

SEAN P. HEALY, J.D.  
ATTORNEY AT LAW  
<genghis@healylaw.com>

113 E. Houston St.  
Tyler Texas 75702-8130



LEGAL ASSISTANTS:  
STACI CLARK, B.S. <staci@healylaw.com>  
MARIE ANGERMILLER, M.A. <marie@healylaw.com>

TEL: (903) 592-7566  
FAX: (903) 592-7589

WWW.HEALYLAW.COM

**CURRENT AS OF OCTOBER 23, 2014**

**NOTE: THIS DOCUMENT IS COPYRIGHTED.  
YOU MAY PRINT OR SAVE IT FOR YOUR PERSONAL USE.  
YOU MAY NOT DISTRIBUTE IT TO ANY OTHER PERSON.  
YOU MAY NOT ALTER OR REVISE IT IN ANY WAY.**

[CLIENT'S NAME]  
[ADDRESS]  
[CITY, STATE, ZIP]  
**RE: NFA Trust**

Dear [CLIENT]:

I want to provide you with some information regarding the use of trusts to own machine guns, silencers, and similar items. This letter will focus on the advantages and disadvantages of forming an NFA trust versus owning the items in your individual name. I will also briefly discuss forming a corporation to own them. Please make sure each settlor, trustee, and beneficiary reads and understands the contents of this letter.

### **Basic Rules**

Federal law permits civilians to own machine guns and similar items. Since 1934 the government has imposed a "transfer tax" on any person wanting to acquire such an item. Federal law allows these items to be owned by individuals, by business entities such as corporations and limited liability companies, and by trusts. To lawfully own such an item, it must be registered with ATF. The person wanting to acquire it must pay a transfer tax (usually \$200.00, but \$5.00 for "any other weapon"), apply to ATF, and have the application approved. Only then can the transfer be completed.

If you have not yet paid the transfer tax and had your application approved, it is illegal to possess these items. Violations are punishable by up to 10 years in prison, forfeiture of the items, and for willful evasion of the tax, fines of \$100,000.00 to \$500,000.00. State law has additional penalties. A felony conviction also makes it permanently illegal for a person to possess any firearm, ammunition, or components.

In 1986 Congress passed a law that froze the supply of machine guns. As a result of that law, civilians may legally acquire only 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 same transfer tax applies to short-barreled rifles and shotguns, silencers and suppressors, destructive devices, "any other weapon," and some components of these items like auto sears (parts that can convert guns to full auto) and baffles for suppressors. However, the "freeze" does not apply to them. Put another way, civilians can lawfully own machine guns registered before May 19, 1986, and other items even if they were not registered by that date.

Texas allows residents to own and possess these items, but some states do not. If you own NFA items and want to take them to another state, you either have to submit ATF Form 5320.20 (or a letter containing the same information), or send a letter containing the same information, and get prior approval from ATF.

The law also allows Class 3 dealers to own and possess NFA items. If you decide to obtain an FFL and become a Class 3 dealer, let me know and we will discuss the process.

On March 29, 2012, the Texas Parks and Wildlife Commission voted unanimously to allow the use of suppressors while hunting game animals. Suppressors were previously legal for use in other shooting activities, and in hunting nuisance animals such as hogs, but not for animals such as deer. The benefits 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.

## **Definitions**

In this letter I will use the following terms:

- ▶ "NFA" means the National Firearms Act, the federal law that regulates machine gun and similar items.
- ▶ "NFA items" means machine guns (and parts such as "auto sears" that can convert firearms to fire as machine guns), suppressors, short-barreled rifles, destructive devices, items defined by the law as "any other weapon," and similar items that are regulated by the NFA. A machine gun is a firearm that can fire more than one round with one pull of the trigger. This is called "fully automatic," as opposed to "semi-automatic" firearms which fire one round with one pull of the trigger, then automatically reload and cock so they can fire another round with another pull. These items are often referred to as "NFA firearms," "NFA weapons," or "Class 3 firearms," because the definition of "firearm" in the act includes other things like suppressors and auto sears. I prefer the term "NFA items" to make it clear that we are discussing all those items, not just actual firearms.
- ▶ "Class 3 Dealer" means a person or business legally authorized to deal in NFA items. Class 3 Dealers are sometimes referred to as SOT's (for "Special Occupational Taxpayer").
- ▶ "ATF" or "BATFE" means Bureau of Alcohol, Tobacco, Firearms, and Explosives, the

federal agency that regulates guns.

- ▶ “NFA Trust” means a trust organized under state law whose primary purpose is to own NFA items, then at some point distribute those items to its beneficiaries, or sell the items and distribute the proceeds to the beneficiaries.

## **NFA Trusts**

Trusts are commonly used in the estate planning process. 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. NFA trusts generally have the same basic characteristics as ordinary living trusts. This letter focuses on the characteristics that are relevant to firearms. If you need general information regarding living trusts or other estate planning issues, let me know.

Here is some basic information about trusts:

- ▶ A trust is a legal arrangement that separates the right to control assets from the right to receive the benefits from those assets. Put another way, 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 irrevocable (set in stone once formed). Making a trust revocable or irrevocable can have legal and/or tax consequences.
- ▶ A trust has three main category of persons involved with it. The donor (or settlor) is the person who transfers the property to the trust. The beneficiary is the person who is intended to benefit from the trust. The trustee is the person who controls the property in the trust, for the benefit of the beneficiary. A trust may have more than one donor, beneficiary, and trustee.
- ▶ The settlor can be a beneficiary, but normally a trust must also have at least one beneficiary who is not a settlor. Otherwise the rights to control and to the benefits “merge.” Texas Property Code § 112.034. The result is that there is no trust and the settlor owns the trust assets. Also, a settlor who is also a beneficiary won’t shield the trust assets from the settlor’s creditors. Texas Property Code § 112.035(d).
- ▶ These limits are especially important in trusts that own NFA items. If the trust is invalid under state law, then you own and possess the NFA items, but the background check and NFA forms are in the name of the trust. If ATF does not recognize the validity of the trust, it may disapprove the transfer or find you are violating NFA by possessing NFA items illegally.
- ▶ Trusts must generally be in writing. NFA trusts have to be in writing, because you will have to provide a copy to ATF (not just a summary or declaration of the trust). In addition, the trustees need guidance to comply with the law.

Access to NFA Items. One of the biggest advantages of an NFA trust is that any of its trustees can lawfully possess the NFA items. An individual who owns NFA items 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. So an NFA trust should reduce or eliminate the possibility of prosecution for possessing the items, if the person doing so is a trustee.

One danger of owning NFA items is a legal concept called “constructive possession.” This is a legal concept that states that a person who has control over an item effectively has possession of it. In this context, it means that a person who has access to an NFA item (by having the combination to the gun safe, or by having access to the key, for example) can be considered to have actual possession of the item. Thus, a person who is not allowed legally to possess NFA items 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, and the spouse is charged with knowingly delivering a firearm to a convicted felon. The government could make this argument against an individual who owns NFA items, 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 items must take steps to limit any other person’s access to them. This includes spouses, children, roommates, partners, and everyone else who is not listed with ATF as owner of the items. A person whose spouse is not listed as an owner would be well advised to keep all NFA items 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.

In this context, one solution is to form a trust and make the spouse a trustee. 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 items. This doesn’t relieve the trustees of the obligation not to allow other persons access to the items, but it does allow them access without having to fear prosecution.

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 items, because most transfers of NFA items 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 items (by a change in state or local law, or federal law), forming a trust may allow your successors to avoid losing 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.

Quicker Processing. Another benefit seems to be quicker and simpler processing of the application. This is because there is no requirement to submit photos, fingerprints, or to wait while local law enforcement considers your request. There is no delay for the FBI to process the fingerprints. Some people indicate that this can shorten the process by weeks.

Please keep in mind that this is anecdotal information only, so I cannot promise you that your application will be processed more quickly.

CLEO Approval. Individuals wishing to acquire NFA items must get their local Chief Law Enforcement Officer (“CLEO”) to sign the application form. But there is no requirement for CLEO’s to sign them. There are at least three counties in East Texas where the CLEO refuses to sign these forms (Harrison, Cass, and Rusk Counties). That means if you live in one of those counties, forming an NFA trust is the only way you can own these items.

By signing the form the CLEO is certifying that he has no information that the NFA item 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. It is normal for CLEO’s to perform their own background check, before signing the form. There is no requirement for CLEO’s to give this approval, which effectively gives your local sheriff or chief of police veto power over your application. 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. This means you can bypass the requirement to obtain CLEO approval by forming an NFA trust. Forming a trust or business entity may be the only way to own or have access to NFA items, if your CLEO is uncooperative. Even if your current CLEO is willing to sign the form, his successor may not be as cooperative.

“Can I draft my own NFA Trust?” Some people draft their own trusts using standard forms or consumer software that helps you draft your own legal documents. 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 programmers often make arbitrary choices about the wording, and the result could invalidate or terminate the trust and result in illegal possession of NFA items. I would not take a chance on a felony conviction to save a little money.

Firearms Laws. As you probably know, 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. The NFA is a particularly technical law, so it is imperative for an owner of NFA items to understand and comply with the law. Your family, friends, and heirs are probably not as familiar with these laws as you are, and they may be completely ignorant of them. A trust can give instructions to the trustees to fulfill their legal duties regarding NFA items. Without this information your heirs and executors may not have this info or even realize they need to take special care with NFA items. An NFA trust can also be a tool to educate your trustees and keep them out of trouble.

## Other Options

What are the alternatives to an NFA Trust?

Individual ownership. First, you could have the NFA items transferred into your individual name. That would require you to go through the full application process, obtain the CLEO signature, and pay the transfer tax for each NFA item. There would be no continuity

of ownership, and no other persons would be authorized to possess the items. On your death, your heirs would be able to take ownership of the items without paying the transfer tax, but if any of them were transferred to other people, the tax would have to be paid.

Corporation/Business entity. Another option is to form a corporation, L.L.C., or other business entity to own the NFA items. There would be costs involved, but they would not be excessive. There is a state filing fee of \$300.00, plus the entity may have to file state and/or federal tax returns.

The consequences would be similar to those involved with an NFA Trust. Most business entities can be structured so their existence is perpetual, so they enjoy the advantage of continuity. Like applications for NFA trusts, corporate applications can be processed more quickly, and do not require CLEO approval. The corporate documents can be drafted so they alert successors that there are special requirements for lawfully owning NFA items.

You may consider using a business entity if there is someone who may not legally possess NFA firearms (minors, convicted felons, etc.) but who may be a beneficiary or involved in managing them in some way. 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 items or any other firearms, ammunition, or components, if he or she is prohibited from doing so by state or federal law. Check with me if any of the persons who might be involved with this process are “prohibited persons.”

One major difference between an NFA trust and a business entity is that business entities must file documents with the State and some of the information is public. This aspect is discussed in detail below.

Another benefit of using a business entity is that the owners may be able to transfer ownership of the corporation without transferring the NFA items and paying the tax.

Texas has in the past required corporations to pay a franchise tax or business receipts tax. These taxes are usually based on income or profits, so they would not apply to an entity that doesn't generate income. Corporations also generally have to file federal tax returns each year, which could result in some recurring costs. State law also requires corporations to hold annual meetings and keep minutes, so this may also cost money if you don't handle this yourself.

I believe an NFA corporation involves a greater risk of problems than an NFA trust. One fact of life is that the organizers of corporations sometimes do not always complete and submit the required documents, such as franchise tax reports and public information reports. This can result in the loss of corporate privileges, and eventually, revocation of the corporate charter. This could happen if you simply forget to file your documents, or you might move and not change your address, meaning you never get the reminders from the state. If you use a corporation to own NFA items, you must take great care to meet all these requirements and keep the corporation in good standing. Failure to do so could result in dissolution of the

corporation. If the corporation dissolves, you will have NFA items in your possession in violation of the law. You should only consider forming an NFA corporation if you are absolutely certain you can keep it in good standing.

In forming a trust, we need to consider how the assets would be distributed if the trust terminates. We also need to determine what events would cause the trust to terminate. The trustees need to make sure they don't knowingly transfer firearms to persons prohibited from possessing them, such as convicted felons, unlawful drug users, or persons convicted of misdemeanor crimes of domestic violence. They also have to go through the registration process to transfer the items from the trust to the beneficiaries. If a beneficiary is a resident of another state, the trustee may be required to transfer the firearms through a licensed dealer. There are a number of other considerations involved, which we will discuss at some point if you choose to form a trust.

## **Privacy**

Gun owners are often very concerned about maintaining their privacy, especially regarding matters like the number and types of guns they own. One concern is that they do not want the government to know how many guns they have, what kinds they are, or where they are stored. Unfortunately it is not possible to legally own NFA items without disclosing these things to the federal government, but it may be possible to avoid disclosing them to the state.

Gun owners are also concerned about public disclosure of the fact that they are gun owners, and of specific information like the types of guns they own and where they are stored. For instance, many concealed handgun licensees do not want their identity disclosed to the public. Gun owners also want to avoid giving criminals a road map to their guns - for instance, by publicly disclosing the address where their guns are kept, and the fact that the guns include things like machine guns and suppressors.

Info to ATF: Any person or entity wishing to acquire an NFA item is required to apply to ATF, pay the transfer tax, and obtain ATF approval, for each item. An *individual* registering NFA items must provide his name, address, and complete information identifying the item. A *trust* registering NFA items must provide the name of the trust and its address, and must also provide a copy of the trust agreement. A *corporation* or other entity registering NFA items must provide its name and address. There is no way around having the federal government know who the owner will be and where the owner is located. However, most filings relating to NFA items are considered tax records, and are therefore not available to the public.

Public information regarding corporations: 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 with the Secretary of State, which must include 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.

Here is a concrete example. Go to the following website: <https://ourcpa.cpa.state.tx.us/coa/Index.html>. 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 (Articles of Incorporation), 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.

If I were forming a corporation to own NFA items, 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.

Trusts and Privacy Issues. 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, as with a corporation or similar entity. You do have to file the trust agreement with ATF, but most filings relating to NFA items are considered tax records, and are therefore confidential. So ATF will have specific information regarding the trust and the NFA items 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. From a privacy standpoint, a trust is clearly superior to a business entity.

No matter how careful you are, if a criminal gets your name and knows that you own NFA items, he may be able to discover your address from another source. This could be an online source like Switchboard.com, a site that compiles public records then sells the information, like Publicdata.com (which has Texas driver's license records, voter registration, vehicle registration, and other records), the real property records like those available on Smithcad.org, your employer's website, or even social networking sites like Myspace.com or Facebook.com. But privacy may be an important factor in your decision of how to acquire NFA items.

## **Compliance**

Whatever vehicle you choose, it is imperative to comply with all state and federal laws regarding firearms. The consequences of violations can include prison time, fines, and



forfeiture of the firearms. And any felony conviction permanently prohibits a person from ever owning or even possessing guns and ammunition. For that reason, if you choose to form an NFA Trust, we must make sure it is thorough, proper, and legal. If for some reason you register NFA items to a trust and the trust turns out to be invalid, you will be possessing NFA items which are not registered to you. This could subject you to imprisonment, forfeiture, and fines. Your successors (heirs, trustees, corporate officers, etc.) would face the same penalties if they do not comply with the law.

Finally, I want you to know that I have consulted a number of sources in compiling this information. This includes the U.S. Code, the Code of Federal Regulations, Texas law, Class 3 Dealers and other Federal Firearms Licensees, other attorneys, blogs, and other sources on the Internet. If you want to review the original information yourself, let me know and I will make a list of accessible sources for you to consult.

Please keep in mind that this advice 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. Obviously the advice would change if the law, policy, or practices change.

### **Information Needed**

To draft your documents, I need the following information:

1. **Settlor:** The full name, address, phone number of the settlor (the person forming the trust, normally you), and any other contact information such as email addresses.
2. **Transferor:** A general description of the NFA item(s) you intend to transfer to the trust, and the 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.
3. **Trustees:** The full name, address, phone number of each Trustee, and any other contact information such as email addresses. Normally you will be the initial Trustee. If you want to give other persons access to the NFA items, you need to name them as initial Trustees also. If you want to place other persons in charge if for some reason you cease to serve as Trustee, you can name them as successor Trustees. You need to name at least one other person as an initial Trustee or successor Trustee, so there is someone to take over if something happens to you.
4. **Beneficiaries:** The full name, address, phone number of the beneficiary or beneficiaries, and any other contact information such as email addresses. The trust will also serve as an estate planning document for the NFA items, so you should name enough beneficiaries or alternate beneficiaries to make sure the items go to someone who is a friend or family member.

### **Forms Provided**

Once I have the necessary information, assuming you have hired me, I will provide

you with the following forms:

1. NFA Living Trust: This is your NFA trust, with a name chosen by you, and with your persons' names (settlor, trustees, and beneficiaries) incorporated into it.
2. Appointment of Additional Trustee: This form is used to appoint an additional trustee. You can choose whether to appoint the person to serve immediately ("additional trustee"), or only after you pass away or are incapacitated ("successor trustee"). The form protects you by requiring the candidate to represent that he or she is eligible to serve, and to promise to comply with the trust's terms, before you actually make the appointment. If you later learn that the trustee is a "prohibited person," you will be able to show that the person became a trustee by lying to you, not because you consciously chose to give such a person access to NFA items. It also gives you written proof that the person read the Trust and agreed to perform the duties of Trustee, before actually being appointed.
3. Removal of Trustee: This form allows you to immediately remove a Trustee. You should use it if you learn a Trustee is prohibited from possessing firearms, or if for any reason you no longer fully trust the Trustee to comply with the law and serve responsibly as Trustee.
4. Assignment Form: This is a form used to transfer assets to the trust. It can be used initially, if you own the items, or later on, if the trust acquires additional assets. The form reminds you and the other Trustees that every transfer of NFA items requires submission of a Form 4 (or the equivalent for other types of transfers), and approval of ATF, before the transfer can be done. It provides you with some protection by making any transfer contingent on receiving that approval.

My forms are intended to be as thorough and flexible as possible, for the following reasons:

1. Civil liability: The forms are designed to protect you and the other people involved with the trust from civil liability. It absolves settlors who are also trustees from most liability. It includes a "spendthrift" provision to protect the property from creditors of the beneficiaries. It includes a provision requiring the trust to indemnify any trustee for good faith actions (the provision is adapted from corporate law). It is intended to provide maximum legal protections and maximum privacy to you and the other trustees (a corporation would provide protection from civil liability, but you would sacrifice some privacy).
2. Criminal exposure: Violation of even one of the federal firearms laws can subject a person to a prison term of ten years and a fine of up to \$250,000.00. It can also result in forfeiture of the firearm and other property. You may know a lot about the law governing guns and NFA items, but your family and friends may not. For this reason, there are reminders of certain legal requirements incorporated throughout the document. The forms incorporate numerous provisions of current law, but admonish the reader that those laws may change. The forms include a number of specific provisions intended to keep you in compliance with the law, and to keep guns out of

the hands of the wrong persons. It allows trustees to educate themselves and get legal advice regarding gun laws.

3. Standard Form: The trust is based on the standard Texas living trust form. That means it has been drafted by experts in trust law, and tested over the years. It has been heavily modified to adapt it to this specific use of owning NFA items.
4. Control: The trust is designed to leave you in control, to the maximum extent possible. For instance, it prohibits any trustee from selling any NFA item without your permission.
5. Estate Planning: This trust is designed to be used as an estate planning document, conveying its assets after your death to the person(s) you choose as beneficiaries. It considers the fact that those persons may not be adults when this occurs.
6. Disability: It allows trustees to use trust assets to provide for your needs if you become disabled.
7. Other assets: This trust can own assets other than just guns, including land, insurance proceeds, and investments, although that is not its primary purpose.
8. Multiple items: The trust can own any number of NFA items. There is no need to draft a separate trust to purchase additional items.
9. Flexibility: The form is drafted to provide maximum flexibility. It is revocable, which means you can modify or terminate it while you are still living. The powers of the trustees are very broad. It includes a number of provisions that could be useful at some point. It allows mergers of similar trusts, moving the situs of the trust to another state, creation of additional trusts, and a lot of other options to adapt to future circumstances. It allows you to engage in transactions between you personally and the trust.
10. Continuity: The trust includes numerous provisions to allow it to continue to exist, including resignation, removal, and replacement of trustees; appointment of additional trustees; adding more property to the trust, etc.
11. Privacy: It preserves your privacy to the maximum extent possible. For instance, it only requires documents relating to the trust to be filed with official (possibly public) records when this is required by law. For that reason, it provides that any resulting disputes will be resolved through arbitration, instead of a lawsuit (where the pleadings and other filings become public record).
12. Custom gun provisions: It also includes numerous provisions that are drafted specifically for owning and possessing firearms and NFA items.

### **Forming Trust and Acquiring NFA Items**

Here are the steps involved:

1. Form a valid trust. You begin this step by hiring me, then providing me with the information needed to draft the trust. I will draft the trust and send it to you for review. Assuming all the information is correct, then you take the trust to a notary, sign it, and have it notarized. For the trust to be valid, you need to transfer some property to the trust. I suggest the sum of \$100.00.
2. Locate a dealer and NFA item you wish to purchase. The transferor of the NFA item (usually a dealer) must have the specific NFA item in possession before you can complete and submit the form, because the form requires its serial number.
3. Complete and submit the ATF Form 4. Fill out the application in the name of the trust, not in your individual name. At this time you will also pay the transfer tax.
4. Transfer the NFA item to the trust, and take possession of it. Once the Form 4 comes back from ATF, you are allowed to complete the transfer.

If you choose to acquire additional NFA items in the future, you will have to complete steps (2), (3), and (4) before you can take ownership or possession of those items.

The trust document includes many of the rules that apply to possession of NFA items. You should read the trust from beginning to end. You should also educate yourself regarding the legal requirements, and check from time to time to make sure they have not changed. These requirements apply to all Trustees. Keep in mind that this letter and the Trust document do not discuss every single legal requirement. Those requirements may change from time to time, as laws change, as courts decide cases, and as agencies like ATF interpret the law and their role. It is your responsibility to comply with all those requirements, as they now stand and as they evolve in the future. My job is to discuss NFA trusts with you in general, to draft the trust documents for you, and to impress upon you the importance of complying with the law.

### **Notice of Proposed Rulemaking**

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. A description of the proposed rule is posted here: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>
- b. "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/>
- c. "White House eyes 'gun trust' loophole," posted at: <http://thehill.com/blogs/regwatch/pending-regs/318133-white-house-reviewing-draft-gun-control-rule>
- d. Here is the White House press release: <http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence>

- e. Here is the actual 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 rule has not yet been adopted.** You can check the status at the first link above ([www.reginfo.gov](http://www.reginfo.gov)). ATF initially published this “Notice of Proposed Rulemaking” on September 9, 2013. The rule was subject to a 90-day comment period, which ended December 9, 2013. ATF initially announced that the rule would become effective in June, 2014, then moved that date back to January, 2015. Last time I checked, the site did not specify a date when the regulation will be made effective. You can check this online, from the official source, by going to this page and looking under “Timetable” for an effective date. 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.

In its current form, this new regulation would require all of the initial trustees of an NFA trust to submit fingerprints and photographs. This requirement would also apply to officers and directors of corporations owning NFA firearms. It appears that this requirement will only apply to the initial transfer of an NFA firearm to a trust or corporation. In other words, it does not appear that ATF will require a new Form 4 whenever a new trustee, officer, or director is appointed or elected (although they admit they are considering this in the future). If this requirement is applied to all such changes, businesses that own NFA firearms will have to submit a new Form 4, pay the tax, then wait for approval before seating a new officer or director. This will significantly disrupt the process of acquiring NFA firearms using an NFA trust, but in its current form, it will only change this process for trusts submitted after the new rule is adopted.

The new rule will allow executors or other personal representatives to possess a decedent’s firearms while the estate is pending, without it being considered a transfer.

It will also significantly change the rules regarding CLEOs. CLEOs will no longer be required to certify that they have no information that the NFA firearm will be used illegally, or that possession by the transferee would violate the law. However, it will require every Form 4 to be signed by the CLEO. There is no legal requirement for a CLEO to sign a Form 4. Presumably an application without a CLEO signature will be rejected. In effect this would give each CLEO the right to prevent a citizen in that jurisdiction from owning NFA firearms, and an NFA trust would no longer bypass that veto.

This new rule appears to be intended to make it harder for citizens to own guns, rather than to solve any genuine problem. ATF’s comments 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 actually occur. There is no allegation that a crime was actually committed in any of the three instances.

This new rule appears to be a solution in search of a problem. Since the NFA was enacted in 1934, there appear to be only two instances where a legally owned machine gun was used in a crime. Both happened in Ohio, and 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). If this rule is adopted, it will complicate the use of NFA trusts and make the lives of law-abiding citizens a little harder. It is *not* in place yet, so it will not affect your initial application. But you need to keep track of the rule so you know if it will be necessary to submit information to ATF before appointing additional (or successor) trustees.

**Will it still be worthwhile to form an NFA trust, if the rule is adopted?** Yes. The rule will eliminate the benefit of bypassing CLEO approval, and force trustees to disclose their personal information and submit to a background check. But forming an NFA trust will still allow friends and family members to become trustees and possess the NFA items without fearing prosecution. If ATF continues its electronic filing program, it will have to be modified to allow fingerprints and photographs to be submitted with NFA trusts, so the processing time for trusts may still be shorter than the processing time for individual applications. And forming a trust will continue to confer the benefits of the trust vehicle, including easier and cheaper transfers (appointing different trustees to transfer control of the trust, instead of submitting a Form 4 and paying the tax for a transfer through ATF).

### **Electronic Filing**

On July 10, 2013 the Acting Director of the ATF approved ATF Ruling 2013-2, authorizing the agency to accept Forms 1 and 4 (among others) electronically. Only licensed dealers may use this process (applicants cannot submit their forms directly). ATF is not allowing fingerprints and photos to be submitted electronically, so as of now electronic filing is only allowed when the transferee is a trust or business entity, rather than an individual. The ruling is posted here:

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

ATF has had problems with the site, and at one point they stopped accepting electronic submissions. The last I heard, the system is up and running again. Dealers have told me that submitting your documents electronically can cut weeks off the wait time, compared to submitting hard copies.

Your Form 4 can be submitted electronically, if the dealer has established accounts at ATF's site and at Pay.gov, and if the system is available. You should ask your dealer if he is aware of this.

---

Thank you for allowing me to help you with this matter. Please let me know how you would like to proceed.

Sincerely,

Sean P. Healy  
Attorney at Law