

**NATIONAL FIREARMS ACT (NFA) TRUSTS
BASIC PRINCIPLES**

SEAN P. HEALY

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

State Bar of Texas
ADVANCED ESTATE PLANNING STRATEGIES

April 27 - 28
Savannah, Georgia

CHAPTER _____

About the Author

Mr. Healy is an attorney in private practice in Tyler, Texas. He is the lead author of the book *The Legal Guide to NFA Firearms and Gun Trusts*, written with Alan Gassman, Jonathan Blattmachr and several other attorneys and published in 2016 (second edition published in 2017) He authored a chapter on NFA trusts in the book *Texas Perspectives on Firearms Law* published by Texas Bar Books in 2015. He is the NFA Editor for Interactive Legal, working with nationally-renowned estate planning attorneys to provide NFA trust forms and supporting knowledge to lawyers throughout the country.

Mr. Healy has served as general counsel for two congressional campaigns, and as National Corporate Counsel for American Mensa. He spoke at the State Bar Firearms Law Seminars in 2003, 2004, 2014, 2015, and 2016, and was Course Director of the 2012 and 2013 Seminars. He is Texas State Rifle Association's General Counsel. 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. Introduction. 3

2. Legal Principles. 4

3. ATF Docket No. 41P/41F. 5

4. Risks. 6

a. Normal estate planning risks. 6

b. Interstate transportation of NFA firearms. 6

c. Inadvertent transfers to prohibited persons. 6

d. Transfers without Form 4. 6

e. Inadvertent violation of firearms laws. 6

f. Changes to the law. 6

5. Drafting NFA Trusts. 7

6. Advantages of NFA Trusts. 7

a. Access to NFA firearms. 7

b. Use of NFA Firearms. 8

c. Education of Client and Trustees. 8

d. Continuity. 8

e. Estate Planning Functions. 8

f. 24-Month Exemption. 8

7. Additional Information. 8

1. Introduction

It comes as a surprise to many people that federal law permits civilians to own machine guns, suppressors, short barreled rifles and shotguns, destructive devices, and “any other weapon” (exotic firearms like pen guns and disguised firearms). That law, enacted in 1934, 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.

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>.

Is it a good idea to allow civilians to own these items? The facts show that there are almost no crimes committed with NFA firearms. Since adoption of the NFA in 1934, no fully automatic firearm legally owned by a civilian has been used in a murder. There appear to be only two instances where a legally-owned machine gun was used in a crime. Both happened in Ohio, one in 1988 and the

other in 1992. One was committed by a law enforcement officer who murdered an apparent drug trafficker. Searcy v. City of Dayton, 38 F. 3d 282, 284–85 (6th Cir. 1994).

The government has also come to the same conclusion. In 1986, ATF Director Stephen E. Higgins testified before the Subcommittee on Crime: “Those [legally owned machine guns] I can count probably in less than my fingers, the number of cases in which those have been used in a crime or a crime of violence.” *Legislation to Modify the 1968 Gun Control Act: Hearings Before the House Judiciary Committee*, 99th Cong. 1165 (1987) (statement of Stephen E. Higgins, Director, U.S. DEP’T OF TREAS., BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES). Mr. Higgins also testified, “Registered machine guns which are involved in crimes are so minimal so as not to be considered a law enforcement problem.” *Armor Piercing Ammunition and the Criminal Misuse and Availability of Machine Guns and Silencers*, 98th Cong. 153, 208 (1987). Crimes committed using illegally possessed machine guns are also rare. http://www.guncite.com/gun_control_gcfullau.html (last visited Dec. 22, 2016).

Some people believe suppressors are also only useful to the Mafia and to spies like James Bond. The truth is that suppressors are primarily used to protect the hearing of those nearby by reducing the noise and muzzle blast. Very few suppressors are used in crimes. Between 1995 and 2005, there were only 167 federal prosecutions involving suppressors reported in Lexis or Westlaw, out of 75-80,000

prosecutions per year. This includes not only convictions, but also sentence enhancements, allegations in the charging instrument, and similar occurrences. Many of these were for mere possession of a suppressor, without any further wrongdoing. There were eight cases where a suppressor was actually used, but not to hurt anyone. There were only two reported murders involving a suppressor during that time. Paul Clark, *Criminal Use of Firearm Silencers*, W. CRIMINOLOGY REV. 8(2), 44–57 (2007).

The bottom line is that NFA firearms are almost never used in crimes. One of the reasons is the amount of trouble and expense required to obtain these items. Another is the stringent background check performed before each purchase.

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.

I have been drafting NFA trusts for a number of years. When I prepared my very first one, I realized that the client would need detailed instructions to operate the trust without running into potentially serious legal difficulties. Turning the client loose with an NFA trust without guidance would be the equivalent of selling a sports car to a teenager without confirming he or she had a license, insurance, and a driver’s ed course. I took the time to meet with the client and explain the proper way to operate the trust and comply with state and federal law. I also took the time to prepare a very long and detailed letter explaining these steps to the client.

Years later, I agreed to serve as Course Director at the Firearms Law Seminar conducted by the State Bar of Texas. One year, my topic was NFA trusts. To draft my paper, I started with the letter explaining NFA trusts to clients.

In 2015 I had the opportunity to work with Alan Gassman, Jonathan Blattmachr, and some other attorneys to write a book on NFA firearms and gun trusts. Much of the material from the letter and CLE paper made its way into the book.

This paper is a very short summary of the concepts contained in the complete CLE paper and in the book.

2. Legal Principles

The key to drafting a gun trust is to recognize the legal

principles involved, then read through a normal trust and revise every single provision that could be affected by one of those principles. Here are the basic legal principles that apply to NFA firearms and trusts:

- a. Possession of NFA Firearms: The NFA makes it illegal for any person other than the registered owner to possess a Title II firearm (machine gun, silencer or suppressor, short-barreled rifle or shotgun, destructive device, or "any other weapon"). Generally this also prohibits “constructive possession” (access to) NFA firearms by non-owners. Violations are felonies punishable by ten years imprisonment plus a fine of up to \$250,000.
- b. Transfer: NFA firearms may not be transferred until the appropriate form has been completed and submitted to ATF along with the tax, and the form has been approved by ATF and returned to the applicant with a tax stamp. This generally takes six months to a year, during which ATF conducts a background check of the transferee.
- c. Trusts and Business Entities: The National Firearms Act (NFA) is a part of the Tax Code (Title 26 of the U.S. Code), which defines "person" to include trusts, corporations, and other business entities. Therefore, trusts, corporations, and other business entities can legally make or own Title II firearms.
- d. Prohibited Persons: The Gun Control Act makes it illegal for any Prohibited Person (felons and nine other categories of people) to possess any type of firearm or ammunition. 18 U.S.C. § 922(g). This includes both Title I firearms ("normal" rifles, shotguns, and handguns) and Title II firearms (NFA firearms).
- e. State Law: State law may also restrict individual ownership and possession of firearms, including Title II firearms. For example, in New York and California, a Title II firearm may not be possessed even if eligible or appropriate under Federal law. In Texas, meeting the federal requirements for transfer and possession of NFA firearms generally ensures compliance with federal law.
- f. New Regulation 41F: Regulation 41F became effective on July 13, 2016. It is discussed in detail below.

- g. NFA Trusts: A trust that owns Title II firearms must be drafted to meet many requirements. It must be valid when drafted, and must remain valid and in existence during the entire time it owns NFA firearms. If it lapses, even if it is later reinstated, then during that time the trustees were committing federal felonies by possessing NFA firearms when they were not the registered owners. It must prohibit the possession of Title II firearms by anyone other than trustees of the trust. Individuals who are prohibited for any one of ten different reasons which can violate federal, state, county, or city local laws and ordinances must also be restricted from the possession of the Title II firearms contained in the trust. Finally, the trust cannot distribute or transfer Title II firearms until approved by the ATF. The violation of any of these requirements could result in legal malpractice and/or an ethical violation, not to mention long prison terms.

3. ATF Docket No. 41P/41F.

The U.S. Attorney General signed a new regulation on January 3, 2016, which significantly changed the law regarding NFA firearms and trusts. The new rule, which became effective on July 13, 2016, provides as follows:

- a. Responsible Persons: All "responsible persons" of trusts and business entities seeking to own NFA firearms are required to submit a completed "Responsible Person Questionnaire" (ATF Form 5320.23) submit fingerprints and photographs to ATF, and to undergo a background check. This applies to Form 1 applications to make an NFA firearm. 27 CFR 479.63(b)(2). It also applies to Form 4 applications to transfer an NFA firearm. 27 CFR 479.85(b)(2). In general, the definition of "responsible person" includes anyone having the right to make significant decisions regarding the trust or business entity, or the right to possess any NFA firearms owned by the trust or entity. 27 CFR 479.11. For most trusts, this will apply to the trustees. For most business entities, this will apply to officers, directors, managers, and possibly some employees. This requirement increases the burden of preparing NFA applications, and compromises the privacy of responsible persons.
- b. CLEO Notification: Requires each transferee and each "responsible person" to notify the chief local law enforcement officer ("CLEO") having jurisdiction over the area of the filing of the

application. This applies to Form 1 applications to make an NFA firearm. 27 CFR 479.62(c). It also applies to Form 4 applications to transfer an NFA firearm. 27 CFR 479.84(c). The rule requires only notification to the CLEO. It replaces the previous requirement for the CLEO to sign each application and certify that it would be legal for the transferee to possess the NFA firearm and that he has no reason to believe the transferee intends to break the law with the NFA firearm. As a result, individuals will now be allowed to own NFA firearms throughout states where it is legal, with or without the approval of local officials.

- c. Estates: Allows executors and administrators of estates to lawfully possess NFA firearms which were registered to a deceased person "during the term of probate," without it being considered a "transfer." 27 CFR 479.90a. This is an improvement which formalizes ATF's preexisting policy for estates.
- d. Exemption: Creates an exemption from the requirement to provide information regarding responsible persons (fingerprints, photos, and the Responsible Person Questionnaire) if the applicant has had an application to make or receive an NFA firearm approved in the last 24 months, and there is no change to the information previously provided. Like the other changes, this applies to Form 1 and Form 4 applications. 27 CFR 479.63(c); 27 CFR 479.85(c). This 24-month exemption is an improvement that should streamline approval of exempted applications, and speed up processing of all applications by reducing volume.

ATF has posted a page with explanations, links to the new forms (Form 1, Form 4, Form 5, and Form 23), here:

<https://www.atf.gov/rules-and-regulations/final-rule-41f-background-checks-responsible-persons-effective-july-13#Who>

ATF posted "Frequently Asked Questions" here:

<https://www.atf.gov/resource-center/docs/general41fqestionsandanswersupdated-6-28-16pdf/download>

ATF has also established an email address for questions regarding 41F: 41F@atf.gov.

The new regulation requires very little revision to the

trust document itself. The Responsible Person information must be reported when the trust is submitted to ATF, so there is no need to discuss the requirement at length in the trust. The same is true for the CLEO notification. The regulation applying to estates will normally not affect an NFA trust. The 24-month exemption affects trusts, but we try to be cautious in describing the law in too much detail in the trust, because the law and regulations can change.

4. Risks

There are a number of legal risks involved in owning NFA firearms. These risks raise the stakes for an attorney who practices in this area.

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. Another risk, which is especially relevant to estate planning, is when a situation later arises, perhaps years later, that the attorney did not foresee. These risks are greatly increased if the lawyer fails to take the time to become familiar with the client's situation.

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 or ammunition. 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 well-drafted NFA trust will not allow prohibited persons to serve as trustees, and will need to make special provisions to sell trust property and distribute the proceeds, if a beneficiary is a prohibited person or later becomes one.

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.

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.

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.

5. Drafting NFA Trusts.

Here is the Table of Contents from a typical NFA trust I recently drafted:

ARTICLE I - Trust Estate
 ARTICLE II - Identification of Beneficiaries
 ARTICLE III - Revocability of Trust
 ARTICLE IV - Distributions While Settlers Are Living
 ARTICLE V - Distributions Upon Death of Settlers
 ARTICLE VI - Restrictions Upon Distribution Because of Age
 ARTICLE VII - General Provisions for Trustees
 ARTICLE VIII - General Provisions Relating to Trust
 ARTICLE IX - Powers of Trustees
 ARTICLE X - Trustees' Powers and Duties Relating to Items Regulated by NFA
 ARTICLE XI - Provisions Relating to Life Insurance
 ARTICLE XII - Indemnification
 ARTICLE XIII - Dispute Resolution
 ARTICLE XIV - Exoneration of Settlor/Trustees
 ARTICLE XV - Definitions
 ARTICLE XVI - General Terms and Conditions

The Articles are almost identical to those used in a normal living trust. The only Article that is "gun-specific" is Article X. All of the changes are in the text of each Article.

There are attorneys who will draft an NFA trust for less than \$200.00. With that fee, it is not practical to conduct a full consultation with the client, take the time to educate him or her on the legal and practical issues, customize the trust, and get it properly executed. I firmly believe it is necessary to invest enough time in the matter to accomplish those things. Here are the steps involved:

1. Conduct an adequate consultation with the client.
2. Consider client's situation and estate planning needs.
3. Thoroughly educate client (and to the extent possible, other trustees) regarding the legal principles and requirements applicable to NFA firearms.
4. Start with the standard living trust form.
5. Draft a valid trust.
6. Customize the trust for its intended purpose.
 - a. Prohibit trustees from specific actions that would violate the gun laws.
 - b. Limit civil liability and criminal exposure as much as possible.
 - c. Maximize client's control of the trust and assets.
 - d. Determine what assets the trust will hold, now and in the future.
 - e. Maximize flexibility of the trust.
 - f. Provide continuity.
 - g. Maximize privacy.
 - h. Include related documents.
 - i. Letter of explanation.

- ii. Removal of Trustee.
- iii. Appointment of Additional Trustee.
- iv. Change of Beneficiary.
- v. Assignment (to add property to trust).
- vi. Declaration of Trust.

6. 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.

If an NFA firearm is registered to an individual owner, then no other person may lawfully possess that firearm. Even allowing other persons to access an NFA firearm places them and the trustee at risk. There is a legal concept called "constructive possession" which generally means that a person who has access to an item can be considered to have actual possession of the item. This may be because the person has the key or combination to the gun safe, or simply has access to the premises where the firearm is stored. Thus, a person who is not allowed legally to possess an NFA firearm can be charged with possessing it, even if he never actually touches it.

A safer course of action is to form an NFA trust and register all NFA firearms to the trust. That allows the individual to appoint his or her spouse, and any other person with access to the gun safe, as trustees.

b. Use of NFA Firearms

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. An NFA trust allows the other trustees to possess and use the items, even outside the presence of the client (the "main" trustee and settlor), without fearing prosecution.

c. Education of Client and Trustees

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.

d. 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 transfer tax.

It is helpful to understand that the federal government treats trusts as entities, rather than as a legal capacity or relationship. ATF registers NFA firearms in the name of the trust ("The Johnson Family Trust") rather than the name of the trustee ("Bill Johnson, Trustee of the Johnson Family Trust"). ATF allows changes in trustees without considering them to be a "transfer."

e. Estate Planning Functions

Like an "ordinary" living trust, an NFA trust also provides for orderly transfer of control of the NFA firearms upon death or incapacity of the settlors. This advantage is desirable enough that many people are forming gun trusts to preserve their firearms for future generations, even if they don't own any NFA firearms.

f. 24-Month Exemption

Regulation 41F creates a 24-month exemption for trusts and business entities which have had an application approved in the last 24 months, if the information on responsible persons hasn't changed. 27 CFR § 479.85(c).

This means that an NFA trust submitting a second application in a 2-year period does not have to send the responsible person questionnaire, fingerprint cards, or

photos. It also means ATF may take less time to process these applications. Before 41F, ATF processed applications by trusts more quickly than applications by individuals, for this same reason. Therefore this exemption makes it easier and quicker for trusts to prepare followup applications, and it should make it easier and quicker for ATF to process them.

7. Additional Information.

Reading this paper definitely does *not* qualify you to draft NFA trusts and represent clients in these matters. If you want additional information, here are some suggestions.

I would be happy to send you a copy of the current version of my full NFA Trusts CLE paper. Send me an email and I will send the paper right back to you.

Interactive Legal produces a document assembly program and provides supporting knowledge and guidance for a wide range of estate planning matters. The company also produces an NFA Trusts module. I am their NFA Trusts Editor, and as such, I worked with preeminent estate planning lawyers including Jonathan Blattmacher, Michael Graham, and Vaness Kanaga to draft the forms. I highly recommend the module.

The Legal Guide to NFA Firearms and Gun Trusts is available here:

https://www.amazon.com/Legal-Guide-NFA-Firearms-Trusts/dp/1540608042/ref=sr_1_1?s=books&ie=UTF8&qid=1488987027&sr=1-1

There is a discount code that lets you purchase the book for a reduced cost. If you will email me and let me know you are a Texas attorney who attended this CLE seminar or read a copy of one of my CLE papers, I will send you the code.

You can also feel free to email or call me with specific questions, or general guidance in these matters.