words, the attorney is justified in charging a higher fee if there is more at stake. Another way of looking at this is that, the more significant the consequences to the client are, the more time the attorney should devote to the matter.

In drafting an NFA trust, the risks to the client include a felony conviction for him or his loved ones, in addition to the normal estate planning risk of having his property distributed in a way that conflicts with his intentions. Put another way, you may commit malpractice by failing to determine the client's level of knowledge about guns and gun laws, or by failing to ask enough questions about the client's overall situation and estate planning needs. If you

charge a lowball fee and focus on volume only, you are greatly magnifying the risks to you and to the client. I believe the risks make it worthwhile for the attorney to devote a little more time to the matter, and for the client to be prepared to pay for that time. You may be in serious trouble if your only defense at a grievance hearing or malpractice trial is, "I only earned \$200.00 for this!"

You may also encounter a few clients who need a full estate planning package, in addition to an NFA trust. Some clients may intend to acquire a large number of NFA firearms, which could justify custom provisions in the trust, or forming multiple trusts. Taking the time to ask more questions may lead to additional income.

I believe the proper approach is somewhere in the middle. You need to spend an hour or so consulting with the client and advising him or her how to use the trust. This assumes you have a detailed letter that augments your in-person advice. You need to allocate an hour or so to draft the trust and ancillary documents. I also set aside 30 minutes or so to meet with the client at the time the trust is signed.

When setting your fee, you need to consider the time spent drafting your basic NFA trust form. If you have spent ten hours researching and drafting your basic forms, and if you have ten clients who hire you to form NFA trusts for them, you will need to charge each client for one hour of that time.

If we assume you will spend two to four hours on each trust, assuming you charge \$250.00 per hour, a reasonable fee for an NFA trust would be \$500.00 to \$1,000.00. If you charge less than that, you are not spending sufficient time to determine the client's needs and to advise him or her on operating the trust. If you charge more than that, then you will have very few clients.

You must also consider the fact that many gun owners who consider owning NFA firearms are very well informed about gun laws, and the NFA in particular. You may meet some lay persons who know more about this area of law than you do. If you have any doubt about this, ask one of these people about 18 U.S.C. § 922(r), or about the (now expired) assault weapons ban. Many gun owners can tell you exactly what makes a gun legal or illegal under these laws. This may be one of the few instances when your client will know more about the law than you do.

#### **4. The Law**

Ownership of NFA firearms is governed both by state and federal law. We will first examine federal law, focusing on the law that specifically regulates machine guns, suppressors, and similar items. Then we will examine the relevant parts of the main federal gun control law, the Gun Control Act of 1968.

##### **a. Federal Law**

###### **i. National Firearms Act**

The National Firearms Act (NFA) is the federal law that regulates machine guns, suppressors, and similar items. It does not apply to ordinary guns such as rifles, pistols, and shotguns.

The NFA is contained in 26 U.S.C. Chapter 53. This is part of Title 26, the Internal Revenue Code, rather than Title 18, Crimes and Criminal Procedure. The NFA is based on Congress' constitutional authority to impose taxes. Violations of the NFA are therefore considered violations of the tax laws.

The NFA is also known as Title II of the Gun Control Act of 1968. For that reason, NFA firearms are also referred to as "Title II Weapons."

All manufacturers, importers, and dealers of firearms are required to be federal firearms licensees, or FFL's. A firearms licensee who deals with NFA firearms is required to become a "special occupational taxpayer" ("SOT"). 26 U.S.C. § 5801. Importers are Class 1 SOT's. Manufacturer/dealers are Class 2 SOT's. Dealers are Class 3 SOT's. For this reason, persons who sell NFA firearms are sometimes referred to as "Class 3 Dealers."

###### **(1) General provisions**

Since 1934 the government has imposed a "transfer tax" on any person wanting to acquire an item regulated by the NFA. 26 U.S.C. § 5811. Along with payment of the tax, the law also requires the applicant to submit an application to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (hereinafter "ATF"), and to receive approval before the transfer.

It is illegal for any person to transfer, receive, or possess an NFA firearm not registered to him. 26 U.S.C. § 5861.

Using or carrying a machine gun, SBR, SBS, DD, or firearm silencer or muffler during any crime of violence

or drug trafficking carries with it a mandatory minimum sentence of 30 years, in addition to the sentence for the underlying crime. 18 U.S.C. 924(c)(1). This could be a concern to an armed citizen who uses his legally owned NFA firearm in self-defense.

###### **(2) Definition of "Firearm"**

The NFA applies to all "firearms." The definition of "firearm" under the NFA is both narrower and broader than the common meaning of the term. It excludes ordinary rifles, pistols, and shotguns, but includes certain parts of NFA firearms that are not actually firearms, such as sears and baffles. The definition of "firearm" under the NFA includes the following items:

1. Machine guns: "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," plus certain parts as discussed below. Guns which fire a three round burst are considered machine guns. 26 U.S.C. § 5845(b). Gatling guns are not considered machine guns. Rev. Rul. 55-528, 1955-2 C.B. 482.
2. Suppressors and silencers: "Any device for silencing, muffling, or diminishing the report of a portable firearm," plus parts as discussed below. 18 U.S.C. § 921(a)(24).
3. Short barreled rifles: "A rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. § 5845(a).
4. Short barreled shotguns: "A shotgun having a barrel or barrels of less than 18 inches in length." 26 U.S.C. § 5845(a).
5. Destructive devices [26 U.S.C. § 5845(f)]:
  - (a) Bombs, rockets, missiles, mines, etc.: any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device.
  - (b) Guns with bores over .50 caliber: "Any weapon which expels a projectile by the action of an explosive or other propellant with a bore of more than one-half inch in diameter (greater than .50 caliber), and weapons which may be readily converted to fire such large projectiles, except a

shotgun or shotgun shell found by the Secretary to be particularly suitable for sporting purposes.” This exception covers 12 gauge shotguns, for example, which have a bore size of .73 inches.

- (c) Exclusions: The term excludes any device which is neither designed nor redesigned for use as a weapon; any device originally designed for use as a weapon then redesigned as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.
6. Weapons made from a shotgun: A weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches, or a barrel or barrels of less than 18 inches in length. 26 U.S.C. § 5845(a)(2).
7. Weapons made from a rifle: A weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches, or a barrel or barrels of less than 16 inches in length. 26 U.S.C. § 5845(a)(4).
8. “Any other weapon”: “Any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.” 26 U.S.C. § 5845(e). Common AOW’s include smooth-bore pistols, pen guns, cane guns, other disguised firearms, guns that can be fired from a wallet holster or briefcase, and handguns with a vertical foregrip.

These definitions appear in the NFA, at 26 U.S.C. § 5845, and also in the GCA, at 18 U.S.C. § 921(a).

In addition to the items described above, the NFA definition of “firearm” also includes the following parts and combinations of parts:

1. Machine gun receivers: The frame or receiver of a machine gun. 26 U.S.C. § 5845(b).
2. Machine gun parts: Any part or combination of parts designed and intended solely and exclusively for use in converting a weapon into a machinegun. 26 U.S.C. § 5845(b). One example of such an item is an auto sear or drop-in auto sear (DIAS), a part which can convert some semi-automatic guns into a machine guns. Most sears require other parts, or other modifications to the gun, before it can function as a machine gun.
3. Combinations of parts: Any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. 26 U.S.C. § 5845(b).
4. Suppressor parts: Any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication. 18 U.S.C. § 921(a)(24). One example of such an item is a baffle for a suppressor.
5. Destructive device parts: Any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled. 26 U.S.C. § 5845(f).

### (3) “Assault Weapons”

There is a lot of confusion regarding machine guns, some of it created on purpose. “Semi-automatic” means the gun fires one bullet each time the trigger is pulled. The “automatic” part refers to the fact that the gun reloads itself, so all the operator has to do to fire another round is to pull the trigger again. The “semi” part refers to the fact that the gun does not fire again without another trigger pull.

“Fully automatic” or “full auto” means the gun fires more than one round each time the trigger is pulled. The term “automatic weapons” refers to fully automatic weapons, in other words, machine guns. Fully automatic guns are machine guns; semi-automatic guns are not.

An “assault rifle” is legitimate term which refers to a fully automatic rifle, fired from the shoulder, with an intermediate caliber cartridge and a detachable magazine. The most common examples are the M-16 (or M-4) and the AK-47.



An assault rifle is distinguished from several other types of gun. A “battle rifle” such as the Browning Automatic Rifle or M-14 is a fully automatic weapon which fires a full caliber rifle cartridge. This is a disadvantage in fully automatic fire because of the increased recoil.

A “submachine gun” such as the MP-5 or Uzi is a smaller fully automatic weapon using a pistol cartridge. Some submachine guns can be fired with one hand. Some have folding or telescoping stocks. Submachine guns range in size from machine pistols (pistol-sized or slightly larger) to rifle-sized, but most are in between, about the size of a carbine.

The term “machine gun” is used generally to refer to all fully automatic firearms, but it can also refer to medium and heavy machine guns. These weapons generally fire rifle cartridges, are often belt fed, are normally mounted on a bipod, tripod, vehicle, or other fixed mount, and sometimes served by a crew of more than one person. Common examples include the Browning M-2 and the M-60

The term “assault weapon” is a political and legal term. In statutes it is often defined to include semi-automatic guns with cosmetic features such as pistol grips, flash hiders, or bayonet lugs that make them resemble military firearms. Most of these features do little or nothing to increase the lethality of the firearm. Politicians and others often misuse the term and cause the public to confuse semi-automatic guns with fully automatic guns.

In this paper, the term “machine gun” will refer to the legal definition of the term in the NFA and Texas Penal Code, which is any firearm which fires more than one bullet for one pull of the trigger.

#### **(4) Machine gun freeze**

In 1986 Congress passed a law that froze the supply of machine guns. 18 U.S.C. § 922(o). Introduced by William J. Hughes (D-N.J.) as a part of the Firearm Owners’ Protection Act, the freeze is known as the Hughes Amendment. As a result of that law, civilians may only legally own machine guns registered before May 19, 1986. Machine guns that were not registered as of that date, including those manufactured afterwards, may only be legally owned by governmental entities like the army and police departments, or by licensed machine gun dealers.

The freeze only applies to machine guns, not to other NFA firearms. Put another way, civilians can lawfully

own other items regardless of when they were manufactured or registered, but may lawfully own machine guns only if they were manufactured and registered before May 19, 1986. As long as this law is in place, the supply of machine guns available for civilians to own will gradually drop and will never increase. As a result, the market price for a “transferable” machine gun is many times more than the price for an identical weapon that is not transferable.

#### **(5) Definition of “Person”**

The Internal Revenue Code defines “person” to include individuals, trusts, estates, partnerships, associations, companies, and corporations. 26 U.S.C. § 7701(a)(1); see also 27 CFR § 479.11. This definition is in the “Procedure and Administration” portion of the Internal Revenue Code rather than the NFA.

The NFA makes frequent references to “persons.” By virtue of § 7701(a)(1), and sometimes by their own explicit language, these provisions also apply to trusts. Here are some specific sections:

1. 26 U.S.C. § 5812 requires the government’s permission to transfer NFA firearms. Section (a)(3) states, “. . . if such person is an individual, the identification must include his fingerprints and his photograph.” Obviously this statute contemplates “persons” who are not “individuals” seeking transfer of NFA firearms into their names.
2. 26 U.S.C § 5822 prohibits “persons” from making a firearm unless it is registered. This section also requires “individuals” to include fingerprints and photos.
3. 26 U.S.C. § 5861, makes it illegal for any “person” to transfer, receive, or possess an NFA firearm not registered to him or her.

These sections are cited in “NFA and NFA Trusts,” a Powerpoint presentation by ATF attorney William Ryan at the 2012 NRA National Firearms Law Seminar.

The Treasury regulations generally define “trust” as used in the Internal Revenue Code as “an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts.” 26 CFR § 301.7701-4(a), which defines “Trust.” State law governs the validity and operation of trusts.

Because these definitions apply to the NFA, the law allows trusts to own NFA firearms.

#### **(6) Requirements for acquiring NFA firearms**

To acquire an NFA firearm, an applicant must pay the transfer tax and submit an application. 26 U.S.C. § 5811, 5812. The application that must be submitted is ATF Form 4, “Application for Tax Paid Transfer and Registration of Firearm,” (<https://www.atf.gov/files/forms/download/atf-f-5320-4.pdf>). The application is executed under penalties of perjury. It must be submitted in duplicate, and it must identify the specific firearm to be transferred by serial number. For this reason, an applicant cannot submit Form 4 until the dealer actually has the NFA firearm in his or her possession.

Individual applicants must submit fingerprints and a photo. 26 U.S.C. § 5812(a), and must secure the signature of their Chief Law Enforcement Officer on the form, certifying that the NFA firearm will be used illegally, or that possession by the transferee would violate the law. There are at least two states that *require* their CLEOs to sign these forms, Alaska and Tennessee. AS 18.65.810; T.C.A. 39-17-1361.

The tax is \$200.00 to transfer any NFA firearm, except it is only \$5.00 to transfer “any other weapon.” 26 U.S.C. § 5811(a).

There are similar requirements for “making” an NFA firearm. This process requires payment of a \$200.00 tax. 26 U.S.C. § 5821(a). It also requires submission of a similar application. 26 U.S.C. § 5822. The form for this process is ATF Form 1, which has similar requirements to Form 4.

These taxes are fixed, and are not indexed for inflation.

ATF maintains a database of all NFA firearms, called the National Firearms Registration and Transfer Record. After submission of the form and approval by ATF, the NFA firearm is registered in the database in the name of the transferee. The applicant cannot take possession of the firearm until the application is approved. 26 U.S.C. § 5812(b). The owner must keep the application, and present it on request. 26 U.S.C. § 5841(e).

#### **(7) Criminal penalties**

Possessing, receiving, or transferring an NFA firearm

without paying the transfer tax and holding an approved Form 4 is unlawful. 26 U.S.C. § 5861. It is punishable by up to 10 years in prison and a \$10,000.00 fine. 26 U.S.C. § 5871. The firearm is also subject to forfeiture. 26 U.S.C. § 5872(a).

*Willful* evasion of the tax is punishable by a fine of \$100,000.00 (for individuals) to \$500,000.00 (for corporations and trusts). 26 USC § 7201.

In addition to imprisonment, fines, and forfeiture, a felony conviction also makes it permanently illegal for the person to possess any firearm, ammunition, or components. 18 U.S.C. § 922(g)(1).

#### **(8) Death of owner**

If the owner of an NFA firearm passes away, his heirs must apply for transfer within a reasonable time (as defined by ATF). ATF takes the position that possession of NFA items is a crime, even when it occurs because of the death of the registered owner. ATF does allow a “reasonable time” to get the items transferred to the heir. <http://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html>. Of course this statement is in a letter from 1999, and ATF has been known to change its position without prior notice.

Transfers to heirs are handled using ATF Form 5. They are tax-exempt.

#### **ii. Gun Control Act**

The Gun Control Act of 1968 is the main federal statute regulating firearms. It is also known as Title I of the federal firearms laws. It applies to “normal” guns such as pistols, rifles, and shotguns, and also to most NFA firearms.

The GCA is based on Congress’ authority to regulate interstate commerce, rather than on its authority to impose taxes.

#### **(1) Definition of “Firearm”**

The Gun Control Act (“GCA”) applies to all “firearms.” The definition of “firearm” under the GCA is “any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” 18 U.S.C. § 921(a)(3)(A).

The GCA does exclude “antique firearms.” This refers to “any firearm not designed or redesigned for using rim fire

or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.” 18 U.S.C., § 921(A)(16). The NFA also excludes “antique firearms” from its definition of “firearm.” 26 U.S.C. § 5845(g).

Most of the items defined by the NFA as “firearms” are also defined by the GCA as “firearms.” Most NFA firearms are also considered “firearms” under state law. Therefore a person possessing an NFA firearm must generally comply with the restrictions on the special types of firearms under the NFA, the federal laws governing all firearms under the GCA, and state laws governing firearms.

There is a narrow category of items that are considered “firearms” under the NFA but not the GCA. Here is a matrix showing how these two laws overlap:

		Gun Control Act	
		Firearm	Not a firearm
National Firearms Act	Firearm	<u>“Firearm” under both laws:</u> * Machine guns * Short barreled rifles (barrel < 16" or overall < 26") * Short barreled shotguns (barrel < 18" or overall < 26") * Destructive devices * Weapons made from a shotgun or rifle * "Any other weapon" * Guns that can be readily converted to machine guns	<u>“Firearm” only under NFA:</u> * Suppressors and silencers * Suppressor parts * Machine gun receivers
	Not a firearm	<u>“Firearm” only under GCA:</u> * Normal pistols * Normal rifles * Normal shotguns	<u>Not “firearms” under either law:</u> * Antique firearms * Airguns * any device (other than a machinegun or destructive device) designed as a weapon but which the Secretary finds is primarily a collector's item and is not likely to be used as a weapon.

**(2) GCA Provisions applicable to NFA firearms**

The Gun Control Act applies to items that are defined as “firearms” both under the GCA and the NFA. In plain English, the GCA applies to “guns” but generally not to parts.

**(a) Prohibited persons**

Federal law makes it illegal for any of these persons to possess firearms or ammunition [numbers are subsections of 18 U.S.C. § 922(g)]:

- (1) Persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year;
- (2) Fugitives from justice;
- (3) Unlawful users of or persons addicted to any controlled substance;
- (4) Persons who have been adjudicated as a mental defective or who have been committed to a mental institution (unless their rights were restored);

- (5) Illegal aliens and persons with nonimmigrant visas;
- (6) Persons with dishonorable discharges from the U.S. Armed Forces;
- (7) Persons who have renounced their U.S. citizenship;
- (8) Persons subject to certain domestic court orders (protective orders and some injunctions); and
- (9) Persons who have been convicted of a misdemeanor crime of domestic violence (if represented by counsel and tried by a jury, or knowingly and intelligently waived those rights).

It is a crime for a person under indictment for a crime punishable for confinement for more than one year to ship, transport, or receive a firearm. 18 U.S.C. § 922(n).

A person is not considered “convicted” if the conviction was expunged or set aside, if the person was pardoned, or had his civil rights restored, unless same provided that the person may not possess firearms. 18 U.S.C. § 921(a)(33)(A).

**(b) Minors**

Persons under 18 years of age may not lawfully possess handguns or ammunition that is only usable in handguns. 18 U.S.C. § 922(x). There are certain exceptions involving specific circumstances. Gun dealers may not sell handgun ammunition to persons under 21. 18 U.S.C. 922(b)(1). To avoid problems, persons under 21 should not generally be appointed as trustees of NFA trusts.

**(c) Transfers to prohibited persons**

It is unlawful to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is a prohibited person. 18 U.S.C. § 922(d).

**(3) Criminal penalties**

Violation of the GCA carries a penalty of up to 10 years in prison, subject to the federal sentencing guidelines. 18 USC § 924(a)(2). Fines can go as high as \$250,000.00. 18 USC § 3571.

**b. Texas law**

There are several areas of Texas law that apply to the possession, ownership, and use of NFA firearms. State

law also governs the creation, operation, and legal effect of trusts.

**i. “Prohibited weapons” and criminal penalties**

The state law governing this type of firearm is contained in Texas Penal Code § 46.05, “Prohibited Weapons.” Subsection (a) makes it illegal to possess ten different types of weapons. These include explosive weapons, machine guns, short-barrel firearms, and silencers, which are all regulated by the NFA. Possessing any of these four items is a third-degree felony, punishable by confinement for two to ten years and a fine of up to \$10,000.00. Tex Pen. C. § 46.05(e), § 12.34.

Section 46.05 also deems other items, not regulated by the NFA, to be “prohibited weapons.” Possession of switchblade knives or “knuckles” is only a Class A Misdemeanor. Possession of a “tire deflation device” is a state jail felony.

The definitions in the state law are different from those in the NFA. See Texas Penal Code § 46.01 and 26 U.S.C. § 5845. The Texas definition of “explosive weapon” is similar to part of the definition of “destructive device” in the NFA, but the state definition does not include firearms that have a bore over ½" in diameter but do not fire explosive rounds. The state definitions only include the actual firearms (machine gun, SBR, SBS, and silencer), but not the parts (receiver, sear, baffles, etc.). The state law also does not declare “any other weapon” to be a “prohibited weapon.” To be a “silencer” under the NFA, the item must be portable, but that is not a part of the definition of “firearm silencer” under Texas law.

A citizen wishing to legally own NFA firearms can comply with the requirements of the NFA, and know that he or she is thereby complying with Texas law. A person being prosecuted for violating the NFA or Texas law (or his attorney) should carefully analyze the definitions to see if they apply to the particular circumstances.

Texas Penal Code § 46.05(c) states, “It is a defense to prosecution under this section that the actor's possession was pursuant to registration pursuant to the National Firearms Act, as amended.” Therefore persons who lawfully purchase their NFA firearm by paying the transfer tax and obtaining approval of Form 4, and who comply with the other provisions of the NFA will have a defense available if they are arrested and prosecuted for possessing a prohibited weapon.

## ii. Hunting with suppressors

On March 29, 2012, the Texas Parks and Wildlife Commission voted unanimously to allow the use of suppressors while hunting game animals (mule deer, white tail deer, and antelope). 31 Texas Administrative Code § 65.11(1)(a). Suppressors were previously legal for use in other shooting activities, and in hunting nuisance animals (such as feral hogs, coyotes, and exotic game) but not for game animals.

The benefits of suppressors include increased safety due to protection from hearing damage, reduced noise pollution, and increased accuracy due to reduced recoil and muzzle blast. I expect that this will significantly increase the number of lawfully owned suppressors in the state.

## iii. Trusts

Trusts are commonly used in the estate planning process. A trust is a legal arrangement that separates the right to *control* assets from the right to receive the *benefits* from those assets. In other words, one person controls the assets for the benefit of another person. The obvious example is a child who inherits significant assets - normally a responsible adult will control the assets for the child's benefit.

Trusts can be revocable (able to be cancelled or amended) or irrevocable (set in stone once formed). Making a trust revocable or irrevocable has legal and/or tax consequences.

A trust has three main categories of persons involved with it. The *settlor* (or donor) is the person who transfers the property to the trust. The *trustee* is the person who controls the property in the trust, for the benefit of the beneficiary (the trustee also has the right to keep possession of the trust property, which is a side benefit of an NFA trust). The *beneficiary* is the person who is ultimately entitled to receive the benefits from the property. A trust may have more than one donor, beneficiary, and trustee.

Texas Property Code § 112.008(c) allows a settlor to serve as trustee, but there can be serious consequences of that decision. The settlor can also be a beneficiary.

An NFA Trust is generally a revocable living trust. This means the settlor retains the power to modify or dissolve the trust ("revocable"), that the settlor is alive when he or she forms the trust ("living"), rather than arranging for a

trust to be formed upon death ("testamentary"). NFA trusts generally have the same basic characteristics as ordinary living trusts. This paper focuses on the characteristics that are relevant to firearms.

- (1) Same person as settlor, trustee, and beneficiary

The biggest risk to the client, and to the lawyer, is that the lawyer could draft an invalid trust. As a result, the trustees could possess NFA firearms without legal authority to do so. The easiest way to draft an invalid trust is to appoint one person as the sole trustee and the sole beneficiary. This seems like a good idea, which would allow the client to obtain all the benefits of an NFA trust without giving up any control. Unfortunately this results in merger of the right to control the property and the right to receive the benefits, which violates the whole idea of a trust.

Texas Property Code § 112.008(b) allows the settlor to be a beneficiary. Section 112.008(c) allows the settlor to be a trustee. But as we will see, one person cannot be the *sole* trustee and the *sole* beneficiary.

Texas Property Code § 112.034 (part of the Texas Trust Code) sets out the doctrine of merger: "If a settlor transfers both the legal title and all equitable interests in property to the same person or retains both the legal title and all equitable interests in property in himself as both the sole trustee and the sole beneficiary, a trust is not created and the transferee holds the property as his own." "Legal title" refers to the interest held by the trustee, primarily control of the assets. "Equitable title" refers to the interest held by the beneficiary, primarily the right to receive the benefits. "Merger" refers to the fact that a single person holds both the right to control and the right to receive the benefits of the trust property. This is contrary to the whole idea of a trust, which is to separate those two interests.

Section 402(a)(5) of the Uniform Trust Code (which has been adopted by 23 states) sets forth this same principle.

In the case of NFA trusts, this principle also means that the individual has possession of NFA firearms which are not registered in his name. Because the trust is invalid, the individual faces possible criminal prosecution.

To avoid merger problems, a trust must also have at least one beneficiary who is *not* a settlor.

## (2) Spendthrift Trusts

A spendthrift trust prohibits the interest of a beneficiary in the income or principal of a trust from being transferred to a third party, whether voluntarily or involuntarily, before it is actually paid or delivered to the beneficiary. Texas Property Code § 112.035(a). The trust does not even have to set this out explicitly - it is enough to use the phrase “spendthrift trust.”

Section 541(c)(2) of the Bankruptcy Code [11 U.S.C. § 541(c)(2)] excludes property held by spendthrift trusts from the bankruptcy estate, so in this circumstance federal law incorporates the protections of state law. Spendthrift provisions are common, intended to protect the assets from claims of the beneficiary's creditors. By taking away any right to assign future distributions to third parties, the trust protects irresponsible beneficiaries from their own bad decisions.

NFA trusts should normally be created as spendthrift trusts. In addition to the normal protections this provides, it also protects the NFA firearms from being transferred in conflict with the settlor's desires. However, the attorney must advise the client that if he includes a spendthrift clause, he will need the consent of the other beneficiaries to terminate the trust. Fewell v. Republic Nat'l Bank, 513 S.W.2d 596, 598 (Tex.Civ.App.--Eastland 1974, writ ref'd n.r.e.).

## (3) Same person as settlor and beneficiary

Spendthrift trusts do have some limitations. The “self-settlor rule” provides that when a settlor is also a beneficiary, a spendthrift provision does not prevent creditors from reaching the settlor's interest in the trust estate. Texas Property Code §112.035(d); see also Daniels v. Pecan Valley Ranch, Inc., 831 S.W.2d 372, 378 (Tex.App.--San Antonio 1992, writ denied). This means that a settlor who also makes himself a beneficiary leaves the trust property vulnerable to the claims of his creditors.

The Fifth Circuit has reached a similar conclusion. In the Matter of Shurley, 115 F.3d 333, 337 (5th Cir. 1997) held that the property contributed to a trust by a settlor who is also a beneficiary is not protected from creditors' claims. The Court explained: “The rationale for this ‘self-settlor’ rule is obvious enough: a debtor should not be able to escape claims of his creditors by himself setting up a spendthrift trust and naming himself as beneficiary. Such a maneuver allows the debtor, in the words of appellees, to ‘have his cake and eat it too.’”

In most NFA trusts there are only one or two settlors (a single person or a married couple). That means in most cases, a creditor would be able to reach the entire trust estate. The clients need to understand this before forming their trust.

These limits are especially important in trusts that own NFA firearms. If the trust is invalid under state law, then the person who possesses the NFA firearm is not the actual owner, and has no authority to possess it on behalf of the (nonexistent) trust. If ATF does not recognize the validity of the trust, it may disapprove the transfer or find the persons named as trustees are violating NFA by possessing NFA firearms illegally.

Because of the vital importance of meeting these legal requirements, nonlawyers put themselves in grave legal danger when they draft their own trusts, find forms on the Internet, or use general living trust forms not intended to own NFA firearms.

Trusts must generally be in writing. Texas Property Code § 112.004. NFA trusts *always* have to be in writing, because the applicant must provide a copy of the trust to ATF (not just a summary or declaration of the trust). In addition, the trustees need guidance to comply with the law, so it protects everyone involved to have the rules set forth in writing.

The trust should also require each trustee to sign it, representing that they have read it and agree to comply with its terms. Trustees who exercise powers or perform duties under a trust are *presumed* to have accepted the terms of the trust, but their signature on the trust or a separate written acceptance is “conclusive evidence” of acceptance. Texas Property Code § 112.009(a).

At some point a trust must terminate. If there are still assets in the trust, they must be distributed somehow. One common arrangement is for the property to be transferred directly to the beneficiary, who may do with it as he or she wishes. Another common arrangement is for the assets to be sold, then the proceeds distributed to the beneficiary.

## (4) Powers of trustees

The “broad form” list of trustees' powers include a number of provisions that could be useful at some point. These powers are similar to the powers held by the board of directors of a corporation. They are described in Texas Property Code Chapter 113.

The client will probably want to retain as much power as possible over the trust and its property. It is understandable that a client who forms an NFA trust and buys the trust property with his own money would want to be able to override the decisions of any other trustees.

Texas Property Code § 113.085(a) governs “Exercise of powers by multiple trustees.” Until 2005, the relevant part of this section read: “Except as otherwise provided by the trust instrument or by court order . . . a power vested in three or more trustees may be exercised by a majority of the trustees.” In 2005 this language was amended to read, “Cotrustees that are unable to reach a unanimous decision may act by majority decision.” This was interpreted to mean that cotrustees must first try to reach unanimous agreement, but if unsuccessful, the majority rules. In 2007 this language was amended to read, “Cotrustees may act by majority decision.”

I was unable to find any Texas cases considering whether trustees can have unequal powers. This is an open question.

You may consider including a provisions stating that in the event of a disagreement between the settlor/trustee and the other trustees, the decision of the settlor/trustee is final. Obviously this is not a typical provision, and it may run afoul of § 113.085(a). Hopefully a court would rule this provision unenforceable, instead of invalidating the entire trust, but it is up to you to determine whether to take a chance. You might increase your odds by incorporating a provision allowing the other trustees to override the decision of the settlor/trustee by a supermajority vote, to make sure their trustee positions are legitimate. This may help counter an argument that the other trustees have no real power and are therefore not really trustees, which would make the settlor/trustee the sole trustee.

In the alternative, you could include a provision requiring a supermajority, or even unanimous consent for certain decisions such as selling or transferring NFA firearms.

## **5. Advantages of NFA Trusts**

### **a. Access to NFA firearms**

One of the biggest advantages of an NFA trust is that any of its trustees can lawfully possess the NFA firearms. An individual who owns NFA firearms could run into trouble with the law for “transferring” the item to another person, even if he simply lets the other person hold it or shoot it. The other person could be prosecuted for possessing an

NFA firearm which is not registered in his or her name. An NFA trust allows any trustee lawfully to possess the NFA firearms, without violating the NFA.

One danger facing owners of NFA firearms and their families is a legal concept called “constructive possession.” In this context, it means that a person who has access to an NFA firearm can be considered to have actual possession of the item. This may be because the person has the combination to the gun safe, has a key to it or access to a key, or simply has access to the premises where the NFA firearm is stored. Thus, a person who is not allowed legally to possess NFA firearms can be charged with possessing them, even if he never actually touches them.

The government has used this argument to prosecute married couples where one spouse is a gun owner and the other spouse is a convicted felon. The felon is charged with being a “felon in possession” of firearms in violation of 18 U.S.C. § 922(g)(1), and the spouse is charged with knowingly delivering a firearm to a convicted felon in violation of 18 U.S.C. § 922(d). The government could make this argument against an individual who owns NFA firearms, claiming that the spouse violated the law by having access to the guns without registering as an owner with ATF.

A person who owns NFA firearms must take steps to limit any other person’s access to them. This includes spouses, children, roommates, friends, relatives, business partners, and everyone else who is not listed with ATF as owner of the items, or a trustee of the NFA trust. A person whose spouse is not listed as an owner would be well advised to keep all NFA firearms in a locked gun safe, and not allow the spouse access to the key or combination. Even with such steps, it would be difficult or impossible to prove in court that the other spouse could not gain access to the items.

Unlike a prosecution under the “felon-in-possession” statute, a prosecution for violating the NFA does not require the defendant to be a prohibited person. Placing the NFA firearm in an NFA trust and making both spouses trustees should eliminate this risk. Another is to form a corporation or similar entity, and give the spouse a position with the company that allows him or her access to the NFA firearms. This doesn’t relieve the trustees of the obligation not to allow other persons access to the items, but it does allow trustees access without having to fear prosecution.

#### **b. Protection from criminal prosecution**

An individual owner of an NFA firearm risks prosecution if he loans it to another person, allows another person to use it under his direct supervision, or even stores it where another person could potentially have access to it. That is because the individual owner is the only person legally allowed to possess the NFA firearm. An NFA trust allows the other trustees to possess the item without fearing prosecution.

A trust also provides for orderly transfer of control of the NFA firearms upon death or incapacity. A well-drafted trust will not allow a prohibited person to become a trustee, to possess the NFA firearms, or to receive a trust distribution that includes firearms.

A well-drafted trust document also provides multiple warnings to the trustees that NFA firearms are subject to strict state and federal laws. It can also warn trustees of the specific requirements, and its provisions can prevent them from taking action that would violate those laws.

#### **c. Continuity**

Another important characteristic of a living trust is continuity. If one or more of the trustees passes away, or ceases to be a trustee, the trust continues to exist. This characteristic is especially important when the property in the trust includes NFA firearms, because most transfers of NFA firearms require an application to ATF and payment of the \$200.00 transfer tax. So even if the trustees change, the trust remains the owner, and there is no requirement to submit paperwork to the government and pay the \$200.00 transfer tax.

One other advantage is that if it ever becomes illegal to *transfer* NFA firearms (by a change in state or local law, or federal law), holding the items in a trust may prevent loss of the items. This is because the trust will continue to exist, and no transfer will be necessary (although the trustees may change). Of course this depends on the exact language of any changes to the law, which is impossible to predict.

#### **d. Quicker processing**

In the past, using an NFA trust has cut weeks or months off the time ATF spends processing an application. This is because there is no requirement to submit photos, fingerprints, or to wait for CLEO approval.

At this point this advantage may no longer exist. ATF is

reporting a significant increase in the number of applications (Form 1, Form 4, and Form 5) from entities, from 840 in 2000, to 12,600 in 2009, to 40,700 in 2012 (excluding applications by dealers; ATF Ruling 2013-2 at 10. ). An email from ATF indicates that they processed more than 199,900 applications (presumably including all types) in 2013:

<http://www.thetruthaboutguns.com/2014/04/foghorn/atf-adding-nfa-branch-staff-reducing-backlog-re-designing-eforms-system/>

I include more information on wait times in the section near the end of this paper entitled “Electronic Filing.”

This is part of an overall surge in applications to acquire NFA firearms. As a result, dealers are reporting that ATF is taking six months or so to process applications, regardless of whether the applicant is a trust or an individual.

In addition, manufacturers of suppressors appear to have a backlog of orders, in part because of the new laws allowing them to be used in hunting. Some manufacturers have a backlog of six months or more, from the time a dealer orders a suppressor until it is delivered to the dealer.

The bottom line is it could take a year or more to receive an NFA firearm.

#### **e. CLEO Approval not required**

Individuals wishing to acquire NFA firearms must get their local Chief Law Enforcement Officer (“CLEO”) to sign the application form. ATF regulations require this certification to come from the local chief of police, county sheriff of the county, head of the state police, or State or local district attorney or prosecutor. 27 CFR 479.63 and 479.85. The regulations also provide that certifications of other officials are appropriate if found in a particular case to be acceptable to the Director. Examples of other officials who have been accepted in specific situations include State attorneys general and judges of State courts having authority to conduct jury trials in felony cases.

By signing the form the CLEO is certifying that he has no information that the NFA firearm will be used for an unlawful purpose, and that he has no information that receipt or possession of the item would place the applicant in violation of the law.



The proposed rule has no requirement for CLEO's to sign them, which effectively gives the local sheriff or chief of police veto power over NFA applications. There are at least three counties in East Texas where the CLEO refuses to sign these forms (Harrison, Cass, and Rusk Counties).

Trusts and business entities are not required to obtain CLEO approval. For that reason, individuals who live in a county where the CLEO refuses to sign the forms may not own NFA firearms unless they do so through a trust or business entity.

It is normal for CLEO's to perform their own background check, before signing the form. It can also significantly delay things. When the transfer is to a trust instead of an individual, there is no requirement to obtain CLEO approval.

**f. Fingerprints and photos not required**

Currently, the requirement to provide fingerprints and photographs along with Form 4 does not apply to trusts and business entities.

**g. 4473 and NICS check ARE required**

The individual who takes possession of the NFA firearm from the transferor must be a trustee. He or she should take a copy of the form appointing him as a trustee, when he goes to pick it up, so he can show it is legal for him to possess the item on behalf of the trust. Obviously the person must not be a prohibited person.

It is a federal felony to knowingly make a false statement on Form 4473, or show false identification to a gun dealer. 18 U.S.C. § 922 (a)(6).

**6. Steps involved in acquiring NFA firearms (including forming a trust if desired)**

**a. Order NFA firearm**

Have the dealer order the NFA firearm and get it in his or her possession. Form 4 requires the applicant to state the name and address of the manufacturer, type of firearm, caliber, model, barrel length, overall length, and serial number of firearm. Therefore the transferor (usually a dealer) must have the specific NFA firearm in possession before the form can be completed and submitted.

**b. Obtain CLEO approval**

**c. If using a trust, draft and execute it.**

The settlor should transfer a nominal amount of assets to the trust (such as \$100.00). Without any property, the trust does not exist. Texas Property Code § 112.005.

**d. Complete Form 4.**

When the dealer receives the item, complete and submit Form 4 and pay the appropriate tax.

If the transferee is a trust:

1. List the trust as the transferee on the form;
2. Provide the name and address of the principal officer or an authorized representative; and
3. Provide a complete copy of the actual trust (a Certificate of Trust is not sufficient).

If the transferee is an individual:

1. List the individual as the transferee on the form;
2. Submit the individual's fingerprints on FBI Form FD-258; and
3. Submit a 2" by 2" passport photo of the individual, taken within one year prior to the application, on each of the two copies of the form.

27 C.F.R. § 479.63.

**e. Obtain CLEO approval.**

If purchasing as an individual, the applicant must take the form to a Chief Law Enforcement Officer and have that person sign the certification on the Form 4. Some CLEO's will perform their own background check.

**f. Submit two complete copies of Form 4 with the proper tax.**

The tax is \$5.00 for "any other weapon," and \$200.00 for all other NFA firearms.

**g. Take possession of the NFA item.**

One Form 4 is approved, a trustee must take possession of the item. The person who does so will have to submit to a NICS check and must be a trustee, so confirm in advance he or she is not a prohibited person and send a

copy of the approved Form 4 and any documentation of the trustee appointment.

## 7. Risks

### a. Normal estate planning risks.

Drafting an NFA trust involves the normal risks associated with drafting any trust. Whenever a lawyer drafts a document, there is a risk of drafting errors. This risk is magnified when a lawyer practices outside his area of expertise, for example when a lawyer who is not familiar with the law governing trusts attempts to draft one. These risks are greatly increased if the lawyer fails to take the time to become familiar with the client's situation.

Another risk, which is especially relevant to estate planning, is when a situation later arises that the attorney did not foresee. A living trust will probably be active for the life of the client, and for some time thereafter. There are many things that could happen during that time that could have significant consequences to the client and his family, and the outcome of some of those may depend on the language in the trust.

### b. Interstate transportation of NFA firearms.

To transport NFA firearms to another state, even temporarily, a person must submit ATF Form 5320.20 and get it approved. 18 U.S.C. 922(a) (4), 27 CFR 478.28. Form 5320.20 is located here: <http://www.atf.gov/files/forms/download/atf-f-5320-20.pdf>.

It is also possible to move the situs (location) of the trust from one state to another. In addition to ATF approval discussed above, it may also be necessary to modify or replace the trust with a document appropriate to the new state. The trustees will have to research the law of the new state and confirm it is legal to own and possess NFA firearms there. They will also need to determine whether there are any special requirements.

### c. Inadvertent transfers to prohibited persons.

State and federal law make it illegal for prohibited persons to possess firearms. It is also illegal to sell or dispose of a firearm to a prohibited person. Even though there is not an explicit prohibition on such a person serving as a trustee, settlor, or beneficiary, this creates significant risks and special drafting considerations for the attorney.

A trustee's duties require him or her to preserve, protect, and control the trust property, for the benefit of the beneficiary. A prohibited person CANNOT legally possess firearms. Therefore I believe it is impossible for a prohibited person to serve as trustee of an NFA trust. Texas Property Code § 112.008 requires a trustee to have capacity to hold the trust property, which could prevent prohibited persons from serving as trustees for NFA trusts. The trust should make this prohibition explicit, and state that any purported appointment of a prohibited person as a trustee is void. The trust should also provide that any trustee who subsequently becomes a prohibited person must IMMEDIATELY resign.

It is unlikely that a prohibited person will ever come to you wanting to form an NFA trust. But there is no legal reason why a prohibited person cannot be a settlor of an NFA trust, as long as his or her involvement is limited to donating other property (not a firearm) to the trust. For instance, a prohibited person could provide the funds to purchase an NFA firearm, to be transferred to the trust. A settlor cannot transfer an NFA firearm to the trust because that would probably involve possessing the firearm before the transfer.

A more likely scenario is where the client wants to form an NFA trust, but one or more of his beneficiaries is a prohibited person. In that case, the attorney must take special care to explain the law to the client. The trust should be drafted to require sale or transfer of the NFA firearms to other persons, to avoid ANY possibility of a transfer to the prohibited person. The attorney should carefully scrutinize the other provisions of the trust to avoid other problems.

### d. Transfers without Form 4.

NFA firearms cannot be transferred without submitting Form 4 and receiving ATF approval. For transfers to heirs, Form 5 is used. The client may know this, but his heirs and family members may not. This creates a risk that a subsequent trustee or family member may transfer an NFA firearm into or out of the trust without Form 4, risking prosecution.

For this reason, the client must make sure his heirs learn of the existence of the trust, and of the special restrictions on NFA firearms. The trust and other documents should be drafted to educate the other trustees, heirs, and family members of these requirements.

**e. Inadvertent violation of firearms laws.**

There are thousands of state, federal, and local gun laws. Most of these laws impose severe penalties for any violation, often regardless of whether the person had any intent to commit a crime or was even aware of the law. In other words, gun laws are “zero tolerance” - good intentions don’t usually matter.

The NFA is a particularly technical law. It is imperative for an owner of NFA firearms, and any trustees of an NFA trust, to understand and comply with the law. The client’s family, friends, and heirs are probably not as familiar with these laws as the client is. They may be completely ignorant of them. A trust can give instructions to the trustees to fulfill their legal duties regarding NFA firearms. Without this information the client’s heirs and executors may not have this information, or even realize they need to take special care with NFA firearms. The client (and the client’s lawyer) should do everything possible to make sure this gift does not result in them doing hard time in the penitentiary. An NFA trust can and should be a tool to educate the trustees and keep them out of trouble.

**f. Changes to the law.**

Most people who sign a will (or trust) take it home and put it in their files, and forget about it. The average lay person does not follow changes in the law. Trusts are often in existence for many years, and for that reason the law governing them is very stable.

Guns are a VERY political subject. Machine guns, suppressors, destructive devices, and similar items are even more touchy. The law governing these items can change with the blink of an eye, or more accurately, with a single election. Trustees absolutely must stay informed about state and federal law, and be prepared to move quickly to stay out of trouble should the law change.

**8. Losing Form 4; Problems with the NFRTR**

ATF maintains a national database of NFA firearms, known as the National Firearms Registration and Transfer Record (hereinafter “NFRTR”). This is required by 26 USC § 5841. The NFA requires owners of NFA firearms to keep the original stamped Form 4, and to present it to ATF on request. 26 U.S.C. § 5841(e). Apart from this legal requirement, there are practical reasons to keep the paperwork safe.

The National Firearms Registration and Transfer Record

is notoriously inaccurate and incomplete. In 1996 an ATF training video was publicized, in which an ATF official said that the agency’s officials always testify that the database is 100% accurate, but he acknowledged “that may not be 100% true.” He indicated that the error rate may be as high as 50% when he took over, but claimed that it had been reduced to approximately 8%. The video is posted here:

<http://www.armsandthelaw.com/Static/rollcall2meg.mp4>.

After the video came out, the Department of Justice distributed a packet to all U.S. Attorneys’ offices, requiring disclosure of the problems in all NFA prosecutions. U.S. Department of Justice, Criminal Resource Manual 1436 (Oct. 1997), posted at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01436.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01436.htm). The NFRTR was subsequently investigated by the Inspector General, and was the subject of Congressional hearings. ATF also ran into problems in court as a result of the inaccuracies.

Owners of NFA firearms have run into significant trouble when their forms were lost or destroyed and the NFRTR erroneously showed no record of the registration of their NFA firearms. It is common knowledge in the NFA community that you *do not* rely on the NFRTR for proof that your NFA firearm is properly registered. The stamped Form 4 is the only reliable proof that an NFA firearm is properly registered in the owner’s name. If the owner loses his Form 4, he could be prosecuted and convicted of possessing an unregistered NFA firearm. I suggest keeping a copy of the stamped Form 4 with the NFA firearm, and keeping the original in a safe, secure, fireproof place like a gun safe.

**9. Drafting NFA Trusts**

An NFA trust must be designed from the ground up to be legally valid, and to provide the maximum benefit to the client. They should also be as thorough and flexible as possible. The attorney should be willing to customize the forms to meet the client’s particular needs.

**a. Conduct an adequate consultation with the client.**

At a minimum, I believe the attorney should obtain the following information from the client:

- a. **Settlor:** The full name, address, phone number, and other contact information such as email address of the settlor (the person forming the trust, normally the client). If the client is married, then his or her spouse

should normally be a settlor as well. The attorney should also to gain an understanding of the client's knowledge of guns, firearms laws, and the NFA. Some nonlawyers know as much or more than lawyers about these subjects. Some people know nothing at all about them.

- b. Trustees: The client should name additional persons as trustees or successor trustees, in case he dies or is incapacitated. If the settlor wants to give other persons access to the NFA firearms, he or she will need to name them as trustees as well. What "line of succession" does the client want? Who will serve as trustees? Will they all begin serving immediately, or will some only become trustees in the event of vacancies (successor trustees)? What happens if all named trustees, including successors, die or become disabled? The client should also obtain the full name, address, phone number, and other contact information for each trustee. Normally the settlor will also serve as one of the initial trustees. The attorney should ask some additional questions, in particular about the trustees' knowledge of guns and gun laws. Do they care about guns? Do they know anything about NFA firearms? Can they be trusted to follow the law? Are they responsible and mature enough to handle this responsibility?
- c. Beneficiaries: What does the client want to happen to the trust property once the trust terminates? Should it be sold, or should it be transferred to a friend or family member who has an interest in NFA firearms? The attorney should also obtain the full name, address, phone number, and other contact information for each beneficiary, in addition to the same information required regarding trustees.
- d. Trust property: A general description of the NFA firearm(s) and any other property to be transferred to the trust.
- e. Transferor: The name and contact information for the transferor. Normally this will be the dealer selling the item(s), but in some cases a person might wish to transfer individually owned items to a trust, or accept a transfer from someone else.
- f. Criminal history: It is essential to determine if any of the possible settlors, trustees, or beneficiaries are prohibited persons. Some people may not be willing to disclose this information truthfully, so it may be advisable to run some form of background check.

- g. Control: What degree of control should the other trustees (other than the settlor/trustee) have? What happens if there is a disagreement among the trustees?
- h. Estate planning information: A trust is an estate planning document. The attorney should obtain general information from the client about his or her estate, debts, net worth, plans for disposing of his property, and any special estate planning considerations. What are the client's broader estate planning goals? Does the client already have an estate plan in place, or any estate planning documents such as a will or trust? If so, the attorney should review it to make sure there are no conflicts with the terms of the NFA trust. Will the NFA trust affect the existing estate plan? Asking these questions may also result in additional business, if the client desires a complete estate planning package.

**b. Consider the client's overall situation, and general estate planning needs.**

An NFA trust is an estate planning document that is adapted to a specific purpose. Do not forget to address your client's estate planning needs. The standard *inter vivos* trust (and therefore the one I use as the basis for my NFA trust) is designed to be used as an estate planning document, conveying the settlor's assets after death to the person(s) chosen as beneficiaries. It also considers the fact that those persons may not be adults when this occurs.

**c. Start with the standard form**

I suggest that you begin with the standard Revocable Living Trust form. This form has been drafted by people who draft trusts and other estate planning documents for a living. It has been tested in court over the years. If you review the form, you will see that it is very thorough and versatile, and it covers a lot of eventualities.

**d. Draft a valid trust.**

As noted above, it is imperative to draft a valid trust. An invalid trust could render your client a convicted felon.

Persons unfamiliar with trusts (including lawyers) may believe they can simply create a trust naming the settlor as the sole trustee and sole beneficiary, and be fully protected. This is not the case. Here are some suggestions for drafting a valid trust:

- 1. Settlors: Normally the client will be the settlor. If the

settlor is married, the spouse should normally be a settlor also. This eliminates the possibility of subsequent claims that the spouse lacked authority over the property. It also reduces the chance of any subsequent challenge by the other spouse, for instance of excessive gifts, or fraud on the community.

2. Revocability: Normally an NFA trust should be revocable. That allows the settlor to amend the trust if needed, which can be important should circumstances change. This also allows the settlor to revoke the trust and retake ownership of the trust property. Of course the trust *must* provide that it cannot be revoked until Form 4 is submitted and approved. Making a trust revocable can also have tax consequences, but this should not be a problem because most NFA trusts will never generate any income, unless the trust sells its assets and makes a profit.
3. Trustees: Make sure the client appoints trustees he can trust. Normally the client will want to be appointed as a trustee, to retain some control over the trust and trust property.
4. Beneficiaries: To avoid merger problems, do not appoint one person as the sole trustee and the sole beneficiary. In other words, appoint at least one beneficiary who is not a settlor. The settlor can be one of the beneficiaries. This could be important if the trustee is disabled, because he may need financial support from the trust. Assuming your client wants to be a beneficiary, there is probably no way to avoid the "self-settlor rule." But you should advise your client that the property he donates to the trust will probably be subject to claims of his creditors. Make special provisions if any beneficiary is a prohibited person. Normally this will mean selling the NFA firearms *before* distributing trust property to that beneficiary.
5. Spendthrift trust: Normally you should make an NFA trust a spendthrift trust. This reduces the possibility that a beneficiary could get into trouble and assign the trust property to a third party.
6. Partial invalidity: Include a clause stating that if any provision in the trust is found to be invalid, the remainder of the trust will remain in full force and effect.
7. Powers of trustees: One motive for forming an NFA trust is to give the trustees access to NFA firearms. The normal motive of relying on the trustee's

judgment to administer the trust property is less important than normal. Therefore the settlor of an NFA trust will want to retain maximum control over the trust and property. Normally a settlor who holds on to too much power may run afoul of the tax laws. But in the case of an NFA trust, which will probably never generate income, these considerations may not matter. For this reason you should consider giving the settlor/trustee as much power as possible, compared to the power given to the other trustees. This could be done through an explicit allocation of decisionmaking power, or by requiring a supermajority for certain decisions.

8. Signatures: Make sure the trust is signed by each settlor and trustee (or have trustees sign a document accepting appointment as such, representing that they have read the trust, and agreeing to comply with the terms).

**e. Customize the trust for its intended purpose.**

An NFA trust should have numerous provisions that are drafted specifically for owning and possessing NFA firearms.

In many cases, the attorney drafting a trust will meet with the client (usually a settlor and a trustee), but will have no chance to meet any of the other trustees or beneficiaries. That makes it difficult or impossible to gauge their knowledge of guns and gun laws, and to advise them regarding the law. For these reasons and more, the trust form should include repeated warnings that all transfers of NFA firearms require submission and approval of Form 4, and payment of the transfer tax. It should also include repeated, redundant, strident warnings that prohibited persons cannot possess firearms, ammunition, or components, including NFA firearms.

An NFA trust should generally encourage the trustee(s) to obtain additional training regarding the safe use and storage of firearms, and the legal requirements of owning guns and NFA firearms. If the trust has assets available other than the NFA firearms themselves, the trust may provide funding for such training. It can also pay for legal advice to the trustees regarding trust matters.

Remember that most clients will not want the trust to require sale of any NFA firearms to fund training or anything else, unless it is absolutely necessary. In fact, most clients who go to the expense and trouble of obtaining machine guns and similar items will consider them family heirlooms. For that reason my standard trust

from requires the trustees to preserve NFA firearms unless it is impossible, or unless the settlor/trustee specifically authorizes their sale.

**f. Limit civil liability as much as possible.**

The forms are designed to protect the client and the other people involved with the trust from civil liability. It absolves settlors who are also trustees from most civil liability. It may include a provision requiring the trust to indemnify any trustee for good faith actions, similar to the ones which are commonplace in corporate law, although this could result in the forced sale of the NFA firearms.

**g. Limit criminal exposure as much as possible.**

The attorney's paramount goal in drafting an NFA trust should be to protect the client and friends and family from criminal prosecution. For that reason, the trust should be drafted to prevent the trustees from taking actions that could violate the NFA (such as transferring an NFA firearm without submission and approval of Form 4, or allowing a prohibited person to have possession of NFA firearms). It should also be drafted to remind the client and to educate the other principals about the gun laws, especially the laws governing NFA firearms and those applying to prohibited persons.

The forms should also admonish the reader that those laws may change, and it is their duty to stay informed of those changes.

**h. Maximize client's control of the trust and assets.**

The client will likely choose an NFA trust in part to allow the other trustees access to the NFA firearms. In most occasions the client will be the settlor, and will also serve as a trustee. Because the client normally pays for the NFA firearms, he or she will want to maintain control over them. Therefore the trust should give the settlor/trustee control over disposition of the items, and it should explicitly prohibit any trustee from selling any NFA firearm without the settlor/trustee's permission.

**i. Determine what assets the trust will hold.**

An NFA trust can own assets other than just guns, including land, insurance proceeds, and investments, although that is not its primary purpose. I do not limit my NFA trust to owning NFA firearms, but you can do so if you think it is advisable. My approach is to make sure the client is fully informed about the advantages and

disadvantages of transferring other items to the trust, then to let the client make the decision.

I do not recommend placing unrelated items (homestead, financial assets, etc.) in an NFA trust. This could conceivably put them at risk of civil liability or forfeiture, should the client or trust ever have problems with the authorities.

I recommend that clients also transfer accessories that are specific to NFA firearms, to the trust. Items that are not specific to those firearms should be kept separate. My general rule is that an item that is only usable with the NFA firearm should be transferred into the trust. I do not recommend placing other firearms, ammunition, or accessories into an NFA trust. For instance, magazines that may be used with an M-16 or AR-15 should not be transferred to the trust. Links used to create belts of .50 BMG ammo for use in an M-2 machine gun should be transferred into the trust along with the firearm itself.

The trust can own any number of NFA firearms. There is no need to draft a separate trust to purchase additional items. This is a significant selling point - the client needs to know that once he forms one NFA trust, he locks in the advantages for all future NFA firearm purchases, as long as the law does not change.

**j. Maximize flexibility of the trust.**

In general, legal documents should provide maximum flexibility to the client. This is especially important if the document is going to be in effect for a long period of time. For that reason, NFA trusts should generally be revocable, which allows it to be modified or terminated while the client is still living.

Whenever a client appoints someone to manage his affairs, such as an attorney-in-fact (power of attorney), I always emphasize the need to designate someone trustworthy. If there is even a chance that the person cannot be trusted, then he should not give the person power over his affairs.

Assuming the client only appoints trustworthy persons to serve as trustees, I advise the client to make the powers of the trustees very broad.

Remember, this document may be in place for many years. The trust should provide the trustees with the discretion to adjust for changed circumstances.

**k. Provide continuity.**

The trust should include numerous provisions to allow it to continue to exist as circumstances change. At a minimum it should include provisions for resignation, removal, and replacement of trustees, and for appointment of additional trustees. It should allow more property to be added to the trust. It should also provide for disposition of the trust property should all the beneficiaries die, and this provision should be coordinated with the settlor's will if possible.

The client may choose to move, so the trust should allow the trustees to move the situs of the trust to another state. The trust should also allow the trustees to merge the trust with similar trusts, create additional trusts to divide the trust assets, and exercise other options to adapt to future circumstances that can be anticipated. The form should also allow the *client* to engage in transactions between him or her personally and the trust. You may or may not want to allow other trustees the same option.

**l. Maximize privacy.**

Gun owners generally value their privacy. Owners of NFA firearms are even more sensitive about this issue. This paper will discuss privacy below in more detail, but at this point it should be obvious that a properly drafted NFA trust will preserve the settlor's privacy to the maximum extent possible. For instance, it should only require documents relating to the trust to be filed of record when this is required by law.

A trust may also provide that any resulting disputes will be resolved through arbitration (which the law deems a private matter), instead of a lawsuit (where the pleadings and other filings become public record).

ATF does require a copy of the actual trust agreement to be filed when a trust applies for transfer of an NFA firearm, but most filings relating to NFA firearms are considered tax records and are therefore confidential. So ATF will have specific information regarding the trust and the NFA firearms it owns, but the State and the public should not have access to that information. That means that the existence of the trust, its specific terms, and the identity of the persons involved with it will generally be private.

**m. Include related documents.**

**i. Letter of explanation.**

A client purchasing an NFA trust needs an "owner's manual." Some of this can be included in the trust itself, but there are numerous matters that need to be explained but do not belong in the trust. I do this in the form of a letter.

My letter is 12 pages long. I actually used it as the starting point for this paper. This paper contains most of the same information contained in the letter, but obviously the letter is intended for a nonlawyer who will be a settlor and trustee.

If the client breaks the law because you failed to provide complete, correct advice, you could be responsible for him/her going to prison and being fined hundreds of thousands of dollars. If the client receives your letter then fails to follow your advice, it will be much harder to hold you responsible for the resulting consequences. Therefore the letter is the primary method of protecting the client and the attorney from future problems.

**ii. Appointment of Additional Trustee.**

At some point in the future, the client will probably need a form to appoint additional trustees. I believe it is unfair to expect him to come back in and pay an additional fee at that time, so I provide the form along with the trust. I like to allow the client to choose whether to appoint the person to serve immediately ("additional trustee"), or only after the client passes away or is incapacitated ("successor trustee").

I also prefer to include a requirement for the possible trustee to represent that he or she is eligible to serve as a trustee, and to promise to comply with the trust's terms, *before* the client actually appoints him or her as a trustee. If there is later a problem with eligibility, this will allow the client to show that he or she did not knowingly allow a prohibited person to have possession of NFA firearms. It also provides the client with written proof that the person read the trust and agreed to perform the duties of trustee, before actually being appointed. My form must be notarized, which requires the candidate to make these statements under oath. ONLY after the possible trustee has signed it and had it notarized does the form allow the settlor or existing trustee to sign it, actually appointing the candidate as a trustee.

### **iii. Assignment (to add property to trust)**

At some point in the future, the client will probably want to transfer additional property to the trust. This could be other NFA items (which of course require submission and approval of Form 4), ammunition or accessories, or other assets unrelated to guns. Providing this form at the time the trust is drafted is an added value to the client, and may prevent him from having to hire a lawyer at some point in the future.

### **iv. Declaration of Trust**

A Declaration of Trust is basically a summary of the trust, providing a basic description without all the details. ATF requires the actual trust to be submitted with Form 4, and will not accept a Declaration. However, a Declaration of Trust may be useful in other situations where the client needs to provide some proof that the trust exists, but does not wish to share the actual document.

## **10. Alternatives to NFA Trusts**

There are two major alternative methods of acquiring NFA firearms, other than forming an NFA trust.

### **a. Individual ownership**

The client could have the NFA firearms transferred into his or her individual name. That would require the individual to go through the full application process, obtain the CLEO signature, provide fingerprints and passport photos, and pay the transfer tax for each NFA firearm.

Individual owners have no continuity of ownership, unlike NFA trusts and NFA corporations. Upon the death of the individual, the executor or administrator must submit Form 5 to have the items transferred into the heirs' names. The individual should take steps to warn his executor or administrator of the special requirements pertaining to NFA firearms. Of course the transfer is tax-free.

Individual owners cannot allow other persons to have access to their NFA firearms.

### **b. Corporation/Business entity**

The client may also choose to form a corporation, limited liability company, or other business entity to own the NFA firearms. There would be costs involved, but they would not be excessive. Texas charges a state filing fee of

\$300.00, plus the client will have to pay an attorney to draft the corporate documents. The entity may also have to file state and/or federal tax returns.

The effects of forming an NFA corporation are similar to those involved with an NFA trust. The officers and directors of the corporation can legally have possession of the NFA firearms. Like applications for NFA trusts, corporate applications can be processed quicker, and do not require fingerprints, photos, or CLEO approval. The corporate documents can also be drafted so they alert successors that there are special requirements for lawfully owning NFA firearms.

The biggest advantage of a corporation or similar entity over a trust is limited liability. The shareholders, officers, and directors of an NFA corporation would enjoy the same protection from civil liability that applies to ordinary corporations. Of course this only covers civil liability, not criminal responsibility, and there are situations where the protections might not apply. Still, limited liability from civil claims is a significant advantage, especially when there are automatic weapons or similar items involved.

Most business entities can be structured so their existence is perpetual. For this reason, business entities enjoy the advantage of continuity just as a trust does. In other words, the entity (trust or business) continues to exist even if the principals (trustees, officers or directors) pass away or are replaced.

Shares in a corporation or other business can generally be transferred without ATF approval. Business entities therefore enjoy the advantage of transferability just as a trust does. In other words, the principals (trustees or shareholders) can generally transfer ownership or control of the entity without triggering a transfer of the NFA firearms and requiring submission of another Form 4 and payment of the transfer tax.

A business entity may also be appropriate if the client wants to designate a prohibited person or a minor as a beneficiary. For instance, a relative who is a convicted felon could be a beneficiary of a trust who receives the proceeds after the trust assets are liquidated. Such a person could also be involved in some capacities with a business entity. Of course this will not allow a person to possess the NFA firearms or any other firearms, ammunition, or components, if he or she is a prohibited person. If any of the persons who might be involved with an NFA corporation are "prohibited persons," then the attorney will have to customize the terms to protect the



client and other principals. The attorney must ask this question of the client.

Texas requires corporations and other businesses to pay a franchise tax or business receipts tax. These taxes are usually based on income or profits, and there is a relatively high exemption, so an entity like an NFA corporation that doesn't generate income will probably not have to pay the tax. However, Texas does require a corporation to file a franchise tax report and a public information report, even if there is no tax due. Failing to submit these documents each year will result in the loss of corporate privileges, and eventually, revocation of the corporate charter. This could happen if the officers and directors simply forget to file these documents, or if the corporation moves and forgets to provide its current address.

One fact of life is that the organizers of corporations sometimes do not always complete and submit the required documents. In my litigation work, I frequently discover corporations that are "not in good standing" for this reason. Suspension of corporate privileges or revocation of the charter leaves the shareholders, officers, and directors without any protection from liability.

Corporations also generally have to file federal tax returns each year, which could result in some recurring costs if the officers pay a bookkeeper, or accountant to prepare the returns.

State law also requires corporations to hold annual meetings and keep minutes. This can incur some costs to pay someone to prepare the minutes for those meetings. Of course there is nothing preventing the client from preparing the franchise tax report, public information report, federal tax return, and annual minutes.

I believe an NFA corporation involves a significantly greater risk of problems than an NFA trust. If the client forms a trust then fails to exercise due diligence, then the trust will probably still be in existence. If the client forms a corporation the fails to exercise due diligence, then the state will eventually revoke the charter and the corporation will cease to exist. If the corporation loses its charter, the principals will have NFA firearms in their possession, in violation of the law. Clients should only consider using a corporation or other business entity to own NFA firearms, if they are prepared to take great care to meet all these requirements and keep the corporation in good standing.

## **11. Privacy.**

Gun owners are concerned about their privacy. They generally want to avoid public disclosure of the fact that they are gun owners, the types of guns they own, and where the guns are stored. People who own devices like machine guns and suppressors are particularly concerned about privacy. There are many reasons for gun owners to value their privacy. They do not want criminals to have a road map to their homes or their guns. They are also concerned, in some cases with good reason, that the government might use those lists to confiscate their guns.

There are several recent events that highlight the importance of privacy to gun owners. A newspaper in New York published a map showing the names and addresses of gun owners in parts of the state. It is a common occurrence to hear about governmental entities accidentally disclosing citizens' private information. The various bills proposed to establish state or national lists of guns or gun owners are a third example. The bottom line is that gun owners should take every possible step to prevent governmental officials or the public from knowing they own NFA firearms.

### **a. Information that must be disclosed to ATF**

There is no way around having the federal government know who the owner of an NFA firearm is, what type of NFA firearm(s) he owns, and where he is located. However, most filings relating to NFA firearms are considered tax records, and are therefore not available to the public. Under current law a person could hide his individual identity from the government, but at least one of the other trustees would have to disclose his identity (on Form 4 as the principal of the trust and on Form 4473 as the person taking possession of the NFA firearm for the trust).

### **b. Trusts and privacy**

A trust is generally a private document. In Texas there is no requirement to file the trust documents or register the trust with the State.

### **c. Corporations and privacy**

In contrast, a corporation or similar entity requires public disclosure of significant information. A corporation must provide additional information to the state, when forming the entity. When the entity is formed, the organizer files a Certificate of Formation (also known as Articles of Incorporation, or charter) with the Secretary of State. The

Certificate of Formation must disclose the name and address of the incorporator (the person forming the corporation), the names and address of the initial directors (members of its board), the name of its registered agent (the person to notify if the corporation is sued), its registered address (where its corporate books will be kept), and a general description of the type of business in which it will engage.

Each year while it is in existence, the corporation is required to file a franchise tax report, and also provide a public information report including the names and addresses of the officers, directors, and members. The entity must also maintain a registered agent and registered office, and notify the state if they change.

The Certificate of Formation and Public Information Reports are public records. Copies of a corporation's governing documents can be accessed online, for a nominal fee, at websites like <https://direct.sos.state.tx.us/acct/acct-login.asp> or various commercial sites.

Here is a concrete example. Go to the following website: <https://ourcpa.cpa.state.tx.us/coa/Index.html>. Click on "Corporation Search" (the fourth link on the page). In the window entitled "Entity name," type "HEALY LAW," then click on "Search by Name." This should produce one result, "HEALY LAW OFFICES, P.C." Click on it. You can see the entity name, its address, and the name and address of its registered agent, along with some other information. Click on the "Officers and Directors Information" button, and you can see the name and address of the director.

If you form a corporation, the same information regarding that corporation would be available online. The Certificate of Formation, any amended versions, changes of registered agent, changes of address, the information provided in the public information report, and some other documents would be available to the public also.

#### **d. Practice notes**

From a privacy standpoint, a trust is clearly superior to a business entity.

If I were forming a corporation to own NFA firearms, I would choose a name that does not involve firearms, state the purpose as "transacting any lawful business," and make every effort *not* to publicize the address where the guns would be kept. You do not want to give the bad guys directions to your gun safe. The law may or may not

require you to disclose that address in a public record. For instance, Texas Business Organizations Code § 3.005(a) requires the certificate of formation of a for-profit entity like a corporation to include the "registered address," which is the location where the corporate documents must be kept. There is no requirement that this be the same as the principal place of business. I would also list my address in the public information reports as a P.O. box, or use a business address.

You might also consider paying a company to serve as your corporation's registered agent. That would allow you to avoid posting your address online.

No matter how careful the client is, a criminal may discover his name, and possibly the fact that he owns NFA firearms. With some basic information, it is fairly straightforward matter to discover his address and other information from online sources. These include online telephone books, similar sources like Switchboard.com, real property or appraisal district records like those available on Smithcad.org, court records maintained by governmental entities, employers' websites, and social networking sites like Myspace.com or Facebook.com. There are also companies like Publicdata.com that compile and resell public records. These include information on driver's licenses, professional licenses, voter registration, vehicle and aircraft registration, civil lawsuits, real property records, and other records. It is becoming more and more difficult to maintain any semblance of privacy. The fact that privacy might be compromised is no reason to ignore privacy entirely.

## **12. Recent developments**

### **a. 8/29/13 Proposed Federal Regulation 41P.**

On August 29, 2013, President Obama announced that he would introduce a federal rule requiring "responsible persons" of firearms trusts and businesses to submit photos and fingerprints, and undergo background checks. Here is some background information:

- a. "Admin. Announces New Gun Control Measures, Targets Military Surplus Imports," posted at <http://www.foxnews.com/politics/2013/08/29/obama-announces-new-gun-control-measures-targets-military-surplus-imports/> (accessed 8/29/13)
- b. "White House eyes 'gun trust' loophole," posted at <http://thehill.com/blogs/regwatch/pending-regs/318133-white-house-reviewing-draft-gun-control-rule>

- d. White House press release:  
<http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence>
- c. Official description of the proposed rule:  
<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>
- c. The “Docket Folder Summary” for this rule (with comments and other information):  
<http://www.regulations.gov#!docketDetail;D=ATF-2013-0001>
- e. Notice of Proposed Rulemaking:  
<https://www.atf.gov/sites/default/files/assets/inside-atf/2013/082913-wash-machine-guns-destructive-devices-and-certain-other-firearms.pdf>

This new rule will *only* apply to NFA items, not to transfers of “ordinary” rifles, pistols, and shotguns. The rule would require the application to be signed by the CLEO, but would eliminate some of the certifications made by the CLEO by signing the form.

The proposed rule does have one good feature. It would create an official rule allowing executors or other personal representatives to possess a decedent’s firearms while the estate is pending. Currently ATF gives executors a reasonable time to transfer them to the beneficiaries, but this is not incorporated into any statute or rule.

**i. The rule has not yet been adopted.**

ATF issued this Notice of Proposed Rulemaking on August 29, 2013. The rule was subject to a 90-day comment period, which ended December 9, 2013. At the end of that period, ATF had received 9,479 comments, which were overwhelmingly against the proposal. The law requires ATF to review each and every comment, before finalizing the rule, which is apparently causing some problems. The initial Notice stated that the rule was intended to be finalized and become effective in June 2014. ATF subsequently moved that date back to January 2015. As of August 25, 2014, the site does not specify a date when the regulation will be made effective. You can check this from the official source (look under “Timetable” for “Final Action”):

<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>

If you are in the business of drafting NFA trusts, you must check this frequently so you know if and when the rule becomes effective.

**ii. Problems with the Rule**

The biggest problem with this proposal is that it requires a CLEO signature on *every* Form 1 and Form 4. See the Notice of Proposed Rulemaking, *supra*, at 14. Currently CLEO approval is only required for transfers to individuals, but not to trusts or business entities. The only way to own NFA items, if you live in an area where your CLEO refuses to sign Form 4, is to form an NFA trust.

Form 4 is written so that by signing the form, the CLEO is certifying that he or she has no information that the NFA firearm will be used illegally, or that possession by the transferee would violate the law. In the Notice of Proposed Rulemaking, ATF asserts that CLEO’s only refuse to sign the form because they are afraid they will be held liable for crimes or other consequences, if they make that certification. Therefore, if the form is revised so those certifications are removed, CLEO’s will have no reason to refuse to sign the form. If you agree with this assertion, then requiring CLEO signatures on all Forms 4, including those where a trust or business entity is the applicant, will not cause any problems. If you believe that CLEO’s refuse to sign the form because they don’t believe civilians should own machine guns or suppressors, or because they are against gun ownership in general, then you have to acknowledge that this rule will prevent many people from obtaining NFA items at all. Depending on your point of view, this will either be a very good thing or a very bad thing. It is beyond dispute that this will result in vastly different treatment of people in different parts of the country, and even different parts of the state, based solely on the attitudes of their local law enforcement officers.

Also keep in mind that there is no incentive for CLEO’s to sign the forms. If the CLEO refuses to do so, under the new rule, ATF will reject the application. That gives local law enforcement the absolute power to deny individuals in their areas the right to possess NFA firearms. A trust would no longer bypass this requirement. If gun ownership is a privilege granted at the discretion of the government, then this is not a problem. If it is a right, then it should not be allowed to exist only at the discretion of the government.

This rule change could cause major problems for corporations. The composition of boards of directors and officers routinely changes from year to year. If the

requirement applies to any changes of officers or directors, then any corporation owning guns will have to obtain ATF approval before seating new officers or directors. If the government treats a change of trustee or of corporate officials as a “transfer,” then each corporation will have to submit Form 4, pay the transfer tax, *and wait for it to be approved* whenever they seat a new officer or director. Approval of a Form 4 takes six months or so. It could take even longer if this new requirement forces trusts and business entities to file Form 4 whenever there is such a change.

The White House press release said, “. . . felons, domestic abusers, and others prohibited from having guns can easily evade the required background check and gain access to machine guns or other particularly dangerous weapons by registering the weapon to a trust or corporation.” This statement is misleading because it ignores several significant facts. First, mere possession of a firearm or ammunition by a prohibited person is a felony. Second, the law still requires the person accepting delivery of the item on behalf of a trust or business entity to complete a Form 4473 and submit to a background check through NICS (the National Instant Check System). Third, the person taking delivery of the item could be committing two federal felonies, one by giving it to a prohibited person and another by misrepresenting the identity of the person who would receive the item.

I have been unable to locate a single reported case where a person was prosecuted for using a trust or business entity to obtain an NFA firearm. In the Notice, ATF identified three occurrences where a prohibited person was involved with a trust or business attempting to obtain an NFA firearm. In none of them did the transfer occur, and there is no allegation that a crime was actually committed in any instance.

### **iii. Possible future requirements**

The proposed rule, as it now stands, would only require fingerprints and photographs for the initial trustees (and anyone else who has access to the items). The Notice of Proposed Rulemaking specifically states that ATF is considering a future rule that will apply this requirement to all trustees and persons with access to the items, even those appointed after the trust is formed and after Form 4 is approved.

As long as the government only requires fingerprints, photos, and background checks for initial applications, then the new requirement will slightly increase the amount of trouble involved in that process. If the

government starts requiring fingerprints, photographs, background check, and CLEO approval for any changes of trustees or beneficiaries, then it will significantly increase the regulatory burden and the legal risks of gun trusts.

### **iv. If this rule is adopted, are NFA trusts still useful?**

My answer is “Yes,” for the following reasons:

- NFA trusts will still allow friends and family members to become trustees and possess the NFA items without fearing prosecution. This is perhaps the single biggest advantage of an NFA trust.
- NFA trusts will make it easier to transfer NFA items (appointing different trustees to transfer control of the trust, instead of submitting a Form 4 and paying the tax for a transfer through ATF).
- NFA trusts allow lawful transfer of control of NFA items without paying a transfer tax or waiting for another Form 4 to be processed (by appointing different trustees).
- NFA trusts will continue to confer the estate planning benefits of a trust, which are particularly useful in this context.

I am advising my clients, if they wish to use an NFA trust, to submit their Form 4 before this rule becomes effective. There is a good chance ATF will process applications received before the effective date under the old rules, and applications received after that date using the new rules. You want your application to be in the pile received before the effective date.

### **b. Electronic Filing.**

On July 10, 2013, the Acting Director of the ATF approved ATF Ruling 2013-2, which authorized the agency to accept Forms 1 and 4 (among others) electronically. This system was intended to bring the NFA section into the 21<sup>st</sup> Century, and shorten the wait time between filing an application and receiving it back with ATF approval.

This e-filing system, which is called “eForms,” is important to purchasers of NFA items, and to the lawyers who represent them. The reason is, as the wait time is reduced, more people purchase NFA items.

**i. 7/10/13 Rule**

The ATF ruling authorizing the eForms system is here:

<https://www.atf.gov/sites/default/files/assets/pdf-files/atf-ruling-2013-2.pdf>.

There are two limitations. First, use of the site requires registration by a gun dealer (with one exception described in the next paragraph). Second, forms that include photographs or fingerprints cannot be e-filed. Because individual applicants are required to submit photos and fingerprints, but trusts and other entities do not have to do so, the only transfer applications that may be e-filed are transfers from a dealer to a trust or other entity.

There is one circumstance where a nondealer can e-file an application. Nondealers are allowed to e-file Form 1 (an application to *make* an NFA item), if the applicant is a trust or other entity. In other words, an application to make an NFA item and register it in the name of a trust, may be e-filed.

As noted above, ATF requires the entire trust document to be submitted with the application. When the application is e-filed, the trust must be scanned and submitted along with the application. The transfer tax must be paid using <https://pay.gov>, which also requires registration.

**ii. Technical Difficulties**

The eForms system first came online on August 3, 2013. Since that date ATF has had serious problems with the system, including unexplained crashes, problems with different browsers, system freezes, and other issues. ATF advised that the site was not compatible with Google Chrome, but some NFA dealers reported that it *only* worked with that browser. In April 1, 2014, ATF notified users that the problems were caused by multiple users submitting forms simultaneously using the same account.

On April 5, 2014, ATF took the eForms system down and posted a message saying it would be unavailable “until further notice.” ATF put the system back online on April 25, 2014, but only for Form 6 (to import firearms). ATF began accepting Form 1 through eForms on June 24, 2014. As of August 25, 2014, ATF is accepting Form 1, Form 6 and 6a (both for use in importing NFA items), and Form 2 (for a business to manufacture or import a firearm). ATF still does not accept Form 4 through the eForms system.

There is some discussion of allowing Form 3 (transfers between dealers) to be filed electronically, but this will increase the risk of the system crashing.

**iii. Decreased Wait Times**

In 2007 - 2008, it typically took one or two months for ATF to process a paper application. According to <http://www.nfatracker.com> and the NFA dealers who spoke to me, the wait time gradually increased to around six months in 2012. In the months before e-filing, wait times had increased to 10 - 11 months.

When the eForms system first came online, wait times for electronic filings were around 5 - 6 months. With paper forms, wait times were approximately three months longer (8 - 9 months). While eForms was active, wait times decreased to a low of approximately 3 months, before the technical difficulties began.

At the beginning of 2014, the NFA Branch had a total of nine (9) examiners to review applications for the entire country. In the first six months or so of 2014, they increased that number to 15, and it now stands at 26. They may hire up to five additional examiners in the near future.

This hiring spurt allowed ATF to decrease the backlog of applications from 86,000 in February to a little more than 50,000 in mid-July. This has decreased the average wait time by approximately one month. Apparently this is the first time in years when the backlog has actually decreased. ATF’s announced goal is to drop the wait time to under six months.

As of August 25, 2014, it appears that ATF is processing applications that were e-filed between March and early April, 2014, and applications that were submitted on paper between November and December 2013. That means the current wait time for trust applications filed electronically is approximately five months, and the current wait time for trust forms filed in paper form is approximately nine to ten months. The wait time for individual applications (which can only be filed using a paper form) is approximately seven to nine months. Thanks to Dave Matheny of Silencer Shop and <http://www.nfatracker.com> for most of this information.

Wait times for Form 3 (transfers between dealers) have also increased. Remember, a dealer can’t submit a Form 4 for a customer until he has the NFA item in his possession, so he can include its serial number on the form. Therefore the processing time for Form 3 affects

customers because it directly adds to their wait times. One NFA dealer reports that before the eForms system, it took approximately 1 ½ weeks for a Form 3 to be approved. Now it takes 6 - 8 weeks. If ATF resumes

Wait times can vary drastically. One NFA dealer reported to me that he received a Form 4 back in approximately nine months, and another Form 4 back in approximately 13 months. Both were submitted on the same day and for the same customer. His record wait time is approximately 1 ½ years. On the other hand, David Goldman reported that one of his clients received a Form 1 back, approved, in one day. Dave Matheny reports that he received one Form 4 back in 30 days. The best guess is that these are the result of some sort of mistake where forms are somehow moved out of order.

#### **iv. Future Improvements**

Dave Matheny of Silencer Shop discussed the current status of the eForms system with me on August 25, 2014. He attended an industry roundtable conducted by ATF on July 22, 2014, along with some of the highest-volume NFA dealers in the country. ATF announced that it was working on "eForms 2.0" with another contractor. They intend to leave the current system in place, but have no way to repair glitches. For that reason ATF will probably not resume accepting Form 4 electronically until eForms 2.0 is up and running.

Another NFA dealer told me that an ATF employee told him over the phone that they expected to resume accepting Form 4 through the eForms system some time in November.

ATF hopes to have eForms 2.0 running some time in the last quarter of 2014, but did not make any promises. The new contractor must go through the vetting process before any actual work commences. Here is some additional information regarding the roundtable:

<http://www.silencershop.com/eforms-20-industry-roundtable/>

An ATF email to eForms subscribers, which discusses the measures the agency is taking, is posted here:

<http://www.thetruthaboutguns.com/2014/04/foghorn/atf-adding-nfa-branch-staff-reducing-backlog-re-de-signing-eforms-system/>

What does all this mean for future wait times? There are at least three variables. First, eForms 2.0 could come

accepting Form 3 electronically, it will significantly decrease the total delay for a customer purchasing an NFA item.

online, making it possible to file Form 4 electronically once again, and significantly speed up the process. Second, if ATF keeps the large number of examiners on the job, the additional attention to applications should eventually eliminate the backlog then directly reduce wait times. Third, if 41P is adopted, wait times will probably increase because each application will include multiple sets of fingerprints and photographs that need to be processed. If the difference in wait times between electronic and paper applications is any guide, 41P will increase wait times by at least one month for every application, and probably more.

#### **13. Conclusion**

I do not believe the "cookie cutter" approach is appropriate for drafting gun trusts. I do not want to compete for this business with Quicken, or Legal Zoom, or with a lay person who believes he can cobble together his own NFA trust from what he can find on the Internet. I am happy to meet with people who are considering these alternatives, but if a potential client can't see the benefits of having an experienced lawyer draft a custom document to protect him and his loved ones, then I will gladly forego that project.

I spent countless hours researching the issues, learning new things over the years, and custom drafting my basic form. I literally went through the *inter vivos* trust form letter by letter, and modified the form in all respects to fulfill the specific purposes described above. Now when someone hires me to draft an NFA trust, I start with my basic form, but each NFA trust is a custom document drafted to meet the specific client's needs. I meet with each client, in person unless that is not practical for the client, and I spend whatever amount of time it takes to explain the process and obtain the necessary information. Once the trust is drafted, I normally meet with the client to answer any additional questions.

Drafting a document may be a routine thing for lawyers, but when a mistake could land your client or his loved ones in federal prison for many years, it deserves your undivided attention. You should devote an appropriate amount of time to it, and charge an appropriate fee for your work. Anything less is a serious disservice to your clients.